

BURROWES and Company

Barristers and Solicitors

Client Newsletter

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TRUSTS AND THE CROWN RETAIL DEPOSIT GUARANTEE SCHEME

The Crown Retail Deposit Guarantee Scheme was introduced on 12 October 2008 to help support maintenance of public confidence in the New Zealand financial system.

The Government has signed agreements, known as Crown Deeds of Guarantee, with a number of institutions. The Crown guarantees the institution's payment obligations to that institution's eligible retail deposit holders. Trusts may also be eligible depositors under the Scheme if they meet the required criteria.

However, some uncertainties have arisen surrounding the Scheme and

its application to trusts. Guidance on the Treasury website states that trustees who are paid for their work as trustees (i.e. professional trustees) are not eligible under the Crown guarantee, because they fall within the wide definition of "financial institution".

However, trustees who happen to be professionals (such as lawyers or accountants) are not automatically ineligible. Therefore, it is unclear whether these professionals, who may charge their services, will be deemed to be independent trustees (which would make the trust ineligible under the Scheme).

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EFFECT OF GST INCREASE ON CONDITIONAL CONTRACTS OR BUILDING CONTRACTS

Where a contract for the sale of land from a GST registered vendor to a non-registered purchaser does not become unconditional before 1 October, section 78 of the GST Act will entitle GST-registered vendors to increase the price by 2.5% to recover the additional GST, at the new 15% rate, as part of the purchase price.

An exception to this is where the contract specifies the rate of GST. However, the standard ADLS/REINZ agreement does not contain a statement of the GST rate. If you receive or negotiate a contract

where the conditional date is on or after 1 October, you should be mindful of the vendor's right under section 78. If you are purchasing a property, for example, you will need to ensure that you have allowed for the increase in the purchase price.

You should be particularly mindful where an extension of conditional dates is being negotiated on or around 30 September. To avoid disputes, it is advisable to get legal advice. It may be beneficial to negotiate any new contracts on the basis of a 15% rate

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EFFECT OF GST INCREASE ON CONDITIONAL CONTRACTS OR BUILDING CONTRACTS

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where the contract will become unconditional on or after 1 October. Unless a building contract specifies the GST at 12.5%, any progress payments paid under that contract after 1 October will also be subject to the rate increase.

The Taxation (GST and Remedial Matters) Bill

The Taxation (GST and Remedial Matters) Bill contains significant changes to GST which will affect all commercial property transactions from 1 April 2011.

The Bill seeks to amend the Goods and Services Tax Act 1985 and provides that tax is charged on supplies of land in transactions between registered persons at the rate of 0%. However, a transaction between a registered supplier and a non-registered purchaser will remain subject to the existing rules.

This would adhere to the basic principle that in transactions, the goods and services tax between businesses should be GST-neutral. At present, this does not always occur in transactions that involve the supply of significant assets.

PATHS, TERRAIN AND AUTOMOBILES— WHAT IS REASONABLE ACCESS TO LAND?

The Court of Appeal recently considered this issue in the case of *Murray and Tuohy v BC Group (2003) Limited and Ors [2010] NZCA 163*. The appellants and their neighbours owned adjoining properties in the Wellington hillside suburb of Ngaio. The properties were created by a subdivision in 1963. The appellants purchased their property in 1989 with the only access to the property via a steep council owned pedestrian footpath.

Twenty years later and suffering health problems, the appellants sought an order under section 129B of the Property Law Act 1952 requiring their immediate neighbours to provide access to their property through a right of way easement, on the basis that their land was landlocked. Section 129B is the remedial provision available to a landowner whose land is landlocked.

The Court of Appeal said that the approach in section 129B cases is well settled and involves three stages (briefly) stated as:

- Deciding whether the claimant's land is landlocked within the meaning of the section;
- If yes, determining how the discretion given to the Court by the section should be exercised; and
- If the Court decides to grant access to the landlocked land, to determine the terms of access.

