

## Getting the basics right with SMSF trust deed establishment

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**As explored in other articles in SMSF adviser, complying with trust law requirements on establishment of an SMSF is critical.**

In recent times, arguably the quintessential example of a trust structure going horribly wrong was 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 SMSF advisers, namely 'non-existent' trustee companies. That is, trust deeds that are signed and dated on establishment of the SMSF by a company that is not registered until sometime later.

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 – as confirmed in the 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**).

In *Mandalay Road* a trust deed for a discretionary trust 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:

1. 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.
2. Based on a review of the trust deed the court was comfortable that the 3 certainties existed - but the non-existence of the trustee company was clearly an issue that could potentially lead to invalidity.
3. 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

trustee was not able to take the role, or in this case, because it did not in fact exist.

4. 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.
5. Furthermore, the trustee company clearly ratified the individual trustee's pre-incorporation actions and assumed the role of trustee of the trust.

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.

Arguably both the above conclusions would also be reached by a court in relation to an SMSF established with similar defects.

### ***Some warnings for SMSF advisers***

The key duties of trustees of trusts generally, and particularly SMSFs often practically create responsibilities for advisers of the structure.

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:

- (a) 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);
- (b) Trustees in bankruptcy (as was the case in *Mandalay Road*);
- (c) Former spouses;
- (d) Estranged family members;

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- (e) Statutory authorities – particularly the Tax Office as the regulator of SMSFs;
- (f) Purchasers;
- (g) 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, SMSF trust establishment 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 SMSF trust deeds, trustees - and their advisers - will need to endure the publicity, uncertainty, delays and financial costs associated with any application.

