

Wishing you all a
Merry Christmas
and safe and happy holidays

Evans Bailey will close for Christmas at 4.30pm on Thursday 23 December 2010 and re-open at 8.30am Thursday 6 January 2011

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Directors' duties

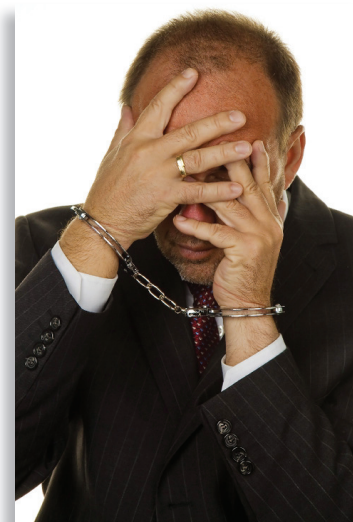
While companies provide limited liability and are considered a separate legal entity, directors can become personally liable if they breach their duties. These duties have become increasingly important in light of the recent financial downturn. When there is financial uncertainty, directors are more likely to make decisions for which they could be held liable. This in turn gives rise to increased media attention.

Recently there have been numerous reports of the Securities Commission taking proceedings against directors of finance companies for misleading investors. Under the Securities Act these directors face fines of up to \$500,000 in civil proceedings, and up to five years imprisonment or fines of up to \$300,000 in criminal proceedings. Therefore directors need to be aware of their obligations to the company.

Duties under the Companies Act 1993

The key duties, found in Part 8 of the Companies Act 1993 sections 131-137, include the following:

- The duty to act in good faith and in the best interests of the company.
- The duty to use their powers for the purpose for which they were conferred and not for any ulterior motive.
- The duty to act in accordance with the obligations under the Companies Act 1993 and the company's constitution.
- That a director must not agree to cause, or allow the company's business to be conducted in a manner that is likely to create a substantial risk of serious loss. To determine this the court will look at what an 'ordinary prudent director' would have done in the circumstances.
- The duty not to take on any obligations unless it is believed on reasonable grounds that the company will be able to perform those obligations when required to do so, and
- The duty to use the reasonable care, diligence and skill that a reasonable director would exercise in the circumstances.



Recent director liability cases

Directors must actively ensure that they are meeting their obligations. The recent case *FXHT Fund Managers Ltd v Oberholster* held that directors who are not actively engaged in the company or 'sleeping directors' can be liable. In this case the inactive director was held liable for a breach of his duty of care even though it was his co-director who defrauded investors. Initially he was not aware of his co-director's dealings, but as soon as he became aware he reported the matter to the authorities; however he was still held liable.

Similarly in *Lewis v Mason and Meltzor* the directors relied on a manager and did not exercise sufficient control over the company's financial position or the day to day running of the company. It was found that reliance on a manager does not excuse a director from liability and the directors were ordered to contribute to the Company's debts.

Summary

The above cases show the need for directors to take positive steps to discharge their obligations under the Companies Act, and be proactive directors who are aware of and adhere to the duties imposed on them.

The importance of a current will

The recent High Court decision in *re Trotter* is a timely reminder of the importance of having a current will, particularly for parties who have recently separated.

Murray and Christine Trotter separated in May 2001 without a separation agreement or the making of a separation order. In October of that year a matrimonial property agreement was concluded that provided for the transfer of the matrimonial home into the sole ownership of Murray and the payment to Christine of half the equity in the home.

Murray occupied the home until his death in 2009 when he died intestate (i.e. having not made a will). Christine applied for Letters of Administration on the grounds that she had a sole beneficial interest in the estate.

The court noted the following:

- Regardless of the fact that the parties had executed a matrimonial property agreement, Christine had a beneficial interest in the estate as a surviving wife.
- Murray and Christine separated by mutual agreement and did not obtain a separation order from the Family Court and therefore Christine was not prevented from obtaining Letters of Administration.
- There were no other potential claimants.

The court found that no cause had been shown why Christine should not be granted Letters of Administration. Christine had the sole beneficial interest in the estate and therefore took priority under the High Court rules.

Unfair parking ticket?

To successfully challenge a parking ticket, read the ticket carefully to ensure all of the details are correct including:

- make, model and registration number of the vehicle
- description of the location of the ticketed vehicle

Next look for any signs in the vicinity relating to the car park to ensure any signage is clear and unambiguous.

If details on the parking ticket are incorrect or signage, including yellow lines, are unclear for any reason, you may have grounds to apply to have the ticket overturned.



