ATKINSON VINDEN
Lawyers

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LawTalk

Keeping you in touch with the law

Welcome to this edition of *Law Talk*, the Client Newsletter of Atkinson Vinden.

In this edition we are pleased to highlight the dangers of accepting deposits of less than 10% in Property transactions and Sue Falkner summarises the risks.

We have an article by Nathan Avery-Williams on the benefits of settling family law disputes out of court and Chris McClure discusses the issue of whether it is necessary to have a corporate trustee for a family discretionary trust or for a self managed superannuation fund.

We trust that the information in *Law Talk* is of value and relevance to you.

Warm regards,

Rod Berry

The Dangers of Accepting a Deposit of Less Than 10%

Sue Falkner

We have discussed with many of you over the last couple of years the dangers of accepting a deposit of less than 10% when selling your property.

In view of property values these days, it is a common request that a Purchaser asks to pay a smaller deposit of say 5%. Over some years Vendors have agreed to this request in the belief that, in the event of default, the Purchaser would be liable for an additional 5%, therefore totalling 10% of the sale price.

An alternative approach was to provide for the deposit to be payable in two instalments, with half payable on exchange of Contracts and the other half on completion.

Court decisions in the last couple of years have impacted substantially on this area. The Courts have held that the attempt by the Vendor to enforce the payment of the balance of the 10% deposit when the Purchaser defaulted amounted to a penalty and was not recoverable.

As we have advised previously, a Vendor must give careful consideration to whether to accept a deposit of less than 10% and must accept that, by doing so, it is likely that in the event of a default by the Purchaser, the Vendor will be unable to recover any deposit in excess of the agreed initial deposit paid on exchanged contracts which, as indicated above, is commonly 5%.

For further information on these issues, please telephone Sue Falkner on **(02) 9411 4466.**

Benefits of Settling Family Law Disputes Out of Court

Nathan Avery-Williams

Family Law

When a relationship breaks down, whether it be a marriage or a de facto relationship, one party may feel it is necessary to have any property or children's issues decided by a Court. Any Court process requires the filling of extensive Court documents, the expenditure of a considerable amount of time and money and emotion. Almost without exception, the litigation process is a long and drawn out one and fraught with uncertainty.

Good advice for any client is that generally litigation proceedings take longer, cost more than expected and may ultimately deliver a less favourable outcome compared to what might have been agreed upon had the parties worked towards settling the matter.

In all family law matters involving children, the Courts expect to be the last resort. Consequently, unless there are concerns about family violence and child abuse, it is expected that both parties attend mediation with a family dispute resolution practitioner who will then help the parties try to reach an agreement. Sometimes despite the parties' best efforts they simply cannot reach agreement. If they have however made a genuine effort the family dispute resolution practitioner will issue a certificate to that effect. Where a party refuses to attend or does attend and makes no genuine effort then the certificate also reflects this and it can be used in Court proceedings in an effort to try to recover costs.

Atkinson Vinden offers a collaborative practice where all parties to the dispute, together with their collaboratively trained lawyers, attend a series of four way conferences where they each work through set tasks.

In property matters, again it is expected that the Court is the last resort and that under the Family Law Rules and Regulations each party is to exchange financial information with the other and put forward an offer prior to commencing Court proceedings. Failure to do so can again raise the potential for a costs order to be made against the defaulting party. It would of course be different in circumstances that warranted urgency.

The advantages of settling a dispute are numerous. The majority of parties whose relationship has ended are not only in emotional distress, but often experience financial stress. Settlement reduces costs significantly. If the parties have children there are large benefits in parents reaching agreement about their care.

Social research on children whose parents have separated irrespective of whether they were married, or have never married, consistently shows that children manage breakdown of their parents' relationship but have difficulty managing where the conflict between the parents is ongoing. Parenting proceedings by their very nature perpetuate and promote ongoing conflict between parents. Consequently, parents need to be careful what proceedings should be brought before the Court and what matters could be resolved by a concerted effort on each parent's part and consider the use of, for example, a good quality children's mediator and psychologist.

When settling children's matters we can include third parties such as a children's psychologist who can tell each parent what it is like to be their child and what it is that the child wants and needs. This information is invaluable and helps parents make smart care decisions for their children. The parents need to focus on their child's relationship with the other parent, not their own conflicted relationship with that parent.

Settlements can take many forms and are to an extent limited only by the imagination. We can exchange formal written offers. Generally we then receive counter offers and bit by bit the parties work together until the entire matter is resolved.

We can have four way settlement conferences where each party, together with their solicitors, attends and we can spend up to a day sorting out an agreement. All issues can be canvassed and both parties participate actively in their own matter, which is important given that it is their own family and their own life.

In addition, Atkinson Vinden offers a collaborative practice. Collaborative practice is where all parties to the dispute, together with their collaboratively trained lawyers, attend a series of four way conferences where

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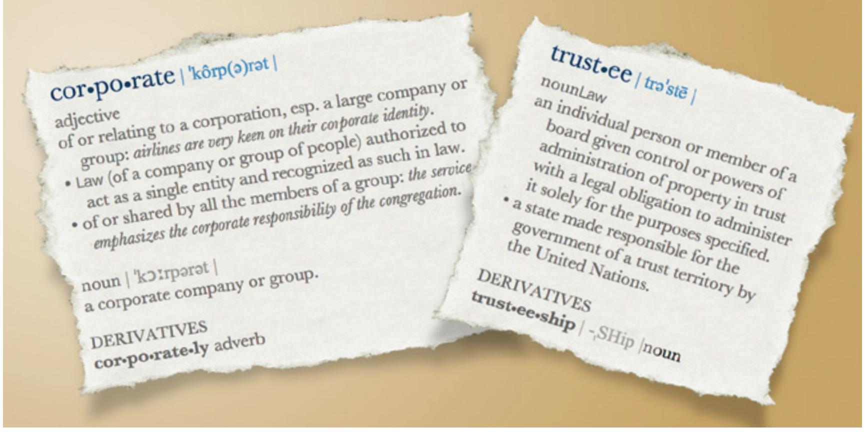

A Corporate Trustee for your Trust Fund - is it Really Necessary?

