

PRESENTERS



Ian Haynes, Kensington Swan, Auckland

Ian is a consultant with the firm Kensington Swan. He is a past-president of NZLS, a former president of ADLSi and a former board member of NZLS. Ian is a former Judicial Conduct Commissioner. He chairs the College of Law New Zealand and the Spencer Mason Trust. He has been a member of the Property Law Section's Executive Committee for many years. Throughout his legal career Ian has specialised in property law. He has prepared NZLS submissions on the Property Law Bill, the Land Transfer Bill and a variety of other Bills and matters. Ian has frequently presented submissions to Parliamentary Select Committees. He is often called upon to make expert determinations and give expert evidence in property law and in professional standards matters.



Tim MacAvoy, Kensington Swan, Auckland

Tim is a consultant at Kensington Swan. He has a wide range of experience in trust law, foreign trusts, estate planning, wills, estate administration and general commercial law. Tim has been actively involved with the IRD regarding the effect of FATCA on law firms and their trust accounts, and on trusts. Tim is a trustee or director of corporate trustees on various private, charitable and foreign trusts. He was a founding director, and later chairperson, of the Auckland Theatre Company.

The authors acknowledge the assistance of Elia Kim and Sarah Kelly in writing these papers.

The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet 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.

Cover and text stocks used in this publication are from Forestry Stewardship Council certified mills, manufactured under the environmentally responsible paper manufactured environmental management system ISO 14001, using pulp from well managed forests and other controlled sources.

CONTENTS

1. LAWYER DIRECTORS	1
1. COMPANY'S STANDING	1
2. DIRECTORS' DUTIES	1
3. ROLE OF LAWYER/DIRECTOR – PROFESSIONAL PRIVILEGE	2
4. SOLVENCY TEST AND CERTIFICATES OF SOLVENCY	3
5. ISSUES WHERE A LAWYER IS BOTH A DIRECTOR AND LAWYER FOR A COMPANY	5
6. PI INSURANCE COVER	6
7. CORPORATE LAWYERS	7
8. POLICY CONCERNING DIRECTORSHIPS	8
SCHEDULE	9
1 SECTION 131: DUTY TO ACT IN GOOD FAITH AND IN THE BEST INTERESTS OF THE COMPANY	9
2 SECTION 133: DUTY TO ACT FOR PROPER PURPOSE	9
3. SECTION 135: RECKLESS TRADING	11
4. SECTION 136: INSOLVENT TRADING	12
5. SECTION 137: DIRECTOR'S DUTY OF CARE	12
6. SECTION 140: DUTY OF DISCLOSURE.....	14
7. SECTION 145: USE OF COMPANY INFORMATION	14
8. DUTIES UNDER THE FINANCIAL MARKETS CONDUCT ACT 2013	16
8.1 Introduction	16
8.2 Liability provisions in the FMC Act.....	16
8.3 Summary of defective disclosure liability under the FMC Act.....	16
9. SECTION 484 – CIVIL LIABILITY	17
10. CRIMINAL LIABILITY	18
2. LAWYER TRUSTEES	21
DUTIES OF TRUSTEES.....	21
<i>General Duties of Trustees.....</i>	<i>21</i>
<i>The Duty to Adhere to the Terms of the Trust</i>	<i>21</i>
<i>The Duty to Act Personally</i>	<i>22</i>
<i>The Duty to Act Unanimously</i>	<i>22</i>
<i>Duty to Act in the Best Interests of Beneficiaries</i>	<i>22</i>
<i>Duty to Invest Prudently.....</i>	<i>22</i>
<i>Duty to Act Impartially as Between Beneficiaries</i>	<i>22</i>
<i>Duty to Exercise Discretions Appropriately.....</i>	<i>22</i>
<i>Duty to Act with Due Diligence and Prudence.....</i>	<i>23</i>
<i>Duty to Seek Advice.....</i>	<i>23</i>
<i>Duty to Pay Debts of Trust.....</i>	<i>23</i>
THE DUTY NOT TO ALLOW A CONFLICT BETWEEN INTEREST AND DUTY	23
THE DUTY TO AVOID CONFLICT OF DUTY AND DUTY	24
<i>The Exceptions</i>	<i>25</i>
CASE STUDY – DUAL TRUSTEES	25
<i>Does a conflict of interest arise in this situation?</i>	<i>25</i>
<i>Does a conflict of duty arise in this situation?</i>	<i>25</i>
<i>In your capacity as trustee of Trust 1, can you vote on matters relating to Trust 2?</i>	<i>25</i>
<i>What is your liability in relation to decisions made?</i>	<i>26</i>
<i>What are the possible solutions?</i>	<i>26</i>
<i>Conclusion.....</i>	<i>26</i>
ARE YOU ACTING AS LAWYER OR EXECUTOR/TRUSTEE?	27
LEGAL COMPLIANCE.....	28
<i>Section HC 2(2) Income Tax Act 2007</i>	<i>28</i>
SECTION 57(3B) GOODS AND SERVICES TAX ACT 1985 (GST ACT)	28
FATCA/CRS.....	28
ERCEG V ERCEG AND THE DRAFT TRUSTS BILL	29
<i>Erceg v Erceg – Facts</i>	<i>29</i>
<i>High Court Decision</i>	<i>30</i>
<i>Court of Appeal (CA) Decision</i>	<i>30</i>
<i>Supreme Court (SC) Decision</i>	<i>30</i>

<i>The SC Approach</i>	32
<i>Draft Trusts Bill</i>	32
<i>Basic Obligations in Respect of Core Documents to be Kept by Trustees</i>	32
CORPORATE TRUSTEES	35
<i>An Individual Acting as Trustee</i>	35
<i>Company as Trustee</i>	36
<i>Where the Corporate Trustee Becomes Insolvent</i>	36
<i>High Court Decision in CIR v Newmarket Trustees Ltd</i>	36
<i>Court of Appeal Decision in CIR v Newmarket Trustees Ltd</i>	37
<i>An Alternative Structure</i>	38
<i>The Safest Approach</i>	38
<i>Other Risks</i>	38
PROFESSIONAL INDEMNITY INSURANCE.....	38
<i>Personal Liability of Trustees</i>	38