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[489] **Tax minimisation and asset protection – an evolving area(?)**

- by Matthew Burgess, Director, View Legal

Where asset protection strategies are problematic due to related tax and stamp duty asset transfer costs, a relatively well known approach is to implement a "gift and loan back" arrangement.

In broad terms, a gift and loan back involves the owner of an asset gifting an amount equal to his or her equity in the asset to a family trust (or low risk spouse).

The family trust then lends an amount of money to the owner and takes a secured mortgage over the property or registers a security interest on the Personal Property Securities Register over the personal assets of the individual the protection is intended for.

The gift and loan back approach ensures there are no CGT or stamp duty consequences to achieving asset protection, subject to the claw back rules under the bankruptcy regime.

***Atia* case**

Historically, arguably, the leading case in relation to gift and loan back arrangements was seen as *Atia v Nusbaum* [2011] QSC044.

In summary the circumstances of this case were as follows:

- Dr Atia (a cosmetic surgeon) entered into a gift and loan back style arrangement with his mother;
- when Dr Atia's mother subsequently called in the debt, Dr Atia argued that the loan and mortgage were not intended to be actually binding and were only a pretence to protect against situations where Dr Atia was sued professionally;
- in particular, Dr Atia argued that his mother was only calling in the debt secured by the mortgage because he had married his girlfriend against his mother's express wishes;
- the Court found that all aspects of the legal documentation, including a deed of gift, loan agreement and registered mortgage, had been validly signed; and
- the Court confirmed that the legal effect of the documentation signed was exactly as the parties intended it to be and there was no mistake or sham involved. This meant that Dr Atia's mother was allowed to enforce recoverability of the debt, and if necessary, exercise her rights under the registered mortgage.

***Re Permewan* – initial decision**

In 2021, the decision in *Re Permewan* [2021] QSC 151 was handed down, with its focus being the removal of an executor of a deceased estate. Relevantly the factual matrix was as follows.

- A son was the executor of a will for his mother.
- The son was involved in assisting the mother implement a gift and loan back arrangement to essentially remove all value from the estate around 17 months before the mother's death.
- The legitimacy of the gift and loan back arrangement was being challenged by a daughter of the mother (as a prelude to challenging the estate of the mother for more provision than what was provided for under the mother's will).
- There were allegations that the son, in his role as executor, had no intention on behalf of the estate in pursuing an investigation of the veracity of the gift and loan back arrangement.

***Re Permewan No 2* – costs decision**

In the decision of *Re Permewan No 2* [2022] QSC 114, the Court had to determine how the costs of the case should be borne. This was in the context that the son and his lawyers had conceded that the promissory notes (which had been prepared to evidence both the initial gift and subsequent loan under the arrangement) had not been validly delivered; impliedly in part because the documentation was dated before the date the trustee company of the trust was registered – and thus the arrangement failed.

To reach its decision on costs the Court explained its views on the legitimacy of the arrangements – assuming the promissory notes had been effective – with a focus on 2 key aspects, namely whether the gift and loan back was void due to either:

- public policy; or
- for being a sham.

The Court concluded, prior to considering the above points that the mother did not have $3 million in cash to pay to the trust if the promissory note was called upon. Rather she would have had to liquidate her assets – and, even if she did so, the obligation to pay CGT upon the realisation of those assets would be likely to have left a shortfall.

Furthermore the Court held that the transactions were not a bona fide inter vivos gift as the mother had no intention of disposing of her property during her lifetime.

Instead it was held that the documents which recorded the transactions were executed contemporaneously with the mother's will and were only ever intended by her to take effect upon her death. That is, the trust was never intended to call on the promissory note or attempt to enforce the loan while she was alive. The court stated that if that had occurred, the mother would have been placed in the position of having to sell her assets (and pay the CGT) to meet her obligations - and the court believed she never intended to do so.

The Court concluded that the evidence of both the lawyers and accountants for the mother supported this conclusion.

Public policy

The Court concluded that it "was almost certain" the transactions would have been unenforceable as being contrary to public policy, because of the following.

- The transactions were illusory in that, contrary to the reality, they were designed to make it appear the mother had departed with her property. That conduct amounted to dealing with her property in a testamentary fashion.
- The sole purpose of the conduct was to ensure that there was so little, if anything, left in the estate on death (meaning any challenge against the estate would have no prospect of success).
- Thus, the effect of enforcing the transactions would have been to defeat or circumvent the public policy upon which the rules concerning challenges against estates are based, and would thereby be generally regarded as injurious to the public interest.

Sham

The Court also concluded that it was "almost certain" the transactions were a sham, as despite the promissory notes, there was never any intention for the mother or the trust (which she controlled) to pay the amounts of the gift or loan (and trigger the CGT costs). Rather, the transactions were only ever intended by her to take effect upon death.

Conclusion

The conclusions in *Permewan No 2* in relation to both the public policy and sham aspects are on one view only relevant to the question of costs in that particular case.

This said, the comments made by the court are a radical departure from cases such as *Atia* (which was not considered in *Permewan No 2*) where on an ostensibly similar factual matrix the concept of a gift and loan back arrangement being void as a sham was expressly rejected. This was on the basis that where the implementation documentation evidences a genuine agreement reached between the parties the suggestion of a sham is untenable.

That is, where the documents are on their face effective, it is not for the court to speculate about the reasons for the transactions being entered into.

Furthermore, a transaction is not a sham merely because it is carried out with a particular purpose or object. If what is done is genuinely done, it should not be deemed to be "undone" merely because there was an ulterior purpose in doing it – such as managing CGT costs or protecting assets from creditors (see *Max Christopher Donnelly As Trustee of the Bankrupt Estate of Geoffrey Walter Edelsten v Geoffrey Walter Edelsten and Ors* [1994] FCA 992; this being another, arguably very relevant, case not considered in *Permewan No 2*).

Similarly, these earlier cases did not entertain any arguments in relation to public policy being a relevant consideration in determining the effectiveness of a gift and loan back arrangement – arguably at least in part because if there was in fact a public policy concern with arranging personal affairs to minimise the risk of a challenge against an estate the notional estate regime (as exists in NSW) would be law in other States.

While the comments in *Permewan No 2* concerning gift and loan back arrangements are not binding on any other court, they create significant uncertainty for advisers in this area; not least of which due to the approach of completely ignoring other leading decisions that reach contrary conclusions.

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