Chris McClure

Commercial Law

Regrettably, lawyers, accountants and other financial advisors sometimes have differing views on fundamental aspects of Trust Law as it applies to the trust funds they manage/advise upon (discretionary/family, unit, hybrid, superannuation funds etc – many of these issues apply to any trust).

One critical issue is the identity (and role of) the trustee and the beneficiaries of a trust. Questions often asked are – "Do I really need a corporate trustee? Aren't individual trustees ok?"

The case of Shail Superannuation Fund -v- Commissioner of Taxation (Shail) highlights numerous important aspects, including a trustee's fiduciary responsibility. Here we concentrate on superannuation funds and the need for a corporate trustee, or otherwise.

Super laws require all funds to be managed by trustees – presently the majority are managed by individual trustees, rather than by a company trustee.

Super laws require all funds to be managed by trustees – presently the majority are managed by individual trustees, rather than by a company trustee. It is often perceived to be a simpler process and less expensive. Super laws allow individual trustees as long as each fund member of a self-managed superannuation fund (SMSF) is one of its trustees.

From the early days of superannuation reform in Australia super laws have stated that funds with individual trustees can only pay pension benefits and not lump sums. These laws have largely been ignored and the ATO does not enforce them (at this time, anyway). A change in policy will be of concern if a fund member wants the option of paying out non-pension benefits. There are many scenarios when this option would be required.

Perhaps a more immediate concern is the issue of succession and administration efficiencies. This is where a corporate trustee has a decided advantage. Some examples…

- **New fund member**…it is simple to appoint the new fund member as a director of a corporate trustee (also a requirement of super laws). If the member is to become an individual trustee, ATO recommends the fund's assets are held in the name of all trustees, raising the spectre of a messy and sometimes costly change to the ownership of existing fund assets. This becomes more pertinent when a member leaves a fund which has individual trustees – clearly the change of ownership will require the removal of the ex-member from ownership documents.
- **Death/succession**…again dealing with this issue is simpler with the corporate trustee; the deceased member is simply removed as a director of the trustee and the fund assets do not require any changeover. That changeover for individual trustees can prove difficult, particularly if after death, members' assets are to be redeemed and funds are urgently required by the nominees of the deceased member's entitlements or his/her estate beneficiaries.

  Single member funds utilising a corporate trustee avoids the requirement for a second individual trustee which is, of course, also required by super laws.
- **Clearer designation**…a corporate trustee removes any possibility of the super fund's assets becoming intermingled with a member's own assets outside the fund which could otherwise cause difficulties, the imposition of fines or an ATO determination that the fund is non-complying.
- **Borrowings**…as most people know, super funds are now able to borrow but only in very restricted circumstances. It is apparent that many financial institutions will only lend to super funds with a corporate trustee. Others that do lend to funds with individual trustees often impose restrictions, including lower loan/valuation ratios and/or higher interest rates.
- **It is of course possible to switch** existing funds' assets to a corporate trustee but this is not as easy as it seems. The super fund trust deed will require updating to note the change of trustee. As noted earlier the transfer of the fund's existing assets can be time consuming, frustrating and costly.

Chris McClure

they each work through set tasks. Consequently one session may involve the use of a children's psychologist and talking about particular issues concerning one of the children or all of them. Another session may focus on financial issues and an accountant can be called in to work with both parties with all cards on the table, to work out what would be the best financial outcome for each party and the children. A collaborative process is generally reported by participants as giving them a high rate of settlement outcome satisfaction. It helps de-escalate conflict, re-establishes a degree of trust and, rather than each party becoming positional and protecting their own interests, each party works together to protect all stakeholders' interests. Stakeholders are all the people concerned in any family law matter, whether it be extended family members, the parties themselves and their children.

It is rare that a settlement outcome is not in the best interests of all parties. Where settlement is inappropriate is in circumstances with a significant disparity in the bargaining positions of each party; this is often evident in situations of ongoing family violence, bullying and control. Notwithstanding that, sometimes the latter can be settled, particularly through a collaborative process if the perpetrator of that type of conduct is willing, as part of the process, to undertake further programs so as to break the pattern of behaviour.

If you have any questions in relation to resolving disputes in the realm of family law, please do not hesitate to contact Annabel Murray or Nathan Avery-Williams on **(02) 9411 4466.**

Keeping in Touch

Do we have your email address: please notify us so that we can also communicate with you by email.
If any of the details shown on the outer envelope are not correct eg your name, title or address, please complete the form below and email, fax or mail it to us on vquinn@atkinvin.com.au, fax: (02) 9412 3657 or P O Box 450 Chatswood NSW 2057.

☐ Incorrect info ☐ Add friend/relative Title: ☐ Mr ☐ Mrs ☐ Ms ☐ Dr ☐ Other ______

Name ______________________________

Old Address ______________________________

______________________________ Postcode__________

Email______________________________

New Address ______________________________

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