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NEWSLETTER

MARCH 2015

Inside this edition

Trust law: trustee's duties – are you at risk?

You might have been asked by a friend or family member to be an independent trustee of a Trust. You may also have been appointed as an executor of someone's estate, which will often also make you a trustee of the estate assets.

Trustees have strict duties to the beneficiaries of the Trust. Most duties are contained in the Trustee Act 1956. In certain situations trustees can be held personally accountable for their actions or for failing to act, so it is important trustees understand their rights and obligations.

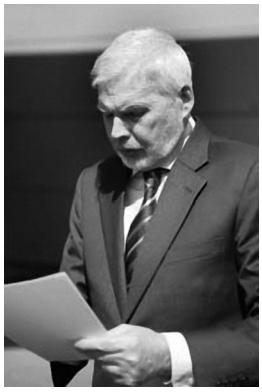
All trustees must know the terms of the Trust (or the terms of the Will as the case may be), and must ensure the Trust (or Will) is managed in an efficient and economic manner. Trustees should take all precautions that an ordinary prudent business person would take in managing similar affairs of his or her own – a trustee must act with care and diligence. An independent trustee is not a 'rubber stamp', meaning they must not blindly agree with and follow the instructions of the remaining trustees or settlors; trustees must carefully consider their decisions.

Trustees have a duty to make prudent investments. This duty applies to the methods trustees use to make the investment, rather than looking at the actual results of that investment. A failed investment is not necessarily a breach of trust as long as the trustees acted prudently when choosing that investment.

Trustees must be impartial. They must consider the needs of each beneficiary and have a duty to manage the Trust assets in the best interests of those beneficiaries in accordance with the terms of the Trust deed or Will. Trustees must avoid being in a position of conflict between their duties to the Trust and its beneficiaries.

Trustees are accountable to beneficiaries. They must keep proper accounting records and may be required to give beneficiaries information and explanations as to the investment of and dealings with the Trust property.

A breach of trust by a trustee can mean he or she is personally liable to the beneficiaries for any loss caused, particularly if it was an intentional breach of trust, dishonesty or negligence that caused loss. If a trustee can demonstrate that he or she acted honestly and in good faith and that the breach of the terms of the Trust was unintentional on their part, that trustee would not ordinarily be liable to the beneficiaries for the consequences of their breach.



When a Trust enters into a contract with a third party the trustees will typically be personally liable to ensure that the contract is completed. They may have a right to be indemnified from the assets of the Trust (meaning the liability they incur will be paid for from the Trust assets); however, they will lose that right of indemnity if they act in excess of their Trust powers or in breach of their Trust duties. In addition to this, any right to be indemnified is only useful if the Trust actually has realisable assets. Recent case law has seen an independent trustee personally liable for Trust IRD debt, as the remaining trustees had fled the country. While the independent trustee had the right to be indemnified, there were no Trust assets left to cover the debt. The independent trustee paid the IRD debt using their own funds.

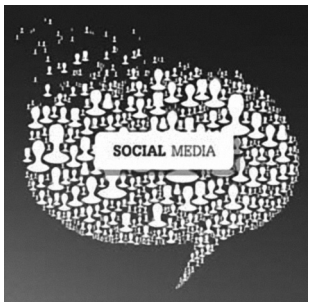
Work life and private life – implications of social media

In the last decade the use of social media has exponentially expanded. Social media such as Facebook enable users to interact with large numbers of people, with immediate and permanent impact. Users of social media might assume that their use of sites such as Facebook in their own time has no relevance to their work life; however, the impacts of the use of social media can overflow from a user's personal life to their work life, with serious effects on both employee and employer.

The effects of the use of Facebook in an employee's own time were recently illustrated in an Employment Relations Authority (ERA) decision Blylevens v Kidicorp Limited [2014] NZERA Auckland 373. Kidicorp employed Ms Blylevens as a centre manager. A number of staff and parents made complaints about Ms Blylevens, which Kidicorp investigated.

During the investigation Ms Blylevens sought assistance from an advocate, Ms Rolston. While representing Ms Blylevens, Ms Rolston posted derogatory comments on her own business Facebook page. Ms Rolston made various comments in two separate posts about Kidicorp, including allegations of Kidicorp “removing unwanted staff”, “bullying”, describing HR as the “vindictive Kidicorp HR Krew” and stating that Kidicorp created a “toxic” environment. Ms Blylevens 'liked' Ms Rolston's posts, and added her own comment to one of them, noting that it was “an interesting article” and “that as a parent looking for childcare it's good to be informed”.

Ms Blylevens was identified on Facebook as an employee of Kidicorp, and her Facebook friends included other Kidicorp staff and parents. Ms Blylevens' 'like' of the posts ensured that Ms Rolston's derogatory comments were disseminated to a wide audience. Kidicorp had a social media policy that prohibited employees from posting information that could bring Kidicorp into disrepute or that could cause reputational damage. After Kidicorp became aware of Ms Blylevens' actions in 'liking' and commenting on the derogatory posts, an investigation was launched. Ms Blylevens was dismissed for serious misconduct.



