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Lost trust deeds, legal advice; and risks for advisers - another reminder

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Previous articles in this Bulletin have considered what seems to be an increasing trend in relation to court decisions concerning lost trust deeds, for example see 2021 WTB (28) [626] and at 2021 WTB 50 [1201].

Certainly a key reason for these cases coming before the courts appears to be the 'know your client' regime.

Arguably there is also an increasing awareness of advisers of the risks for trustees in adopting non-court sanctioned remedies such as simply signing a 'deed of confirmation' where an original - and wet signed - trust deed can not be located.

The 2021 case of Jowill Nominees Pty Ltd v Cooper [2021] SASC 76 (“Jowill”) 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.

Ellasil decision

In the Application by Ellasil Pty Ltd [2023] VSC 69 ("Ellasil"), the court was faced with a relatively complex factual matrix - all as a result of the inability for the original trust deed establishing the SMSF to be located.

There were also numerous gaps in the chain of deed updates over the years, and questions as to the validity of certain deed changes that were before the court due to apparent errors in signing and failures to date the documentation.

In relation to the lost trust deed the court ultimately confirmed:

- The decision in Orlanski v Spiegel [2015] VSC 662 ("Orlanski") appears to have accepted that deeds of confirmation are a valid solution in circumstances where original trust deeds are thought to be lost. However critically in that case, the original trust deed was found five years after the deed of confirmation was executed and did in fact contain sufficient powers for the adoption of the deed of confirmation. This proven provision of the original trust deed was critical in supporting the decision by the court to accept the validity of the deed of confirmation.

- In Ellasil, the original deed was not before the court, and therefore the court had to rely on threads of evidence to firstly establish that there was in fact a trust deed that had validly established the SMSF.

- The presumption of regularity states 'where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act' (see McLean Bros & Rigg Ltd v Grice (1906) 4 CLR 835 ("McLean")).

- However, it is only in cases where the original trust deed is available, but supplementary deeds are missing, that the presumption of regularity is of any relevance (see Re Thomson [2015] VSC 370 ("Thomson")).

- In Ellasil, based upon the references in the 1989 deed, the 1996 deed and the 2015 deed, it was accepted by the court that in or around 25 June 1979 a deed of trust establishing the fund was validly executed and that despite a number of questionable aspects to the validity of its purported adoption, the 2015 deed of variation was able to be relied on by the trustee as the trust deed for the SMSF.

Binding death benefit nomination

The Ellasil decision is also of interest in the context of the binding death benefit nomination (BDBN) aspects.

Specifically in Ellasil there were the following BDBNs:

- various undated nominations;
- nominations dated 3 December 2006;
- a nomination dated 7 December 2006; and
- a nomination dated 2017.

While there were doubts expressed by the court as to the validity of the 2006 nominations (as the deed likely in force at the time did not permit BDBNs), given a 2015 deed was held to be effective and the 2017 BDBN was valid in accordance with that deed of variation, and otherwise at law, the trustee was justified in relying on it.

Role of accountant

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 1 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 2 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 ("Legal Practice Board"), 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.

US case law

Perhaps not surprisingly, other jurisdictions have also struggled with what amounts to the provision of legal advice, particularly as machine learning and artificial intelligence generally (and ChatGPT specifically) continue to become increasingly sophisticated and prevalent.

As 1 example, in the case from the US of In re Peterson (Bankr D Md, No.19-24045, 1 June 2022) ("Peterson"), it was held that a website (see: https://upsolve.org/) that enabled clients to complete bankruptcy applications did in certain areas of the process amount to legal advice, and overall the site was 'close' to the (unqualified) practice of law.

While the court accepted the website's promises that it would modify the offending areas of the platform, it was also blunt in its warning that Upsolve should 'review its website and software en toto for areas where the process could be moved further away from the precipice of legal advice'.

Other litigation involving Upsolve has also seen the platform successfully confirm its right 'to train professionals who are not lawyers to provide free legal advice on whether and how to respond to a debt collection lawsuit' (see Upsolve Inc. v. James, No. 22-cv-627 (SDNY, May 24, 2022) ("Upsolve")).

Conclusion

As is the case in many areas of holistic tax and estate planning, perhaps the only certainty for specialist advisers is that there will be no slowdown in work.

Perhaps too it is a reality that the litigation lawyers running matters disputing aspects of arrangements such as trust deed provisions and BDBNs become increasingly busy.