



WEEKLY TAX BULLETIN

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'Approximately right' trust establishments fine; with court approval

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A previous article in this Bulletin (reported at 2021 WTB 24 [521]) explored what was arguably a quintessential example of a trust structure going horribly wrong, namely the decision in *Re McGowan & Valentini Trusts* [2021] VSC 154 ("Re McGowan").

While that case involved numerous trust structuring fails, one aspect perhaps is the most prevalent for trust advisers, namely 'non-existent' trustee companies. That is, trust deeds that are signed and dated on establishment of the trust by a company that is not registered until sometime later.

As set out in the previous article, the equity heuristic courts appear to adopt in this style of situation is that a trust will not be permitted to fail for want of a trustee because that would be contrary to the settlor's intention.

Reinforcement of position

The more recent case of *Bolwell (Liquidator), in the matter of Mandalay Road Holdings Pty Ltd (in liq) v Goldsmith-Medd (Trustee)* [2022] FCA 1300 ("Mandalay Road") reinforces the conclusion in relation to trustee companies purporting to sign trust deeds before incorporation.

In *Mandalay Road* a trust deed and contract for the purchase of a property were both signed by a company that did not exist until some weeks later.

The individual who purported to sign on behalf of the trustee company did become the sole director and shareholder of the company following its registration.

Evidently leaving aside the (likely material) risk that both the trust deed and contract had been backdated, or at least retrospectively amended (given that details such as the ACN of the company would not have been known at the date the trust deed and contract were signed), the court confirmed:

- The requirements for the creation of an express trust are the so call '3 certainties' - namely certainty of intention, certainty of subject matter, and certainty of object (see *Korda v Australian Executor Trustees (SA) Ltd* [2015] HCA 6).
- Based on a review of the trust deed the court was comfortable that the 3 certainties existed (see *Legal Services Board v Gillespie-Jones* [2013] HCA 35) - but the non-existence of the trustee company was clearly an issue that could potentially lead to invalidity.
- However, given (as noted above) that a court of equity will not allow a trust to fail for want of a trustee, it was reasonable to rely on the fact that as the trust deed provided for changes in the trustee this was evidence supporting a conclusion that the settlor did not intend for the trust to fail because the named



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trustee was not able to take the role, or in this case, because it did not in fact exist (see *Raftland Pty Ltd (as trustee of the Raftland Trust) v Commissioner of Taxation* [2006] FCA 109).

- Thus the individual signing the trust deed purportedly on behalf of the non-existent company individually became the trustee of the trust upon execution of the trust deed and maintained that position until such time as the trustee company was incorporated - at which time the company automatically became trustee.
- Furthermore, the trustee company clearly ratified the individual trustee's pre-incorporation actions and assumed the role of trustee of the trust, with the relevant ratification actions listed as including:
 - The company was named as purchaser in its capacity as trustee for the trust in the contract for the purchase of the property;
 - The company settled on the property purchase and was named on the title as registered proprietor as trustee, with the transfer documents including a copy of the trust deed;
 - There was evidence supporting the fact that the company operated exclusively in its capacity as trustee of the trust - and never traded or carried on any business whether in its own right or as trustee of another trust;
 - As trustee, the company also entered into two chattel mortgage agreements;
 - Some years later, the company was replaced as trustee.

Ultimately then the court confirmed, as was the case in *Re McGowan*, that a party executing a trust deed on behalf of the intended corporate trustee prior to its incorporation becomes an individual trustee of the settled sum upon receipt.

Further, the individual holds the settlement sum (and any other assets acquired) on trust pending the intended trustee company being created and taking active steps to ratify the actions of the individual trustee prior to incorporation.

Some warnings for trust advisers

The key duties of trustees often practically create responsibilities for advisers of the trust. For example, the following duties of a trustee tend to only be discharged where the advisers for the trust ensure the trustee discharges them:

- being thoroughly acquainted with the terms of the trust and all documents relating to or affecting the trust property;
- keeping all trust documentation safe and secure;
- adhering rigidly to the terms of the trust and conforming to and carrying out the wishes of the settlor as expressed in the deed of trust.

The key trustee duties are however ultimately predicated on the avatar of the trustee being known, correct and validly appointed at all times.

The tendency for 3rd parties to be pedantic about compliance with basic trust establishment issues appears to be on the increase, for example:



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- Financiers, particularly in the context of the 'know your client' regime (for example, the significant rise in recent times of court applications where a trustee is unable to locate the original - wet signed - trust deed, see *Jowill Nominees Pty Ltd v Cooper* [2021] SASC 76, reported in this Bulletin at 2021 WTB 28 [626])
- Trustees in bankruptcy (as was the case in *Mandalay Road*)
- Former spouses (for example, *Rigby & Kingston (No 4)* [2021] FamCA 501, reported in this Bulletin at 2021 WTB 36 [847])
- Estranged family members (for example, the recent high profile decision in *Smorgon v ES Group Operations Pty Ltd & Ors* [2021] VSC 608)
- Statutory authorities (for example, the numerous cases where backdating or "retro dating", "pre-dating" or "intended date" have been held to be invalid - see the article in this Bulletin at 2022 WTB 7 [131])
- Purchasers (and their advisers during due diligence) - we have seen examples where the validity of trust deeds signed electronically has been (correctly) denied
- Professional bodies and indemnity insurers (for example, in *Legal Practice Board v Computer Accounting and Tax Pty Ltd* [2007] WASC184 an accountant arranged for a trust deed to be bought for a client via an online provider. While the base trust instrument had been written by lawyers, the accountant then populated the template and was held liable for illegally providing legal advice).

Conclusion

Cases such as *Mandalay Road* and *Re McGowan* provide some comfort that a court of equity may remedy most, if not all, trust compliance issues.

This said, the cases themselves are a stark reminder that in many instances 3rd parties may refuse to accept the legitimacy of unilaterally created trustee solutions, such as deeds of rectification, clarification or confirmation.

Furthermore, if court approval is required to remedy defects in trust deeds, trustees - and their advisers - will need to endure the publicity, uncertainty, delays and financial costs associated with any application.



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