

NEWSLETTER

August/September 2003

I AM MY TRUST.... OR AM I?

If you are a trustee – are you familiar with your obligations when dealing with Trust assets? If you treat your Family Trust's assets as an extension of your own assets, you run the risk of being found to have committed a breach of trust, and could be personally liable for the repercussions of that breach!

Trust Bank Accounts

Trustees need to ensure that the Trust has a separate bank account at all times. It is important that only Trust transactions are conducted through the Trust bank account.

If you are an independent trustee, you need to ensure that the Trust's bank accounts are used appropriately. Often independent trustees are kept in the dark about the trust bank account, and have no idea if it is being used correctly.

It is not uncommon for some trustees to use a Trust bank account as their own for their day to day transactions. Using the Trust eftpos card to buy groceries or to pay for your night out is risky!!

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Use of Trust Assets

As a trustee, you must ensure that the Trust assets are always recognised as belonging to the Trust and are not used for personal use. If you are an independent trustee, you must ensure that the other trustees adhere to their obligations as trustees and do not use Trust assets for personal use, or enter into transactions involving Trust assets without your prior approval.

The ownership of Trust assets needs to be correctly documented in the names of the trustees (as joint tenants), to ensure that there is no opportunity for improper use of those Trust assets by the trustee in whose name they lie. If you fail to ensure this, you could be liable for breaching your duty as a trustee.

Recent Case

In the recent High Court case of ASB Bank Limited v Davidson & Others, a trustee was found to have breached the above 'golden rules'. Mr Davidson was held personally liable for a debt incurred pursuant to a guarantee given by his Family Trust. This was because he did not obtain the unanimous approval of the trustees prior to committing the Trust to guarantee further bank advances. He signed the new documentation in his capacity as trustee of the Trust, without arranging for the other trustees to sign.

The Judge held that "Mr Davidson is yet another example of a person who, having arranged the formation

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of a Family Trust to protect assets and gain income tax advantages, thereafter chose to ignore the legal implications of his trusteeship and simply regarded the assets of the Trust as part of his overall assets which were available to him to do as he wished. He was able to do so because it is quite obvious that his co-trustees failed to exercise their responsibilities as trustees".

Mr Davidson was held personally liable to pay the \$200,000 claimed, together with interest and solicitor/client costs.

Be Alert

If you are a trustee, play it safe when dealing with the Trust's assets, and make sure the activities of your fellow trustees are not putting you at risk.

ON A MISSION FOR COMMISSION

When can a real estate agent claim a commission?

Entitlement to Commission

The agent must be licensed to carry on business as a real estate agent and must have a written *appointment* to act as an agent to perform a service for the vendor (the seller). The *appointment* need not state that commission is neither payable nor the rate at which commission will be charged. It must, however, state the acts the agent must perform to earn the commission.

General Authority

A standard sale and purchase agreement contains a general authority for an agent to sell the property. By signing the agreement, you appoint and confer an entitlement to commission upon the agent listed in the agreement. An agent becomes entitled to commission as soon as a purchaser enters into a binding, unconditional contract with the vendor, regardless of whether or not the sale is ever completed.

Introductions

Standard written *appointments* often contain 'introduction' provisions, providing for commission to be payable where the agent introduces a purchaser to the property. Commission is payable where there has been an 'introduction' and subsequent sale, even if the vendor and purchaser opt to conduct and finalise negotiations between themselves. The agent need only bring about the 'introduction'. Such provisions can also apply after the agency has expired.

However, the 'introduction' itself must be the effective cause of the subsequent sale. If the agent's introduction ceases to be instrumental in any way in bringing about the sale, the agent's right to commission is lost.

What is the Effective Cause?

It can be difficult to determine when an agent's introduction is the 'effective cause' of the subsequent sale. This is highlighted by the following case.

In October 2001, J entered into a sole agency agreement with FBRL. During the term of the agency, the agent introduced R and P to the property. R and P's offer to purchase the property was rejected in December 2001. The sole agency agreement expired a month later.

After the agreement expired J made improvements to the property and in March 2002 started marketing the property privately. In May 2002 R saw one of J's advertisements, re-inspected the property a month later, and purchased it shortly after.

