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## NEWSLETTER

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### 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.

## **RELATIONSHIPS OF SHORT DURATION**

The Property (Relationships) Act 1976 ("the Act") has been in place since February 2002 and the Courts are slowly gathering together a collection of decisions to guide practitioners and their clients through the new provisions and issues that were introduced.

An interesting case has come from the deepsouth dealing with relationships of short duration for unmarried partners (usually less than three years).

There is a distinction made between relationships of short duration between married and unmarried partners. For married partners, the Court will divide their relationship property according to the respective contributions to the relationship of each partner. For unmarried partners, the Court does not have jurisdiction to divide their property unless:

- There is a child of the relationship; or
- The applicant has made a substantial contribution to the relationship; and

- In either case, the Court is satisfied that the lack of an order will result in serious injustice.

The presence of a child or a substantial contribution will not necessarily be a reason for the Courts to find that serious injustice will result.

### **What is Needed?**

For an application of this type, the Court will need detailed and specific information about the likely result and degree of injustice that would result if the Court refused to intervene.

Section 15 of the Act empowers the Court to award lump sum payments or transfer property to one party where 'economic disparity' exists. Economic disparity arises if, on the division of relationship property, the income and living standards of one partner are likely to be significantly higher than those of the other partner because of the effects of the division of functions or roles within the relationship.

The birth of a child may be the key to a successful application under section 15 if one parent is unable to pursue a career by having to assume the primary caring position. If the Court refuses to intervene it would, in effect, block any application under section 15 to address economic disparity. On the other hand, the Child Support Act 1991 could provide relief through availability of financial support.

A significant disparity in contributions may be sufficient for the Court to intervene. However, prior to the changes in the Act, de facto partners (who were not covered by the legislation) had to rely on arguments that a "constructive trust" had been established in order to be granted a share of the property, and that may still be the case. A "constructive trust" is created where a person made contributions to the other's property and had a reasonable expectation that he or she would

receive a share of the property in return for the contributions.

In the case from the deep south the Judge stated that a combination of factors, each not necessarily in itself amounting to a serious injustice, might together add up to a serious injustice. Unfortunately for the applicant in this case, she failed to satisfy the serious injustice test, despite the birth of a child during the relationship.

We may have thought that with new legislation, many of the old principles and arguments would no longer apply. However, this decision emphasizes the many complexities of the old legislation and common law which have carried through.

## **ON A MISSION FOR COMMISSION**

**W**hen 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.

## LANDLOCKED LAND

One way in which owners can have land lawfully taken from them is under section 129B of the Property Law Act 1952. This section provides that access may be granted to an owner of landlocked land for the purpose of providing relief from lack of access. Obviously, to provide that relief the Court must make an order against the owner of the neighbouring land to allow access.

A piece of land is landlocked if there is no reasonable access to it. In the 1970s and 1980s it was more likely that reasonable access would not necessarily include vehicular access. In one 1980s case, the Judge commented that "vehicular access in Wellington is the exception rather than the rule ... what is required is that there should be adequate off-street parking".

### What is Reasonable?

In a more recent 1994 case, however, the Judge held that while reasonable access did not invariably mean vehicular access, a determination should be made in light of current requirements and the general topography and nature of the area in question. In that case, vehicular access was granted.

The successful cases have generally arisen where there is "inadvertence or a historical accident". Typically access was available to the owner of the landlocked land through an informal arrangement and that access was subsequently denied. This is because the Court must have regard to the access that existed when the applicant purchased or otherwise acquired the land, or the circumstances in which the land became landlocked.

In *Kingfish Lodge (1993) v Archer* the applicant was the owner of a licensed tourist lodge which had existed since 1946 but was accessible only by sea. The owner had plans for redevelopment which required access by land through neighbouring farms. Negotiations with the owners of those farms had been unsuccessful. In that case it was held that the land was not landlocked. Physical access to the land did not necessarily require vehicular access. For 46 years it had depended exclusively on sea access quite successfully and could therefore continue to do so.

In *Wentworth v Sayes*, however, the landlocked land was a valuable block at the bottom of a cliff facing the ocean. The land was part of a subdivision in 1962 in which the other blocks except for this one all had vehicular access. In 1994, application was made for vehicular access and that application was opposed by 23 defendants. The application was successful and the Judge noted that three acres of prime residential property necessarily requires vehicular access. "The idea of parking on the land above the cliff ... and walking down a track makes no sense".

While the application was not made by a property developer, there is a concern that property developers may abuse the grant of relief. Because in this case it would seem that a development opportunity was available to the owner, it raises concerns that property developers may take advantage of section 129B to develop landlocked land to the detriment of the owner who must grant access to it.

Although cases under section 129B arise fairly infrequently, it is not uncommon for practitioners to come across landlocked land from time to time. Generally, these matters can be resolved without recourse to the Court but relief may be available under s129B if required.

## **STOOD DOWN?!! . . . SUSPENDED?!! . . .**

**T**he 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.

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*We will be closing our office for the Christmas break on Monday 22nd December 2003 and re-opening on Wednesday, 19th January 2004.*

*We wish you a very Merry Christmas and a Prosperous New Year.*

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