Ms Blylevens challenged her dismissal. The ERA found that her dismissal was justified. Ms Blylevens' explanation that her 'likes' did not endorse or support Ms Rolston's derogatory posts was not accepted. The ERA likened Ms Blylevens' actions in 'liking' and commenting on the posts to her standing outside the childcare centre and handing out copies of Ms Rolston's derogatory comments about Kidicorp while telling people “here is an interesting article – it is good to be informed”. The ERA had no difficulty in finding that Ms Blylevens' actions breached her employee obligations of fidelity, loyalty and good faith.

This case clearly illustrates the need for employees to be mindful that their use of social media in their private capacity and in their own time may have unexpected implications for their employment. This case also provides employers with some assurance that if an employee is using social media in a way that may damage an employer's reputation, an employer can consider disciplinary action.

Protecting your trading name

The reputation of your business may be its most valuable asset. You have worked hard to develop your brand, so it makes sense that you also know how to protect it.

In New Zealand you can call your business anything you like. That name is known as a Trading Name. Trading Names are not registered, meaning it is quite possible that other businesses can use the same name, which may cost you customers. So, what can you do to prevent another business from using your Trading Name?

Companies Act 1993

Many people incorporate a company to own their business. A company name cannot be identical or nearly identical to another, however, this does not prevent someone from using a Trading Name similar to your own.

Registered Trade Mark

Your Trading Name can often be registered as a Trade Mark with the Intellectual Property Office of New Zealand (IPONZ). IPONZ runs a central register, providing you with clear evidence that you own that Trade Mark and an effective deterrent to others seeking to use that name.

To register as a Trade Mark, your Trading Name needs to be capable of being represented graphically and must distinguish your goods or services from anyone else's. This can mean if your name is too generic (i.e. 'Wellington Lawyers') your application will probably be declined. A registered Trade Mark provides you with all the remedies of the Trade Marks Act 2002. This can potentially allow you to recover damages, lost profits and litigation costs where someone is infringing on your Trade Mark..

Fair Trading Act

The Fair Trading Act 1986 ('FTA') provides you with some protection, relying on the provision that "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." By way of example, Airport Rentals Limited, trading as 'Airport Rentals' were able to rely on the FTA and obtain an injunction to prevent a competitor from using the name 'Airport Car Rentals' within 50 km of Christchurch Airport, as it was likely to mislead customers. However, it is not always this simple. Courts are not willing to grant injunctions that restrict conduct without sound evidence. While it seems like a simple question - how do you demonstrate that a business Trading Name similar to your own is actually likely to deceive? In a similar case to 'Airport Rentals' discussed above, Diesel and Turbo Service Centre Limited were unsuccessful in their application for an injunction to stop a competitor down the road trading as 'Diesel and Turbo Auckland'.

Passing Off

Passing Off is a common law remedy that can be used where a competitor's goods or services are wrongly represented as being yours. For example, Coca-Cola recently brought an action of Passing Off (amongst other things) against the New Zealand distributor of Pepsi for using a similar shaped bottle, claiming that it was a misrepresentation that damaged the Coca-Cola brand and was likely to deceive customers. The claim failed, with the Court finding that Coca-Cola was such a well-known brand in New Zealand there was little chance of customer confusion.

The best approach may be to rely on all of the above methods to protect your Trading Name. Registering a Company and a Trade Mark can act as an effective deterrent, but it may still be necessary in some circumstances to seek enforcement using the above remedies to protect your brand.

Judicial review – the Lucan Battison case

In June last year, Lucan Battison, a 16 year old student from St John's College in Hastings, took his school principal and board of trustees to the High Court for suspending him for having long hair, in contravention of the school's 'hair rule', which requires students hair to be short and tidy.

Although Lucan won the case (Battison v Melloy & Anor [2014] NZHC 1462), many condemned his actions as undermining the authority of the school. However, it should be kept in mind that Lucan did not actually appeal the school's decision to suspend him. Rather he asked the Court a far more fundamental question – whether or not the decision to suspend him and the 'hair rule' itself were even lawful.

This type of case is a judicial review, and is distinctive from an appeal in that the merits of the decision in question do not get considered by the Court. Judicial review highlights the critical role the Courts play in New Zealand's constitutional framework by ensuring that the exercise of public power is done in accordance with the rule of law.

The school's decision

The 'hair rule' had been established in accordance with the Education Act 1989 ('Act'), which provides that boards can make rules they think may be necessary for the control and management of the school.

The principal thought that Lucan's hair contravened this rule. Although Lucan offered to tie his hair up, this was not considered to be an acceptable solution, so he was suspended. The Act enables a principal to suspend a student if reasonably satisfied that the student's conduct is a dangerous example to others.

