

October 2018 | Issue 14

IN THIS ISSUE

Page ONE

Corporate Trustees and Liability

Page TWO

Decision Making Trustees Must Be Able to Work Together Trust Bill Update

Page THREE

NZ CA Member Contact Details

CORPORATE TRUSTEES AND LIABILITY

A trust with a corporate trustee, rather than a natural person trustee is often referred to as a trading trust. However, whether or not a trust is carrying on business, one or more trustees can be companies rather than natural persons. The reasons for this include:

1. To address concerns surrounding trustee liability, and
2. Because the use of a corporate trustee can reduce the costs associated with retirement and appointment of trustees, and

Liability

Trustees act "personally". What this means is that a trustee is liable for losses incurred, even if the trustee cannot benefit from the trust. Although a trustee will have a right of indemnity from the trust, if the trust is insolvent the trustee can be left meeting the cost of any shortfall.

An alternative is for the person who would otherwise be a trustee to act as a director of a trustee company, rather than to act as a trustee personally. Although this approach can reduce the risk of personal liability, if a loss has occurred because the director acted recklessly or otherwise in breach of the Companies Act, the director can still be liable. If the director suffers losses as a result, the director, unlike a natural person trustee, does not have a right to indemnity from the trust.

Costs of Trustee changes

If a trust owns land, any appointment or retirement of trustee will require a legal conveyance of the title. Where the title is subject to a mortgage, a discharge and registration of mortgage may also be required.

However, if the trustee is a corporate trustee, while it may be necessary to obtain bank consent for a change of director, no conveyancing will be required and so there may be some cost savings.

Governance mechanisms

One of the complications with corporate trustees is that while aspects of the company models such as limited liability and perpetual existence are desirable attributes of the corporate trustee the economic and traditional governance attributes can be less appealing. What this means is that the Companies Act 1993 applies and so as well as trustee obligations the company must also meet all obligations under the Companies Act.

It is also important to carefully consider the terms of the trust deed as commonly trust deeds will limit who can be the director or shareholder of a corporate trustee so that beneficiaries do not have effective control of the trust.

DECISION MAKING

Trustees must generally act unanimously. Where decisions are not made by all the trustees, the trustees can later ratify the decision. However, if the validity of a decision is challenged the trustees can be required to prove that a valid decision was made. This was highlighted in the recent decision in *Fisher v Faafiu* where an agreement for sale and purchase was signed by one of the two trustees who owned a commercial property. The agreement was cancelled when the purchasers failed to pay the balance of the deposit payable under the agreement. The question for the court was whether the agreement was ratified by the trustee who did not sign. If it was not, then the deposit would have to be refunded to the purchasers as there was never an agreement.

TRUSTEES MUST BE ABLE TO WORK TOGETHER



Trustees fall out, sometimes to the point where a working relationship is no longer possible. Applications to remove trustees are becoming an

increasingly common occurrence. So, should trustees fight attempts to remove them? When is it appropriate to do so, and when not? And what are the potential consequences of misjudged opposition?

The recent decision in *O'Keeffe v Jones* is a useful example of judicial thinking on the subject. Ms O'Keeffe and Mr Jones (a lawyer) were trustees of an estate who disagreed on a number of aspects of estate administration. When Ms O'Keeffe asked Mr Jones to resign he refused and invited her to apply to the High Court. She did so, applying to have either Mr Jones removed or else both trustees replaced by the Public Trust. Mr Jones subsequently consented to the appointment of the Public Trust but opposed an application by Ms O'Keeffe to have her costs met from the estate.

This was an estate where there were seven children, not all on good terms. Palmer J recounted that disagreements between Ms O'Keeffe (the fourth child of the seven) and Mr Jones had been ongoing but had come to a head when the trust's bank account became overdrawn and outgoings went unpaid.

Each accused the other of misconduct.

Ms O'Keeffe brought her action to remove Mr Jones based on both the alleged misconduct and the deadlock following the breakdown of the relationship between them. Ms O'Keeffe's siblings were, unsurprisingly, split over who they favoured, which probably influenced the subsequent agreement for consent orders in favour of the Public Trust. However, when the draft order included an order for Ms O'Keeffe's costs, Mr Jones withdrew his consent. Further affidavits were exchanged, and time passed. A consent order was agreed on replacing the trustees, but the matter of costs was set down for a hearing.

Mr Jones had known for years that the relationship with Ms O'Keeffe was not working but had persisted to refuse to stand down. Ms O'Keeffe brought the action not personally but as trustee.

The court found that Mr Jones had not acted as reasonably in opposing her application, merely prolonging proceedings, and ended with an order to pay costs personally on an indemnity basis.

Aspects of Mr Jones conduct as a trustee that invited particular consideration by the court included:

- Mr Jones' antagonistic approach to his co-trustee
- Correspondence in which he "practically dared" his co-trustee to take proceedings
- Filing a notice of opposition when the matter was substantially settled
- Mr Jones' dealings with the trust's funds through his firm's trust account including payment of his own fees without the agreement of his co-trustee, refusing to transfer to trust funds from his firm's trust account to other accounts, refusing to pay trust debts and refusing to act as a trustee unless his firm was paid in priority to other debtors

Trust Bill Update

As mentioned in the previous newsletter, the new Government has picked up the Trusts Bill and included it in the Parliamentary legislative programme. Currently the Trusts Bill is being considered by Select Committee, which is expected to report back on the Trusts Bill by the end of October 2018.



About NZ CA

NZ CA Limited was formed in May 2001 and currently has 29 independent Chartered Accounting firms in 35 locations throughout New Zealand. NZ CA has a 'nationwide' network

spanning from Kaitaia to Invercargill and has further potential to grow. Members of NZ CA share resources to provide the ultimate innovative and practical business advice tailored to their clients' requirements.

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