



WEEKLY TAX BULLETIN

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Backdating of legal documents – Advisers Beware

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Backdating legal documents is never permissible, regardless of the phrase used to describe the approach (eg "retro dating", "pre-dating", "intended date").

Indeed in most professions, involvement in backdating can result in an action for professional misconduct. Similarly, charges of fraud may also be imposed on those involved.

Edwards

The decision in *Edwards & Anor v Brougham* [2022] SASC 8 succinctly confirms the rules in this regard.

Relevantly the factual matrix involved a dispute about the trusteeship of a discretionary trust where:

- a sole individual trustee purported to transfer an asset of the trust to themselves (as a potential beneficiary of the trust);
- there was evidence confirming the appointor of the trust had exercised their power to unilaterally remove the trustee before the purported transfer;
- the trustee, on advice from a lawyer, backdated a deed of transfer to a date that was before the appointor removed the trustee.

In relation to the backdating, the Court simply confirmed that it was "not in itself effective to make a retrospective determination for the purposes of the trust deed".

Interplay of trustee and appointor roles

Helpfully for trust advisers, the decision in *Edwards* also confirmed:

- it is not necessary for a trust deed to have a condition for effective removal of a trustee the giving of notice to the trustee being removed;
- the key reason for not requiring a removed trustee to be notified is that a former trustee, who continues to exercise powers honestly without notice of their removal, will be protected in several ways, eg they are indemnified by trust assets (assuming they have acted honestly);
- where 2 or more appointors are nominated, unless there is unambiguous wording to the contrary, the assumption is that the surviving appointor may act solely, ie the appointment of 2 or more persons to an office is both joint and several;

- similarly, unless there is clear wording preventing the outcome, a trustee may also act as appointor;
- the Court acknowledged that having a trustee also acting as the appointor (or principal or guardian) of a trust was a "relatively unusual" situation and "would naturally be expected only as a measure of last resort", given that under the trust deed (as is often the case) the appointor was structured as a checking mechanism on the powers of the trustee.

Alternatives to backdating

Rather than backdating documents, in some instances, a deed, dated when signed, that "rectifies" or "clarifies" the original intended documents may be effective, at least as between the parties.

Another alternative is to produce a document dated when signed, with an "effective date" included which predates the signing of the document and purports to ensure the arrangements are in place from the earlier point in time.

The above approaches may however be subject to challenge, particularly if aggrieved parties refuse to sign or otherwise be bound. Similarly, any such document will not be binding on third parties, including revenue authorities.

The English decision of *Malik v Hussain* [2020] EWHC 2334 (Ch) provides a useful summary of the key issues in this regard.

In summary, *Malik* confirmed the following.

- The execution of a deed will not operate to create a contract from the date of the deed if the external evidence clearly shows that there is no such agreement in fact – thus, for example, signing documents to "create" something that did not exist at the relevant time (eg, to achieve a tax break) will be a sham transaction and invalid (see *Dickenson v Gross* (1927) 11 TC 614).
- A statement in an agreement to the effect that the arrangements have existed from a date preceding the execution of the agreement itself cannot in law operate retrospectively – at best the statement may accurately reflect the past position, but if in fact there was no agreement during that period such a written statement cannot retrospectively alter the situation (see *Waddington v O'Callaghan* (1931) 16 TC 187).
- As explained in *Saywell v Pope* (1979) 53 TC 40, it is important to distinguish between the parties to a document and a third party (eg revenue authorities) and the parties themselves as a statement in (in this case) a partnership agreement that the arrangements existed from a certain date was held to possibly bind the "parties, as between themselves, to take their accounts and to assume all other obligations on the footing that they have been partners from the stated date, it cannot, however, operate actually to make them partners from the stated date, if they were not in truth partners".
- Therefore, while parties can agree as between each other to treat themselves as having been contractually bound from an earlier date than the date of the agreement, such agreement cannot establish that in law there was in fact agreement from such date so as to bind third parties unless there actually was in truth such agreement (see *Dong v Monkiro Pty Ltd* [2005] NSWSC 749).

Conclusion

Ultimately, "effective date" style clauses generally only create "contractual estoppel" between the parties, precluding each party to the contract from alleging that the actual facts are inconsistent with the state of affairs set out in the document (see *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386).

Effective date agreements can never create a situation where some form of authority is imposed on third parties – such as the Tax Office – for past acts that could only have been undertaken if the arrangements had in fact been in force at the time of those acts (see *FCT v Shell Energy Holdings Australia Limited* [2022] FCAFC 2 – see 2022 WTB 4 [73]).