

Advising on BDBNs? Another warning

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As explored in previous articles in SMSF Adviser, one of the key trustee duties of any form of trust is to know the terms of the trust deed and keep the original wet (ie not electronically) signed trust instrument safe and secure. This duty is very difficult to discharge however if the trust deed is lost.

The 2021 case of *Jowill Nominees Pty Ltd v Cooper* [2021] SASC 76 is one of a series of court cases focused on where a trust deed has been lost. The decision highlights the fact that court application is the only pathway to achieving a solution that is binding on beneficiaries and third parties such as revenue authorities; as well as providing protection to the trustee where an original trust deed has been lost.

In the 2023 decision of the *Application by Ellasil Pty Ltd* [2023] VSC 69, the court was faced with a relatively complex factual matrix, which resulted almost entirely from the original trust deed establishing the SMSF having been lost.

While the decision does not explore the issue further, the role played by the accountant for the SMSF may have had at least an indirect impact on the difficulties faced by the trustee. As one example, the advisers to the SMSF appear to have failed to identify the fundamental issues that flowed from the lost trust deed until many years after the problem could have first been identified.

Furthermore, in relation to multiple, potentially invalid, binding death benefit nominations (**BDBNs**) the court accepted that these were prepared by the accountant for the fund and forwarded to the members for execution.

The court also accepted that the accountant likely had at least two discussions with a member of the SMSF and received confirmation of the intended nominated beneficiary under the relevant BDBNs. The accountant however made no file notes of these discussions, nor were they able to provide more detail as to when the discussions occurred.

Assuming the accountant was qualified to provide death benefit advice, whether then also preparing and issuing a BDBN amounts to legal advice remains an issue for all advisers to be cognisant of - and at a minimum ensure that they have approval on from their firm, licensee, professional body and insurer.

In particular, as explored in cases such as *Legal Practice Board v Computer Accounting and Tax Pty Ltd* [2007] WASC184, where template legal documents are populated by a non-lawyer this can amount to the provision of legal advice. In situations where unqualified lawyers enable the production of legal documentation and legal advice, those advisers will be in breach of the relevant legal profession legislation.

Furthermore, the failure of the accountant to confirm whether each BDBN was valid in accordance with the trust deed for the SMSF, and in turn whether it was signed, dated and witnessed correctly potentially created further exposure for the firm, for which they may have had no insurance cover.

The issues in relation to the BDBN were further complicated by the fact that the latest version of the trust deed (which was ultimately held to be effective, despite the fact that the original trust deed had been lost) mandated that the trustee 'shall' act in accordance with a 'current binding direction in accordance with the provisions of the Law'; however the deed failed to define 'the Law'.

Additionally, a schedule to the deed provided a 'Nominated Beneficiary' form, which on its face noted that it was not binding, and stipulated that if a member wished to make a binding direction to the trustee, it should be made in the form and with due execution 'as prescribed by law'.

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The court observed that, while as a matter of statutory interpretation compliance with Superannuation Regulation 6.17A is not required for SMSFs (as confirmed in the high profile case of *Hill v Zuda Pty Ltd* [2022] HCA 21), the terms of the deed may have in fact required it.

Alternatively the court opined that similar to decisions such as *Munro v Munro* (2015) 306 FLR 93 and *Re Narumon* [2019] 2 Qd R 247, the language in the deed of 'in accordance with the provisions of the Law' and 'as prescribed by Law', may have simply had the effect of incorporating only those provisions of the law that apply to SMSFs.

The court ultimately concluded that regardless of the correct interpretation of the deed on this point, the BDBN in question was in fact valid given it did comply with the SIS Act, as it was:

1. in favour of a dependant of the member;
2. ensured that the proportion of benefit was readily ascertainable;
3. clearly a notice in writing and signed in the presence of two witnesses with the requisite declaration;
4. possible to assume the trustee had provided all the information it reasonably believed was needed regarding a BDBN to the member, given the member was the sole director of the trustee; and
5. in effect at the time of the member's death.

