



## 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—in times of financial uncertainty, directors may be more likely to make decisions for which they could be held liable.

The media have reported in depth lately on cases where the Securities Commission has taken proceedings against the directors of finance companies for misleading investors. Under the Securities Act, these directors face fines of up to \$500,000 and up to five years imprisonment. Directors therefore need to be aware of their obligations to the company.

A director's key duties are described in Part 8 of the Companies Act 1993 and include:

- 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.
- The duty to use the reasonable care, diligence and skill that a reasonable director would exercise in the circumstances.

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 (so called '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.

These cases demonstrate the need for directors to take positive steps to discharge their obligations under the Companies Act, and ensure they are aware of and adhere to the duties imposed on them.

For more information, please contact one of our offices.

This article is provided for general information purposes only and not as legal advice.



## TRUSTS - THE PAPERWORK IS CRUCIAL

Trusts are a popular choice for people who are concerned about protecting their assets for themselves and for their children. However, the formation of a trust by the execution of a trust deed and transfer of assets to the trust is only the start. A successful trust is one that is regularly monitored by the trustees and where there is a clear paper trail evidencing the ongoing administration of the trust by the trustees.

### Why the need for paperwork?

If the trust is not properly administered, there is a risk that it may be seen to have either "lapsed" or that it is simply a "sham". This usually occurs where the assets which form part of the trust fund are treated by the trustees as if they are their own personal property held for their own benefit rather than assets held by them for the benefit of the beneficiaries of the trust. Given that trustees are frequently both trustees and beneficiaries of the trust, it is all the more important that a clear distinction exists in the minds of the trustees regarding assets which are held by them personally and those which belong to the trust.

### Essential paperwork

The administration of a trust will depend very much on the nature of the assets which make up the trust fund. A trust fund that consists of the family home in which the beneficiaries reside will not require the trustees to do a great deal for so long as that situation continues. If there is a debt owing by the trust to the settlors of the trust (i.e. the persons who originally set up the trust and transferred assets to it) then the debt should be gifted by the settlors in annual increments of \$27,000.00 (for each settlor) until the entire debt has been forgiven. We can monitor this for you and complete the annual gifting documents.

In addition to gifting, trustees should meet at least once a year to review the trust fund and the manner in which the trust fund has been applied for the benefit of the beneficiaries. There may be no need for the trustees to make any decisions but the important point is that:-

- The trustees have turned their minds to their duties and responsibilities; and
- A trustee resolution records how those duties have been discharged over the previous 12 month period.

**In the case of trusts that hold income producing assets (such as investment properties and shares), the matters which trustees should attend to include:**

- Regularly reviewing the performance of investments
- Preparing and filing a tax return
- Ensuring that the trustees meet at least annually and possibly more frequently, depending on the nature of the investments which they are monitoring
- Ensuring that any new investments and/or transactions that the trust may enter into are properly documented and supported by appropriate resolutions
- If the trust receives income then a separate trust bank account must be opened and the income channelled through that.

Minutes of trustees' meetings should be kept and particular care taken to record decisions taken concerning investment of trust funds and distributions to the beneficiaries.

### Conclusion

The advantages of keeping the paperwork for your trust up to date cannot be overstated. A trust which is properly administered will provide a much greater degree of protection than one which is effectively dormant because the trustees have not turned their minds to their duties and responsibilities under the terms of the trust deed.

If you have any doubts as to whether your trust is being properly maintained, please phone us.

---

For more information, please contact one of our offices.

This article is provided for general information purposes only and not as legal advice.



**wynyardwood**  
LAWYERS & NOTARIES

Auckland 379 6126 East 274 4451 Warkworth 422 2190  
[www.wynyardwood.co.nz](http://www.wynyardwood.co.nz)