FBRL learned of the sale and claimed commission on the basis that they had introduced R and P to the property during the term of the agency.

The District Court held that the introduction had a material bearing on the sale even though the agency had ceased five months earlier.

On appeal to the High Court, the earlier decision was set aside. While it was found that the initial introduction was material to the sale, it was not conclusive that the introduction was the effective cause of the sale. Fresh advertising, and the further work undertaken at the property, could have removed the causal effect of the original introduction.

Our Advice

There are other circumstances where commission may be payable and there are many options when appointing an agent to sell your house. If you intend to sell your property – investigate your rights before you sign on the dotted line.

DOES THE STOVE WORK?

For many clients the most disappointing part of a new house purchase is finding that the chattels in the new house do not function properly. Even worse, some clients carry out a pre-settlement inspection, ascertain that the chattels are not in working order but then find that their lawyer has no ability to force the vendors either to fix those chattels or to reduce the purchase price to take account of that condition.

The Agreement May Not Be of Much Help

In a dispute, the starting point is the terms of the agreement. In the commonly used ADLS agreement, the vendor warrants that on settlement, the chattels are in the 'state of repair' as at the date of the agreement (fair wear and tear excepted).

In order for the vendor to have breached that warranty, the purchaser will need to be able to show that the 'state of repair' of the chattels on the date of settlement is worse than the 'state of repair' of the chattels at the date the agreement was signed. Very few purchasers go through a property and test each element, dishwasher, garage door

opener, wall heater, and ceiling fan before they sign the agreement. If the purchaser cannot show that the goods have deteriorated since signing, then the vendor needs only to assert that the chattels are in the same state of repair as at the date of signing, and the purchaser can take no action.

Even if the purchaser can prove the change in condition of the chattels, the sale cannot be held up for that reason. The agreement only creates a right of compensation and the purchaser will need to pursue the vendor in the Disputes Tribunal to recover the costs of repair.

Is There a Way Around The Problem?

There are a number of possible solutions. The purchaser could ensure that the agreement contains an additional clause in which the vendor further warrants that the chattels will be delivered to the purchaser in good repair and working order at settlement. Again, however, a breach of this clause will only allow the purchaser to pursue the vendor in the Disputes Tribunal.

Some solicitors recommend to their clients that they go through the property with a camera. They then test each chattel and take photos of them in working order. If there is deterioration they then have some evidence to take to the Disputes Tribunal to recover the costs of repairing those chattels.

There May Be Other Problems

A further issue arises because of the new Personal Property Securities Act ("PPSA"). A purchaser was recently visited by repossession agents three days after she had purchased the property. The agents came to repossess the stove which was subject to a hire purchase agreement.

If the stove was worth more than \$2,000 at the date of its purchase under the HP agreement, regardless of whether or not the purchaser knew of the hire purchase agreement, the agents would have

been entitled to repossess it. The purchaser would have had to rely on the vendor's warranty in the agreement that all electrical installations were free of charges, and could then pursue the vendor in the Disputes Tribunal.

However, if the stove was worth less than \$2000 at the time of purchase and the purchaser had no knowledge of the hire purchase agreement the purchaser would have been protected by the provisions of the PPSA and been able to keep the stove.

Some Advice

If you are purchasing a property, you should discuss these issues with us. You can then see if you can avoid potential problems caused by faulty chattels or undisclosed hire purchase agreements.

COMPANY COMPLIANCE – THE ONGOING SAGA

Being involved in the Board or management of a company can be a minefield. Have you met all requirements and timeframes? Have you disclosed personal interests when you should have? What are the ramifications if you have missed something?

You may unwittingly be treated as a director of the company that you are involved in, even if you are not actually appointed to that position. If that is the case, you need to be aware of your responsibilities.

Deemed Directors

Who is a director? If you consent to being a director and details are filed with the Companies Office then you're clearly in the frame. However the situation may arise where you are deemed to be a director. The Companies Act ("Act") defines a director as "a person occupying the position of director of the company by whatever name called".

This could include a person who is invalidly appointed, or who continues to sit around the Board table even though his or her appointment has expired. A shareholder (or even an employee) exercising powers which should really be exercised by the Board, would be deemed to be a director, as would a person on whose instruction the Board then acts.