Wills and property ownership – things you need to know

The recent High Court case of *Rauch & Ors v Maguire & Anor [2010] 2 NZLR 845* highlights two interesting distinctions. Firstly, the distinction between ownership of property as 'joint tenants' and ownership as 'tenants in common'. Secondly, the distinction between the duties of disclosure owed to beneficiaries by 'Executors' and by 'Trustees' of a deceased person's estate.

The facts

The deceased and his son owned two properties that were originally purchased in 1997; mistakenly as tenants in common. The mistake was corrected one year later when the properties were transferred to them both as joint tenants. The effect of owning the properties as joint tenants was that on the death of the father in 2009, the properties were transmitted by survivorship to the son and did not form part of the estate.

The son gained from this correction because the two properties, which together were worth \$5 million, were accordingly his and did not form part of his father's estate. This in turn meant that the father's estate reduced in value from \$2.5 million (a half share of the two properties) to \$39,000 – hence the claim by the disgruntled beneficiaries (who did not include the son).

The High Court held that the residuary beneficiaries were not entitled to information from the executors and trustees of the estate. The properties were personal assets that were transmitted by survivorship prior to death and as such the circumstances were confidential.

Joint tenancy or tenancy in common?

If property is owned as joint tenants then it does not become part of the estate and transfers by survivorship to the

surviving joint tenant regardless of the contents of the will. If property is owned as tenants in common, then it forms part of the estate and is dealt with according to the terms of the will.

Beneficiaries' rights to disclosure of information

It is common for the executor and trustee named in a will to be the same person, however beneficiaries' rights of disclosure of information differ depending on whether they seek disclosure from the Executor or the Trustee.

In the above case, the residuary beneficiaries could not compel the Executors to disclose any information because they had no legal or equitable property interest in the un-administered estate. They had no greater right to disclosure after death than during the deceased's lifetime.

The residuary beneficiaries also could not force the Trustees to disclose information regarding the transfers because the information sought was information relating to non-trust assets. The assets were not part of the residuary estate. The Court held that disclosure is at the Trustees' discretion and if asked the Court would intervene in a supervisory role, if appropriate, given the particular circumstances. In this case, the residuary beneficiaries could not show good reason for the court to intervene and order disclosure.

A beneficiary has a right to disclosure of information by the Trustee, provided the information sought relates to the assets of the estate.

Conclusion

Understanding the manner in which property can be owned, including an appreciation of the distinction between joint tenants and tenants in common is crucial to estate planning.

Real Estate Agents Act 2008

The Real Estate Agents Act 2008 came into force on 17 November 2009, replacing the 1976 Act and introducing a new regulatory regime. The Act's purpose is to promote and protect consumers' interests and "promote public confidence in the performance of real estate agency work". Some of the important changes under the new Act are outlined below.

Real Estate Agents Authority

A Real Estate Agents Authority ("Authority") has been established as an independent Crown entity to replace the Real Estate Agents Licensing Board. It will be responsible for such matters as licensing, receiving complaints, disciplinary action, regulating standards, and consumer information. The Associate Minister of Justice Hon. Nathan Guy has stated that the public will now be able to access the Authority to gain impartial and easy to understand information and that the Authority will provide a robust, transparent complaints and disciplinary process.

Licensing

Every person engaged in real estate agency work must apply for a licence on a yearly basis. There will be a public register of licensees that will record whether the licensee has been disciplined in the last three years. This will allow consumers to make informed choices when choosing an agent.



Code of Conduct

The Authority will establish a Code of Conduct that will set minimum standards of behaviour by which all licensees must abide.

New complaints and disciplinary processes

The Authority will establish Complaints Assessment Committees, as required, to more effectively deal with complaints and investigate allegations about licensees. Each committee will have three members and will investigate complaints, make determinations about complaints, promote resolution of complaints, lay and prosecute charges before the Real Estate Agents Disciplinary Tribunal, refer complaints to other agencies where appropriate, as well as inform complainants about decisions and publish decisions.

Real Estate Agents Disciplinary Tribunal

The Real Estate Agents Disciplinary Tribunal (the "Tribunal") has been established, and is independent of the Real Estate Institute with members being appointed by the Minister. The Tribunal will hear and determine claims brought by a Complaints Assessment Committee and will hear any subsequent appeals against the Committee's decisions.

The hearings are to be held in public and appeals of Tribunal decisions will be heard in the High Court. The Tribunal may:

- suspend or cancel a license,
- impose a fine of up to \$15,000 in the case of an individual or up to \$30,000 in the case of a company,
- order agents to pay compensation of up to \$100,000 or have their license cancelled or suspended.