Lucan challenged the lawfulness of this action. The High Court decided that both Lucan's suspension and the 'hair rule' itself were unlawful. The Court's view was that the Act sets a high threshold and only allows suspension where a student's conduct so seriously impacts on the welfare of other students that the principal is left with no alternative.

The case also decided that the 'hair rule' itself was not lawful, because all such rules by the board are subject to the general laws of New Zealand, which include a requirement for certainty. Lucan had offered to tie up his hair and there was evidence to suggest that if he did his hair would appear to be short. The Court considered that the rule did not actually require hair to be cut, and there was too much uncertainty about what was meant by the 'short' in order for it to be enforced.

Although Lucan's lawyers made a number of arguments that the 'hair rule' also breached his right to personal dignity and freedom of expression, the Court did not consider it necessary to rule on this point – leaving open whether a new, more certain 'hair rule' could be put in place by the board in future. The Court was clearly mindful of the significant precedent that would be set.

Conclusion

A claim for judicial review invokes the court's inherent power to supervise the use of public power to ensure it is used appropriately. Although the public may disagree on whether Lucan should have taken his school to court in these circumstances, the fact that he at least had the right to must not become contentious.

Sports – law – criminalising match-fixing in New Zealand

With the two large-scale international competitions taking place in New Zealand in 2015 (the Cricket World Cup and FIFA Under 20 World Cup) the question has been raised as to whether New Zealand's current legislation provides adequate tools to prosecute match-fixers. The recent revelations about former New Zealand cricketer Lou Vincent's involvement in match-fixing have only served to draw further attention to the issue.

Sport New Zealand produced the Regulatory Impact Statement – Match-Fixing Criminal Offences on 12 February 2014 ('SNZ's statement') to provide policy guidance on this issue. SNZ's statement outlined that any changes to our legislation would have to be blunt tools, given the limited timeframe available to put them in place before New Zealand's competition hosting begins. It also clarified that the statement was prepared on the assumption that our existing laws do not adequately provide for prosecution of match-fixers.

While the laws we have in place may already cover some aspects of match-fixing, there are likely to be holes in the current framework that could impair prosecution and see match-fixers escape punishment.

SNZ's statement recommended a minor amendment to the Crimes Act 1961 to explicitly cover match-fixing. Accordingly, the Crimes (Match-Fixing) Amendment Bill ('the Bill') was introduced to Parliament on 5 May 2014.

The Bill proposes an amendment to Section 240 of the Crimes Act – "Obtaining by deception or causing loss by deception." The amendment clarifies that "deception" includes an act or omission done with the intent to influence a betting outcome of an activity. The influenced activity can be the overall result, or any event within the activity. The reference to any event within an activity is particularly important for cricket, given that a lot of match-fixing in cricket relates to controlling small elements of the game, for example, the timing of an event such as a no-ball.

There is also an important exception in the Bill, which is that the act or omission in question must be done otherwise than for tactical or strategic sporting reasons. On past occasions teams in sporting competitions have considered, for example, that avoiding a bonus point would be in their best interests. They have accordingly "under-performed", in the sense that they have played within themselves in order to get the best possible result for their team. This exception appears to acknowledge a team's right to make such a choice, provided it is for tactical or sporting reasons.

The Bill has not had its first reading but given the timing pressures in place, it is expected to receive priority. The Bill anticipates a commencement date of 15 December 2014, reflecting the intent to have the amendment in place in time for the sporting events of 2015.

It will be interesting to see what amendments, if any, are made as the Bill passes through the legislative process, given that meaningful review may be hampered by the objective of having match-fixing criminalised as soon as possible. A potential difficulty for our legislators is that there is no standard international approach to match-fixing. Without a proven international example to follow, New Zealand's response may be a case of drawing a line in the sand and reacting as this issue develops.

SNIPPET

TRAFFIC LAW – CAN YOU BIKE HOME FROM THE PUB?

You cannot be charged with a drink driving offence under New Zealand law while riding a bicycle, unless it has a motor. Excess Breath/Blood Alcohol (EBA) charges only apply if you drive or attempt to drive a motor vehicle, meaning a vehicle drawn or propelled by mechanical power (see sections 2, 11 & 12 of the Land Transport Act 1998 [the LTA]). A bicycle without a motor is not considered a motor vehicle (see Lawrence v Howlett [1952]) nor is a bicycle with an electric motor of less than 300 watts (see NZ Gazette 25 July 2013).

However, this is not without risk. While EBA charges can only apply while driving motor vehicles, some other charges, such as careless driving, are not restricted to your activities with vehicles that have motors. Someone cycling home under the influence could be charged with careless driving if it can be shown they have used their bicycle carelessly or without reasonable consideration for other persons (see sections 2 & 8 of the LTA).

Please give me a call if you have any queries about any of the newsletter items

Bruce Wyber

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