

June 2010

# TrustLaw

This newsletter is produced by Brookfields' Trusts and Management Services Team to keep you up to date on recent cases and information in the fields of trusts management and asset planning.

## Property Ownership, More On Tax, Removal Of Trustees

### Property Ownership

Properties are often owned by more than one person. Properties can for example be owned by a couple, siblings, business partners or by co-trustees. Under New Zealand law where more than one person owns a property it is owned either as joint tenants or tenants in common. The decision as to what is the most appropriate form of property ownership is dependent on the reasons why the property is to be owned with others.

#### *Tenants in Common*

If a property is owned as tenants in common each owner has a defined legal interest in the property. The ownership percentage or fraction held in the property is stated in some way on the title. If two people equally own the property the title would record each owning a half or an equal share. However, if one of the owners has put in, say, 95% of the funds to purchase the property the title would typically record their share as being a 95/100<sup>th</sup> share and the other owner a 5/100<sup>th</sup> share.

A property that is owned as tenants in common can be dealt with by the owners separately as to their respective shares. The owner of the 5/100<sup>th</sup> share referred to above could sell their share (if anyone would buy it) without the consent of the co-owner. This share can also be left in the owner's will.

If the property is sold each of the property owners would typically take the percentage of the sale proceeds that is represented by their ownership share.

In theory each property owner is free to deal with their share of the property as they wish. If the property is used as security for any borrowings, however, all the co-owners will need to commit to the property being used as security. If a mortgage is secured over the property, unless otherwise agreed with the lender, each of the co-owners is fully liable under the mortgage.

A tenancy in common is most appropriate where the ownership is to be kept completely separate, for example if someone is in a business partnership or someone wants to ensure that the property will form part of their estate.

#### *Joint Tenancy*

Under a joint tenancy there is no defined ownership share between the property owners. Upon the death of one of the joint tenants the property passes by survivorship to the remaining owner/s.

Joint tenancy is commonly used by couples to simplify their estate planning. Upon the death of one the survivor takes the property by survivorship – it does not form part of the deceased's estate. In most circumstances, if a claim is made against the estate, for example under the Family Protection Act, the property that was jointly owned will not be available to meet claims. This is because the property that was owned as joint tenants is not part of the deceased's estate.

**Auckland**      **Manukau**      **Wellington**  
t 09 379 9350      09 262 2145      04 499 9824  
f 09 379 3224      09 379 3224      04 499 9822  
[www.brookfields.co.nz](http://www.brookfields.co.nz)



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Joint tenancy is also the form of property ownership that applies to property owned by trustees of a trust. Upon the death of one of the trustees the property passes to the surviving trustee(s). Again it does not fall within the estate of the deceased trustee.

When property is being purchased the form of ownership that is appropriate to your circumstances should be discussed carefully with your legal adviser.

## Trustees' Tax Liability

In our last TrustLaw a trustee's liability for tax debt was discussed. A Court case decided in April this year again highlights the need for trustees to be aware of what their co-trustees are up to.

This was a case in which an independent trustee company which acted as trustee for a considerable number of trusts argued that a statutory demand brought by the Inland Revenue Department for payment of income tax and GST should be set aside. One of the arguments submitted by the trustee company was that it had had no involvement whatsoever in the day to day management of the debtor trust and ought not to be held accountable for the actions of its co-trustee. The co-trustee failed to disclose to the trustee company that the trust had tax obligations which had not been met. The Court in this case considered that the fact that the independent trustee company took no active part in the day to day management of a trust could not be used as an excuse.

This again is a salient lesson for all trustees to be aware of what their co-trustees are doing. There is no such thing as a passive trustee. Trustees must be active and not rely on their co-trustees.

Trustees are liable for their co-trustees' actions. If you are a trustee vigilance is required to protect your interests, as is active involvement in the day to day activities of the trust. It is no excuse that you were not aware of what your co-trustee was doing – you have a duty to be aware.

## Removal of Trustees

Some trust deeds include a power to remove trustees. We do not recommend this as it represents a de facto form of control. A co-trustee can be coerced to agree to decisions which may not necessarily be in the best interests of the trust – "you agree or I will remove you". This is particularly relevant to the independent trustee whose role is to maintain the integrity of the trust.

The power to remove a trustee must be validly exercised. It must not be used to advance the position of the person holding the power. For example, it would not be a valid exercise of the power of removal for a husband to remove his wife as a trustee to prevent her from receiving funds from the trust at the end of their marriage. The same care must be taken with any power held under a trust deed.

Trustees who are also beneficiaries have an inherent conflict in their role as trustee and the requirement for impartiality on the part of trustees in considering the interests of the beneficiaries.

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**Talk to us for advice on any of these matters.**

### Howard Johnston

*Partner*

t: (09) 979 2161

e: johnston@brookfields.co.nz

### Alison Gilbert

*Senior Associate*

t: (09) 979 2253

e: gilbert@brookfields.co.nz

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