Disclosure obligations

Real Estate Agents are now required to provide certain information to clients such as disclosing conflicts of interest, and making disclosure of all discounts and rebates the agent will receive.

Agents must provide an approved guide to clients who are entering into agency agreements or agreements for sale and purchase. The guide will provide a plain language explanation of the document and the implications of signing it.

Agency agreements

Clients must be given a copy of an agency agreement within 48 hours of signing. In the case of a sole agency agreement the client will now have a cooling-off period, until 5pm of the day following signing, to elect to cancel the agreement.

Trust beneficiaries' rights to information

How much information should beneficiaries under a trust be given, and what information are they entitled to? In many trusts the settlors and trustees are Mum and Dad and the beneficiaries are the children. Usually the children are kept informed and advised of the assets in the trust and the question of what information should be disclosed to the beneficiaries is often not an issue.

Questions may arise as beneficiaries get older or where communication between trustees and beneficiaries is limited or has broken down. The beneficiaries may become suspicious of the actions of the trustees and demand financial statements and other financial information from the trustees.

Trustees are not legally required to show beneficiaries all Trust documents, although in many cases trustees will for example supply a copy of the Trust Deed, information and explanation as to investments, financial statements and accounts of the Trust.

Historically it was thought that a beneficiary under a fixed trust ("fixed beneficiary") had an entitlement to view trust documents and information, and a beneficiary under a discretionary trust ("discretionary beneficiary") did not. Under a fixed trust the number of beneficiaries and the share they will receive are defined. Under a discretionary trust the trustees may use their discretion as to who will be a beneficiary and what share a beneficiary will receive. The reasoning therefore was that a fixed beneficiary has an entitlement to Trust property, whereas a discretionary beneficiary merely has the right to be considered as a beneficiary.

In *Schmidt v Rosewood Trust Ltd* the Privy Council held that a beneficiary's entitlement to seek disclosure of trust documents is based on the Courts' inherent jurisdiction to administer Trusts rather than whether the beneficiary is a fixed beneficiary or a discretionary beneficiary. Both fixed and discretionary beneficiaries can apply to the Court for disclosure of Trust documentation.

Where a beneficiary applies to the Court for disclosure of a Trust's documents, the Courts will, in exercising their discretion, balance the interests of trustees, beneficiaries and third parties. The beneficiaries do not have an absolute right to information. The Court will consider the nature of the information and the interests of all the beneficiaries.

Information which the Courts have in the past provided to beneficiaries include:

- copies of the Trust Deed,
- financial accounts and statements of the Trust,
- any Deeds of Variation of Trust Deed, and Deeds of Retirement and Appointment of Trustees,
- valuations of assets of the Trust, and
- legal opinions related to beneficiaries rights and the interpretation of a Trust Deed's provisions.

In exercising their discretion, the Courts will consider such

factors as issues of personal and commercial confidentiality and sensitivity, whether limitations need to be placed on the use of the documentation or information, whether some documents should be withheld in full or in part, and what impact the disclosure will have on the trustees, the beneficiaries or third parties.

There will no doubt be times when a trustee will refuse a beneficiaries' request for trust information. This decision is more likely to be respected and accepted where the trustee and beneficiary have developed a history of communication and respect. As trustee, if you are unsure as to what type of Trust information you need to disclose to the beneficiaries, we recommend you seek legal advice beforehand.

Abolition of gift duty

Revenue Minister Peter Dunne recently announced the proposed abolition of gift duty. His statement said that the compliance costs are too high for the amount of revenue that it is bringing in. Mr Dunne says that the protection that gift duty offers in the areas of income tax, creditors and social assistance has only ever been incidental and very limited.

Mr Dunne said, "We are satisfied existing legislation more than adequately covers those concerns".

Legislation to abolish the tax was to be introduced in November 2010 and we shall be keeping a close eye on it. In the meantime, we are recommending to clients that they continue their gifting programmes.

We expect that the abolition of gift duty will create improved opportunities in terms of transfer of assets to trusts. However, balancing that will be the need to take into account a variety of other legislation designed to prevent people from "hiding" their assets in trusts. We also anticipate that there will be an increased need to ensure that regular meetings are held between the trustees of trusts, and their professional advisers, to ensure that the trusts are conducted properly. We believe that there will be far greater scrutiny of trusts in the future, and developments in this area will need to be closely monitored.



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