2020 ISSUE TWO

STUART·CARLYON

Financial advisers for your lifetime goals

Gimme Shelter? Trusts' use by date drawing closer.

In the 1980s family trusts became a popular tool to shelter from rest home fees. Here was a way that pools of capital, generically earmarked for family, could exist not only as a shelter from asset and income testing but as a means for business owners to protect family assets from business risk. For many Trusts, the latter is still an effective tool but less so for residential health care.

The new Trusts Act 2019 comes into effect on 30 January 2021 and trustees and settlors need to be aware of the changes. There are more legal obligations.

First, the Act has listed mandatory and default duties that trustees will, or may, be bound by from January 2021.

Alert Level 3 has not locked down spring in Parnell

The mandatory duties

Forget the set-and-forget nature of old Trust regimes. There will be more duties made mandatory for trustees including: Acting in accordance with the terms of the Trust, acting for the benefit of the beneficiaries and exercising powers for their proper purpose.

These mandatory duties may not look too demanding, but a clear demonstration that you've actively pursued them can make all the difference if there's a dispute regarding the handling of the Trust. Caution – these overarching mandatory duties are non-negotiable.

Default duties

A second layer of obligations are negotiable, though any variance needs to be carefully noted in the set up and minutes of the Trust. They include:

- a general duty of care
- a prohibition against trustees acting in their own interests
- a prohibition against limiting a trustee's discretion
- a duty not to profit from the trust
- a duty to act unanimously, and
- a duty to act for no reward.

You get the picture. A Trust is not there to benefit yourself, or to act as a pool of assets that one can dip into at will.

Open disclosure

Secondly there's one area that will bother many people with trusts. The Act will now require that trustees must make available to all beneficiaries (or their parent or guardian in the case of minors) 'basic trust information'. Such information includes:

- the knowledge that a person is a beneficiary of a trust
- the name and contact details of the trustees
- the awareness of any change of trusteeship, and
- the knowledge of their right as beneficiaries to the terms of the trust or other trust information.

Under the new law, a beneficiary can exercise their right to access other trust information or the trust deed and this request must be satisfied by the trustee within a reasonable period of time. This open-disclosure regime hits at the heart of many Trusts which have traditionally been set up to benefit an unspecified number of beneficiaries. And that opens you up to any litigious beneficiary who claims the Trust is "unfair."

A Trust can no longer be set to one side to be managed ad-hoc.

A trustee may deny a beneficiary access to either the 'basic trust information' or any further requested information if they believe it is reasonable to do so.

But this decision, too, may be subject to litigation. In deciding to deny information, a trustee must consider a number of factors including:

- the nature of the interest held by the beneficiary and other beneficiaries (including the extent of the interest and the likelihood it will be received)
- the effect of giving the information (for example on family relationships)
- the age and circumstances of the beneficiaries
- the practicalities of giving the information, and
- any other factor the trustee reasonably considers to be relevant.

But these reasons must be defensible.

You have 5 months. What the changes mean for your Trust

Existing trusts have until January 2021 to ensure they are compliant with the Act. If you operate a trust, then you must review existing trust documents to ensure they comply.

You should ensure that you are comfortable with the current beneficiaries and consider changing them if not. Some trust deeds allow you to remove beneficiaries, others do not. The level of transparency required by the new Act means that information you consider private may soon have to be disclosed.

Recently we attended a clear, pragmatic Estate Planning & Tax Council presentation by lawyer, Denham Martin about Trust issues.

As he notes, lots of trusts are being wound up because of this fear of disclosure requirements. However, there is another caution: if you intend to wind up a Trust there may be serious implications for the tax position of foreign beneficiaries. He also recommends that Trustees need to hold back money from distribution if there are tax uncertainties.

If you have a Trust you wish to review, get in touch with your lawyer and accountant sooner rather than later. You are also welcome to talk to us first from an overall financial planning perspective.

Film – Heroic Losers

A financial meltdown comedy thriller? We recently marvelled at the rural Argentinian movie Heroic Losers which is set in 2001 at a time of economic and financial collapse. It builds from a laconic start, where a misfit group of middle-aged locals decide to set up a farming co-op.

So far so modest. But things take a turn when, on the eve of the financial meltdown, the bank deliberately forecloses, and a devilishly crooked lawyer absconds with the co-op's hard-earned stash of US dollars.

The movie builds and builds, becoming both indescribably tense and hilariously funny as the band of ill-equipped locals seek their revenge. (Put it this way; things don't go according to plan.) A smash at the NZIFF, and deservedly so, look out for the possible re-release, or an appearance on Netflix.

Properties with an eye to the future

Our investment portfolios are not completely immune to the impact of Covid-19, and noticeably any funds exposed to the retail sector did suffer. After all, during lockdowns nobody can go shopping. In the USA and Australia many retail brands have gone to the wall.

Kiwi Property Group who own Sylvia Park Mall and The Base in Hamilton as their flagship retail properties, also took a blow on the share market. In their recent announcement to the stock exchange, Linda Trainer, Kiwi Property GM Asset Management, says the solid post-lockdown June 2020 trading performance (up on this time last year), was encouraging, and reflects a solid bounce back compared to other retail centres, though she warns that much will still depend on New Zealand's overall economic performance. "For now, sales are strong," she says. She also points out that Kiwi Property Group has a portfolio with a strengthening non-retail exposure.

In contrast, another holding in our portfolios is Goodman Property Group which delivered a stellar performance due to owning light industrial property which fared better than retail.

Recently the Stuart Carlyon team was invited to a tour of Goodman's industrial properties in south and west Auckland. Goodman's focus on logistics companies meant business as usual during the lockdown. Tenants include DHL and NZ Post (kept busy delivering things) to Cottonsoft toilet paper; a product that did very nicely during the pandemic rush.

Highbrook Business Park is their beautifully landscaped flagship development where companies such as OfficeMax are happy to have their head office as part of their warehouses.

Innovation at older sites caught our eye too. Goodman worked with NZ logistics company Coda (owned by Fonterra and Port of Tauranga) to develop a freight hub integrated with rail sidings. Here up to 300 container loads are unloaded and reloaded between trucks and trains inside modern warehouses. The design obviates the need for excess use of trucks, saving 11,300 truck journeys per annum and around 1.5 million litres of fuel each year.

The new freight hub, located in Otahuhu, incorporates energy efficient features such as LED lights, power check metering and efficient heating and cooling systems, as well as water efficient fittings. The site has quadrupled in size since 2016.

ESG – an important ingredient of good business

It is encouraging to see businesses like Goodman Property talking about the bundle of Environmental, Social and Governance (ESG) considerations as part of their strategy.

We fully support these initiatives because they have a beneficial impact on risk as well as return. Stronger governance results in less risk while lower energy consumption and reduced waste generation makes simple economic sense. A high ESG rating indicates a stronger degree of future-proofing.

In their announcement Kiwi did highlight that it "is the highest rated New Zealand company within the CDP (Carbon Disclosure Project) and is a member of FTSE4 Good, a series of benchmark and tradable indices for ESG (Environmental, Social and Governance) investors." Kiwi has achieved a 50% reduction in CO_2 emissions vs 2012 baseline.

We applaud next-generation properties that reduce energy and CO_2 waste. Most certainly they will outperform their older generation counterparts.

Suite 2.1, 8a Cleveland Road, PO Box 137-154, Parnell, Auckland 1151, New Zealand Phone: 64 9 307 2331 Fax: 64 9 307 2330 www.stuartcarlyon.co.nz