

LegalTalk Alert

Contracting as Trustee and ensuring assets really are trust assets

11 November 2010

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you like to grow?*

Contracting as Trustee and ensuring assets really are trust assets

Authors: Tim Manefield and Amanda Alassad-Bruun

In recent months, PwC has received a number of enquiries in relation to purchasers who have acquired land in their capacity as Trustee. This is clearly a common practice. However, the implications of not doing it correctly can be significant.

Here are some of the relevant issues:

- A person or company which enters into any agreement without making it clear in the agreement that it is a trustee will be personally liable for the agreement. That will be the case, even if the underlying trust does not have the assets to perform the agreement.
- A trust may be a separate economic entity from the trustee for accounting and financial purposes, but it is not legally separate. Therefore, it could be that the particular asset has not successfully been included in the trust assets.
- An attempt to move an asset from a person's personal assets to trust assets is treated as any other transfer and will be subject to income, corporate or indirect taxes such as GST and stamp duty.
- Where a trustee enters into a contract for sale, describing the trustee in the wrong way can be quite costly because the trustee may have to pay two lots of stamp duty on the contract, each assessed on the value of the land. The first amount of duty payable is duty on the transfer of the property and the second amount of duty payable is for a declaration of trust over property.

Why is personal liability an issue?

A trust is not a separate legal entity. A trustee who enters into a contract with another person will be personally liable under that contract unless the trustee clearly indicates that it is entering into the contract only as trustee and expressly limits the other person's rights under the contract to the assets of the trust.

Generally speaking, a trustee has a right to be paid out of the assets of the trust for any liability it incurs as trustee, so long as it has not been negligent or acted outside its authority as trustee. In most cases, that will protect a trustee who has failed to specify its capacity in a contract, but if the assets of the trust are not sufficient to meet the obligations under the contract, the trustee would have to pay the balance out of its personal funds. If the trustee is a company, then the directors of the company could be personally liable, either for insolvent trading if the company does not have sufficient personal assets or in negligence.

Commonly, business people may use company structures and trusts in order to protect assets or limit their personal exposure to a business. That protection could be ineffective without a limitation of liability clause.

Why is appropriate record keeping an issue?

There may be a number of reasons why it is important to prove that an asset belongs to a particular trust.

The land registers in a number of States do not recognise trusts. Therefore, there is no record on the Certificate of Title that the trust in fact owns the property.

The following steps should be taken to make it clear that an asset was acquired for the trust:

- The Contract for Sale should record that the purchaser enters into the contract as trustee of the trust.
- If the purchaser is a company, the minutes of meeting of the company should show that the trustee agrees to hold the property on trust, that the trust has acquired the asset and how the purchase price was paid out of the assets of the trust.
- The financial accounts of the trust should reflect the arrangement that the asset is being purchased and held as an asset of the trust.
- All costs and expenses for the property should also be paid from the trust's bank account and signed off by the directors. The bank accounts should be set up as "ABC Pty Ltd as trustee for the ABC Trust".

A subsequent declaration of trust

If the Contract is entered into in the name of the purchaser, and subsequently the purchaser seeks to change its status to the trustee of a trust, that change would be either an on-sale or a declaration of trust. Both alternatives would attract stamp duty.

Practically, it will also be difficult to establish a proper record because (as discussed above) the transfer cannot record the purchaser's capacity so there would need to be some other document which ensures that the particular property is a trust asset.

Double Stamp Duty trap: What wording creates a declaration of trust?

Usually duty must be paid on the value of the property under a Contract because it is an agreement to sell the property. However, the Contract could also be a declaration of trust so that a second round of duty would be payable on the market value of the property. This can happen where the purchaser is described:

- a. as trustee for a named person or persons, for example, describing the purchaser 'as trustee for John Joseph Farrar', or
- b. as trustee for a named class of persons, for example 'the children of Alan Brown' or 'the beneficiaries of the ABC Trust', or
- c. as trustee for a named corporate body. Typical examples of corporate bodies are associations, institutions, business firms, non-profit enterprises, governments, government agencies, religious bodies, local churches, and conferences, or
- d. as trustee for a named unincorporated body. Typical examples of unincorporated bodies are a society, club, trade union or other body.

What wording does not constitute a declaration of trust?

Words in a contract that simply describe the purchaser's capacity as a trustee of an existing trust will not be a declaration of trust for stamp duty purposes. For example 'Alan Brown as trustee of the Brown Family Trust' will not attract additional duty if the Brown Family Trust already exists at the time that contracts are exchanged.

Some safer ways to describe a trustee are:

- a. just "as trustee", or
- b. as trustee for the estate of a named person, for example: 'Alan Brown as trustee for the Estate of the Late Emily Jane Brown', or
- c. as trustee for a named trust, for example 'ABC Pty Limited as trustee for the ABC Trust', or
- d. as trustee for a named superannuation fund, for example 'Alan Brown as trustee for the Brown Superannuation Fund', or
- e. as trustee for a company to be formed or incorporated.

For further information, please contact:

Andrew Wheeler
Partner
+61 (2) 8266 6401
andrew.wheeler@au.pwc.com

John Cannings
Partner
+61 (2) 8266 6410
john.cannings@au.pwc.com

Stephen Moulton
Partner
+61 (3) 8603 4788
stephen.moulton@au.pwc.com