

PRESENTERS



Stephen Law, Senior Associate, TGT Legal, Auckland

Stephen is a graduate of Victoria University of Wellington and was admitted in 1996. As a senior associate with TGT Legal, he advises on company law, directors' duties, shareholding, governance and trusts. Stephen's experience covers business acquisitions, due diligence, reporting and advising on New Zealand securities legislation as well as a wide range of commercial contractual matters.



Juliet Moses, Partner, TGT Legal, Auckland

Juliet is a partner at TGT Legal, a boutique trust and private client law firm based in Auckland. She specialises in trusts, personal asset planning and superannuation and is a regular presenter of seminars and author of articles on issues arising in those areas. Juliet has spoken at several New Zealand Law Society conferences, ADLSi conferences, and at STEP (Society of Trust and Estate Practitioners) and NZICA events. She is the chair of the STEP education committee and also published a chapter in the CCH 2011 edition of the Master Trusts Guide on the Termination and Insolvency of Trusts.

The statements and conclusions contained in this presentation are those of the author(s) only and not those of the New Zealand Law Society. This presentation has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.

CONTENTS

INTRODUCTION	1
THE PRINCIPLES AND PURPOSES OF TRUSTS.....	3
THE NATURE OF A TRUST	3
PURPOSES OF A FAMILY TRUST.....	4
SUCCESSION PLANNING	5
CREDITOR PROTECTION	5
RELATIONSHIP PROPERTY.....	5
DISADVANTAGES	6
COMPARISON OF TRUSTS WITH OTHER OWNERSHIP STRUCTURES.....	7
SOLE TRADER	9
ORDINARY PARTNERSHIP.....	10
LIMITED PARTNERSHIP	10
LIMITED LIABILITY COMPANY.....	10
DISCRETIONARY TRUST	11
CHOICE OF STRUCTURE	11
THE KEY PLAYERS IN THE FAMILY TRUST.....	12
SETTLOR	12
BENEFICIARIES	13
PROTECTORS.....	15
TRUSTEES AND THEIR DUTIES	17
INTRODUCTION	17
TRUSTS BILL DUTIES	17
MANDATORY DUTIES	18
<i>Know the terms of the trust.....</i>	18
<i>Duty to act in accordance with the trust terms.....</i>	18
<i>Duty to act honestly and in good faith.....</i>	19
<i>Duty to hold or deal with property for the benefit of beneficiaries or the permitted purpose.....</i>	19
<i>Duty to exercise powers of a trustee for a proper purpose</i>	19
DEFAULT DUTIES.....	19
<i>General duty of care.....</i>	20
<i>Duty to invest prudently</i>	20
<i>Duty not to exercise power for own benefit.....</i>	21
<i>Duty to consider exercise of power</i>	22
<i>Duty not to fetter future exercise of powers</i>	22
<i>Duty to avoid conflict of interest</i>	22
<i>Duty to keep proper accounts.....</i>	22
<i>Duty of impartiality</i>	23
<i>Duty not to profit.....</i>	24
<i>Duty to act for no reward.....</i>	24
<i>Duty to act unanimously.....</i>	24
OTHER DUTIES OF TRUSTEES.....	25
<i>Duty to act personally and not to delegate.....</i>	25
<i>Identification and distribution of proper beneficiaries</i>	25
BENEFICIARIES' RIGHTS TO INFORMATION.....	27
THE DOCUMENTS THAT ARE SOUGHT	29
THE CONTEXT FOR THE REQUEST AND THE OBJECTIVE OF THE BENEFICIARY IN MAKING THE REQUEST ...	29
THE NATURE OF THE INTERESTS HELD BY THE BENEFICIARY SEEKING ACCESS	30
WHETHER THERE ARE ISSUES OF PERSONAL OR COMMERCIAL CONFIDENTIALITY	30
WHETHER THERE IS ANY PRACTICAL DIFFICULTY IN PROVIDING THE INFORMATION.....	30
WHETHER THE DOCUMENTS SOUGHT DISCLOSE THE TRUSTEE'S REASONS FOR DECISIONS MADE BY THE TRUSTEES.....	30
THE LIKELY IMPACT ON THE TRUSTEE AND THE OTHER BENEFICIARIES IF DISCLOSURE IS MADE.....	30
THE LIKELY IMPACT ON THE SETTLOR AND THIRD PARTIES IF DISCLOSURE IS MADE	30

WHETHER DISCLOSURE CAN BE MADE WHILE STILL PROTECTING CONFIDENTIALITY	30
WHETHER SAFEGUARDS CAN BE IMPOSED ON THE USE OF THE TRUST DOCUMENTATION	30
PRESUMPTION OF AVAILABILITY OF BASIC TRUST INFORMATION	31
PRESUMPTION TO PROVIDE INFORMATION TO BENEFICIARY ON REQUEST	32
SECTION 45(2) FACTORS	33
TRUST DEED PROVISIONS	35
INTRODUCTION	35
THE TRUST AS A SUCCESSION STRUCTURE.....	35
MANAGEMENT AND ADMINISTRATION POWERS	35
EXPRESS POWER OF VARIATION	38
DISPOSITIVE POWERS.....	39
TERMINATION OF TRUSTS	39
TRUSTS BILL AND PERPETUITIES	40
SELF-BENEFIT CLAUSES	41
RESERVED POWERS	43
EXONERATION AND INDEMNIFICATION CLAUSES.....	44
THE FUNDAMENTAL PRINCIPLES OF A TRUSTEE’S LIABILITY TO CREDITORS.....	47
AN INTRODUCTION	47
CONTRACTING WITH TRUSTEES	49
CORPORATE AND COMMERCIAL ISSUES AND RISKS	51
INTRODUCTION	51
GENERAL MATTERS RELEVANT TO LENDERS AND CREDITORS.....	51
TRUSTEE INDEMNITY AND IMPAIRMENT	53
PARTICULAR RISKS FOR LENDERS AND CREDITORS.....	54
CORPORATE TRUSTEE INSOLVENCY.....	54
<i>Corporate trustee – multiple trusts.....</i>	<i>55</i>
REDUCING RISK – LENDING TO TRUSTS.....	56
<i>Things a creditor should check.....</i>	<i>56</i>
CREDITOR COMPROMISES	57
<i>Disclosure of assets held in trust.....</i>	<i>57</i>
ACCESS TO TRUST ASSETS	58
<i>Other ways of accessing trust assets</i>	<i>61</i>
<i>Section 44 and 44C of the Property (Relationships) Act 1976</i>	<i>61</i>
<i>Section 182 of the Family Proceedings Act 1982.....</i>	<i>62</i>
<i>Sham and illusory trusts</i>	<i>62</i>
<i>Powers as property (“bundle of rights”).....</i>	<i>63</i>
CONCLUSION	65