As a general rule, professional advisors are not seen as deemed directors provided they maintain a purely advisory role.

Directors' Interests

If you are involved in the management of a company, you will be aware that it can be a 'paper war' when trying to meet your record-keeping obligations.

One critical record-keeping obligation is the obligation to maintain a Directors' Interests Register. The intention of this requirement is to deter inappropriate behaviour by directors. Section 139 of the Act sets out what is seen as a director's interest.

What is an interest?

Where a director (including a deemed director) has an 'interest' in a transaction, he or she must disclose that interest. An interest includes the situation where the director:

- Is a party to a transaction, or will derive material financial benefit from a transaction ("Benefiting Party"); or
- Is a director, officer or trustee of a Benefiting Party; or
- Is the parent, child or spouse of a Benefiting Party.

It is best to err on the side of caution – if in doubt disclose!

Ramifications

Where the company has not received fair value for a transaction where a director has an interest

(whether or not the interest was disclosed), the company can avoid the transaction at any time up to 3 months after the transaction is disclosed to all shareholders. In addition, note that disclosure in the Interests Register is not considered disclosure to shareholders.

Where the company has received fair value, the transaction cannot be avoided. But in either case a director could be liable to a fine of up to \$10,000 for failing to meet the disclosure obligations.

What Can I Do?

If you are a director, or think you may be treated as one, check that the company has adequate procedures in place to ensure the company complies with its record-keeping and administrative obligations. You may wish to develop checklists to refer to when considering each board transaction. Remember – ignorance is no defence!

STOOD DOWN?!! . . . SUSPENDED?!! . . .

The school has just phoned . . . your son or daughter is in serious trouble and the school is considering disciplinary action!

Panic! What does this mean? What are your rights?

When can my Child be Stood Down or Suspended?

A principal of a school can stand down or suspend your child if satisfied on reasonable grounds:

- That there has been gross misconduct or continual disobedience that is a harmful or dangerous example to other students, or
- Where it is likely that your child's behaviour will cause serious harm to themselves or another student.

There are no hard and fast rules about what will constitute gross

misconduct or continual disobedience.

How Long can my Child be Stood Down for?

Your child can be stood down for one or more specified periods, provided that each period does not exceed 5 school days in any one term or 10 school days in any one year (these times do not apply to suspensions).

A principal may lift the stand down at any time.

Who Must the School Tell?

The school must immediately notify the Ministry of Education and a parent/guardian of the child that has been stood down or suspended. The school must also give reasons for its decision.

Do We Get a Say?

Stand Downs

If your child has been stood down, you can request a stand down meeting with you, your child, and the principal.

If at the meeting, the principal is satisfied that reasonable grounds for the stand down do not exist, then the stand down must be withdrawn. This is at the principal's discretion.

Suspensions

If your child has been suspended, the principal must provide a written report to the Board of Trustees. The Board must then give you and your child written notice:

- That a suspension meeting is to be held,
- The time and place of the meeting, and
- The options available to the Board in respect of the suspension.

In addition, at least 48 hours before the meeting, the Board must provide information about the procedure to

be followed at the meeting, a copy of the principal's report, and any other information presented to the Board. The Board must also advise you and your child that you may attend and speak at the meeting.

The options available to the Board include:

1. Lifting the suspension;
2. Extending the suspension;
3. If the child is under 16 years, excluding the child from the school. (The principal must then try to arrange for them to attend another school); or
4. If the child is over 16 years, expelling him or her.

If the Board does not choose one of these options the suspension will end at the close of the 7th school day after the day of the suspension or, if the suspension occurs within 7 days before the end of term, at the close of the 10th calendar day after the suspension.

The Board must record its decision and the reasons for it in writing.

The power to make the ultimate decision will rest with the Board, not with you. This does not mean, however, that there is no benefit in taking part in the process.

Unfortunately if you are unhappy with the Board's decision the only recourse you have is for judicial review. This involves the appointment of a lawyer to take the case to the High Court. Furthermore, the review process is only to consider the procedural fairness of the process and the method of the decision-making rather than the merits of the decision and the outcome itself.

If you are unsure about what is happening, or are unhappy with the final outcome, it may be useful to give us a call.

If you have any questions about the newsletter items please contact us, we're only too happy to help.