The High Court, from which the appeal came, held in February 2009 that the appellant's property was not

landlocked for the purposes of Section 129B (and accordingly there was no need to consider the second and third stages).

Under section 129B(1)(a) a "piece of land is landlocked if there is no reasonable access to it". It was the appellant's case that taking into account modern day community expectations and standards, a residential property without vehicular access does not enjoy reasonable access and is therefore landlocked.

In the Court of Appeal, Justice Gendall, who delivered the reasons of the Court, stated "we cannot accept that it is necessarily the case that under modern day community standards vehicular access on to the site of a residential property is necessary for it to enjoy reasonable access".

Further into the judgement Justice Gendall stated: "obviously, if people cannot get onto their property it has no reasonable access. If they can access it from a public roadway or walkway through a suitable pedestrian route then such access may be reasonable, depending on the circumstances". In this case there was evidence from the respondents that this was typical of access to properties in Wellington's hilly suburbs.

The Court of Appeal agreed with the High Court's conclusion that, having regard to contemporary standards, the present access was reasonable and that vehicular access was primarily a matter of convenience for the appellants. Accordingly the appeal was dismissed.

TRUSTS AND THE CROWN RETAIL DEPOSIT GUARANTEE SCHEME

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The Treasury states on its website that it is not an independent adviser to depositors about financial or legal issues. Accordingly individuals will have to seek their own legal advice, and it will be up to lawyers to decide whether or not they are caught.

If you have a professional acting as a trustee, it is advisable that you seek legal advice regarding this issue. To ensure that a trust receives the benefit of the Crown guarantee, it may be in the interests of the

trust for the professional to resign as an independent trustee.

In addition, the Scheme has other implications such as potential disqualification from the scheme due to the status of overseas resident beneficiaries.

Please contact us if you seek further clarification on these issues. We note that special rules apply to the South Canterbury Finance collapse.

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.

WILLS

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.

Legislation

There have been recent concerns that some previously

valid wills may now be invalid under the Wills Act 2007. The Wills Act 2007 made amendment to the previous law by requiring two witnesses to sign a statement attesting they were present at the time a person made their will. Wills made without that statement are now technically invalid.

The Act has been met with some scrutiny because it does not provide any allowance for the validation of non-conforming wills made before 2007. There has been considerable criticism from the judiciary who have recommended the Act needs urgent legislative reform. They have warned that without immediate reform the Courts will be forced to make non-conforming wills invalid, even if the intention of the will seems clear and it was made validly at the time.

Amendments to the Bill have been proposed which would mean that a will-maker will not need to actually sign their will in the presence of two witnesses but can instead acknowledge that the signature on the will is their own in the presence of witnesses later. However this has raised concerns of abuse in some quarters, especially for the elderly who could be manipulated into making this acknowledgement.

Justice Minister Simon Power and others have recommended that an amendment should be made to section 14 of the Act which would allow for the intention of a pre-2007 will to not be defeated by technical non-conformity.

Currently there is no certainty that judges will uphold a wills' intention without a clear indication that the will was witnessed. This uncertainty will continue until new legislation is passed. Accordingly people should ensure in the meantime that their will is valid under the 2007 Act.

GOVERNMENT MAY ABOLISH GIFT DUTY

The Government has announced that if certain concerns can be smoothed out, gift duty may be abolished. The concerns centre around credit protection and social assistance.

Revenue Minister Peter Dunne, said a recent report has found a "strong case" for repealing gift duty. Gift duty was introduced to prevent people from avoiding estate duty rules. However, these rules were abolished in 1992. The duty prevents people from gifting

large assets where the effect may be to undermine creditors' interests, hide tax income and perhaps gain access to social assistance.

The report has found that gifting programmes involve significant work and costs to Inland Revenue are high, but little money is actually collected.

Consultation is to take place over the next few months to deal with these concerns.

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