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TRUSTEE—AM I LIABLE?

Over the years New Zealand has seen an expansion of Family Trusts to the extent that they are now as common as the second family car. What many people fail to appreciate is that as Trustees they bear the risks associated with the Trust assets and unless otherwise agreed Trustees are personally liable for losses suffered by the Trust.

Consider the situation of Joanne who has been asked by her friend Sally to be the Independent Trustee for Sally and her husband Tom's Family Trust. In deciding whether or not Joanne should accept the role as Trustee she should consider the following Trustee Duties:

- To be familiar with the terms of the Trust Deed;
- To act honestly, diligently and prudently especially in regards to the management of property and investments;
- To act impartially between Trust beneficiaries;
- To act in accordance with the terms of the Trust for the benefit of the Trust beneficiaries;
- To maintain accounts and records;
- Provide information;
- To manage the Trust with reasonable care and skill (to managed trust affairs in the same manner and precautions as you would manage your own affairs);
- Seek advice as needed;
- To regularly consider the exercise of the Trustees powers.

If a Trustee is in breach of their obligation (ie negligence) they have a duty to restore the Trust to the position it would have been but for the breach.

Passive Trustee?

Sally has told Joanne she "will let Joanne know when she is needed to sign things but otherwise Joanne doesn't have to do anything". However the concept of a "passive" Trustee is not recognised in law. All Trustees are equally liable to a Trust's beneficiaries and creditors. Unless a Trust Deed states otherwise Trustees have a duty to make decisions unanimously and cannot delegate their powers to a Co-Trustee.

Tax Liabilities & Resolutions

Where a Trust is earning an income (ie from rental properties) annual accounts need to be prepared detailing the earnings. However where the only asset is a family home passing an annual resolution in lieu of an AGM is recommended. The resolution needs to state the Trust's assets and liabilities that fairly reflect the value of the Trust assets. It is also a good idea to confirm the current Trustees and beneficiaries. The Trustees duty is ongoing and resolutions should be passed annually even if there

has been no change to the assets as this enables Trustees to show that they have meet their duty to manage the Trust property.

Liability to Trust Beneficiaries

Consider the situation where Joanne signs off on a large distribution made to one of Sally & Tim's adult children to the exclusion of the others. Joanne doesn't know anything about the circumstances of the other adult children (the Trust beneficiaries). If the other beneficiaries filed proceedings claiming a breach of trust could Joanne be held liable? The answer is Yes. A Trustee has a duty to act impartially between beneficiaries and where the interests of one beneficiary are preferred to the prejudice of the others, a Trustee can be in breach of trust. Trustees do not owe the same obligations to discretionary beneficiaries.

Limit Liability & Liabilities to Third Parties

In order to avoid personal liability an Indemnity or Exemption clause may be included in the Trust Deed or alternatively a Deed of Indemnity may be signed. Provided that the a Trustee acts honestly complying with the terms of the Trust the Indemnity clause will generally protect the Trustee against any liability owed to the Trust beneficiaries for any loss.

What many Trustees fail to realise is that an Indemnity clause will not protect them against third party creditors such as banks. Prior to entering into any agreement with a third party a Trustee needs to ensure that there is a Limited Liability clause in the agreement. The effect of the Limited Liability clause is that the Independent Trustee is not personally liable for any loss suffered by the third party that is not covered by the assets of the Trust. Simply signing a contract as Trustee without a limitation clause will not be sufficient to limit a Trustees liability.

In some circumstances a Trustee can apply to the High Court to be relieved from personal liability for a breach of trust under s73 of the Trustee Act 1956. However Court granted relief is not a given and a Trustee must first meet the criteria.

If you have any questions regarding Trusts or Trustees Liability please don't hesitate to contact one of the team.

20 MINUTE FREE

**WANT to review your Family Trust structure?
 THEN call us and take advantage of our 20 Minute Free interview**