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Appointor succession and the Marshall Warren Effect

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As explored in other articles in this Bulletin (for example, see 2022 WTB 39 [458]), generally from a trust law perspective, it is possible for the appointor or principal provisions of a trust deed to be amended.

Similarly, assuming the trust deed creates the requisite power, it should be possible to achieve a change of appointor without triggering any tax (nor stamp duty) impost, see this Bulletin at 2017 WTB 12 [352].

Overview

In almost every holistic tax and estate plan involving a trust, it is necessary to consider the best way to appoint a successor appointor.

Predictably, the starting point in this process is to review the trust deed.

Often, the deed will permit the incumbent appointor to have their successor nominated under the will.

Generally, if available, a nomination under the will is the easiest and most commercially sensible approach to take.

In other instances, for example, where there may be a challenge to the will, it may in fact be more appropriate to structure the appointor succession in a standalone document that sits outside the will.

Any approach is always subject to the deed.

Unfortunately, trust deeds tend to be consistently inconsistent – even when the same deed provider is involved - with the approaches available. For example the succession of appointorship may be via:

- appointment via will;
- appointment via enduring power of attorney;
- automatic lapsing of the role;
- mandated succession embedded into the trust deed;
- no appointor or principal role in the first place;
- succession nominated by some other party (eg a ‘guardian’ or ‘nominator’);
- no provision in the deed at all as to what happens to the role and no rules as to how appointor might appoint a successor;

- one of the above, however only in the event of death, but not incapacity of the incumbent; and
- some combination of one or more of the above

Trust deed provisions and appointor succession

Arguably, the importance of reading trust deeds pedantically in relation to managing the role of appointor has suffered from the so call 'Marshall-Warren Effect' - that is general apathy and ignoring of the principle, before sudden and universal acceptance (Australian scientists Marshall and Warren endured 22 years of criticism before worldwide acclaim concerning their theory that ulcers were not caused by stress).

Historically, it appears that the nuances of trust deeds in relation to appointor succession were afforded little attention, at least until the decision in Jenkins v Ellett [2007] QSC 154 (“Jenkins”), where it was held that an attempted variation to change an appointor was invalid. This was because the relevant power in the trust deed was crafted so that it could only be used in relation to the ‘trusts declared’, and in particular did not extend to varying the schedule to the trust deed.

Subsequent cases have explored the exact parameters of the decision in Jenkins, and questioned its conclusions, at least to the extent they rely on an argument that an appointor's role can not be subverted by the trustee it was designed to supervise by amending a trust deed - if the trustee otherwise holds the relevant power.

In more recent times however the core heuristics in this area have received significant attention. For example, the high profile decision in Owies and Owies v JJE Nominees Pty Ltd (ACN 004 856 366) (in its capacity as trustee for the Owies Family Trust) [2022] VSCA 142 (“Owies”) had as a key aspect issues surrounding an attempted (and failed) change of appointor (again see this Bulletin at 2022 WTB 39 [458]).

The attempted change to the appointor role in Re Owies was held to be ineffective due to the manner in which the variation power was crafted.

Recent decision

The relevant variation clause in Re Owies was drafted in a similar manner to the wording that appears in many older trust deed precedents used by (evidently) many providers.

For example, the template wording has now also featured in the high profile case of Artcam Enterprises Pty Ltd v Campbell McLaren & Ors [2023] VSC 196 ("Artcam").

Artcam is arguably notable for a range of issues, including:

- the relevant trust derived in the region of $65M following the sale of its shares in Jalna Dairy Foods Pty Ltd;

- a portion of the proceeds were then allegedly used to finance the purchase of a riverfront home in Noosa for $27M, perhaps financed by partial repayment of a $46M unpaid present entitlement owed to a beneficiary;

- the existing trustee sought its own removal and the replacement by an independent trustee, which the court noted as being highly unusual;

- the court accepted the request for removal by the incumbent trustee and appointed an independent trustee (being a former judge who had returned to working as a solicitor). The independent trustee was given permission to charge their 'standard' rate of $2,000 an hour;

- the breach of section 259D of the Corporations Act by the trustee, a provision in a related area to the prohibition on share self-ownership under section 259A (an issue explored in this Bulletin at 2013 WTB 48 [2032]). The contravention of section 259D related to a company obtaining control of an entity that held shares in the company. The contravention in this regard is an offence of strict liability under the Criminal Code. While a contravention does not affect the validity of any transaction, the removal of the trustee did ensure an ending of the breach of the legislation.

While not reaching a concluded position on the issue of the validity of the purported variations to the appointor role, the court in Artcam accepted the advice of counsel that the most likely conclusion is that both the offending amending deeds of variation were in fact ineffective.

That is, the variations would be void because, as was the case in Re Owies, the variation power included in the deed referred only to the 'trusts hereinbefore' declared - as distinct from a general power to vary the terms of the trust deed.

Furthermore, as there was no duty or obligation on the trustee to amend the definition of appointor in the schedule of the trust deed, that role was not a 'trust' and accordingly not within the reach of the variation power under the trust deed.

Conclusion

The relevant variation power in Artcam was as set out below - with the mark up showing the differences to the variation power in Re Owies.

Advisers would likely benefit from being familiar with the wording; and on high alert whenever reviewing a trust deed with the drafting approach used to create a power of trustee variation.

SUBJECT to Clause 10 hereof the Trustee for the time being may at any time and from time to time by deeds ~~with the consent of the Guardian if alive~~ revoke add to or vary all or any of the trusts hereinbefore limited or the trusts limited by any variation or alteration or addition made thereto from time to time and may by the same or any other deed or deeds declare any new or other trusts or powers concerning the Trust Fund or any part or parts thereof ~~the trusts whereof shall have been so revoked added to or varied~~ but so that ~~the~~ any law against perpetuities is not thereby infringed and so that such new or other trust powers discretions alterations or variations:

but so that any law against perpetuities is not thereby infringed and so that such new or other trust powers discretions alterations or variations –

- may relate to the management or control of the Trust Fund or the investment thereof or to the Trustees' powers or discretions in these presents contained;
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- shall not be in favour of or for the benefit ~~of the Settlor~~ or result in any benefit to any person from time to time being the Settlor Guardian Appointor or Trustees or any of them except a person named or described in the Schedule as a Specified Beneficiary but shall otherwise be for the benefit of all or any one or more of the General Beneficiaries ~~or the next of kin of any of them or the next of kin of the Primary Beneficiary or Primary Beneficiaries or any of them~~ …