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‘Gift and loan back’ arrangement ruled invalid by Federal Court

By Miranda Brownlee, Accountants Daily and *Matthew Burgess, View Legal*

In a decision handed down this week, the Federal Court of Australia found that the DG Institute engaged in conduct that was misleading or deceptive and made false representations about an asset protection it promoted as the Vestey Trust or Master Wealth Control Package.

The DG Institute, operated by former solicitor and barrister Dominique Grubisa, promoted the Master Wealth Control program as teaching strategies which would enable participants to completely protect their assets from creditors.

The strategies taught in the program included setting up a structure described by DG Institute as an ‘impenetrable Vestey Trust’ or ‘asset protection trust’ (Vestey Trust) using what was described by DG Institute as “legally binding documentation” provided by it.

The promotional materials and course materials provided to participants after signing up to the MWC program disclosed the purpose of the Vestey Trust structure as being to protect the participant’s assets from attack by creditors.

The ACCC raised concerns about representations about the Vestey Trust being false and misleading in December 2022 when it commenced proceedings in the Federal Court.

The ATO also previously issued a warning to SMSFs about the Vestey Trust, outlining concerns about compliance risks with the arrangement.

The Federal Court found that the DG Institute made representations that the Vestey Trust structure would provide consumers with complete protection from creditors when that protection was not provided by the adoption of those strategies.

Commenting on the decision, View Legal director Matthew Burgess said the ACCC managed to successfully attack all key aspects of the approaches of the DG Institute.

At a basic level, the Vestey trust structure involved setting up a discretionary trust would be created and controlled by the client.

“All future income of the client was intended to be assigned to the trustee and paid into the trustee’s bank account, although as a matter of law that was only valid to the extent of existing debts at the time the Notice of Assignment was given,” Burgess explained.

“The client would then withdraw money from time to time from the trustee’s bank account to meet personal expenses of the client, thereby borrowing money from the trustee free of interest and with no obligation of repayment for at least 50 years.

“That loan would be secured by the equitable mortgage, and would also be the subject of a caveat on the title of any real property and could be the subject of PPSR registration in respect of personal property.”

Burgess said there was an obvious flaw with the structure which was promoted as protecting the client’s property from creditors, when in fact it only afforded protection to the extent of the amount of the secured loan by the trustee to the client.

“In the early stages of the structure, the amount of the loan would be relatively small,” he noted.

“That is, the amount of the loan would be limited by the amount of the existing debts assigned to the trustee, and would be limited further by the amount of the withdrawals from the trustee’s bank account to meet personal expenses of the client.

"Despite this fact, the program claimed to provide clients with complete and immediate protection from creditors to the extent of all their net worth."

While not raised by the ACCC, the Court also noted that the strategy had been wrongly attributed to the well-known Vestey family from the UK, who never entered into arrangements analogous to those promoted.

The Federal Court also found Grubisa to be liable as an accessory for her involvement in DG Institute's conduct in making the Vestey Trust Representations "by aiding, abetting and procuring the contraventions and by being knowingly concerned in and party to the contraventions".

"Ms Grubisa knew that her conduct was misleading and deceptive. Because Ms Grubisa had actual knowledge that the Vestey Trust Representations were false, it is unnecessary for me to express an opinion as to the wide view of accessorial liability," said Justice Jackman in his decision.

The Court also held that the promotional claim that the Vestey Trust approach had been approved by the decision in Sharrment Pty Ltd v Official Trustee In Bankruptcy [1988] FCA 266 was false and misleading.

"In the Sharrment decision it was held that the disputed transactions were not shams, but real transactions, and in order for the acts or documents to be shams, the parties must intend that the acts or documents are not to create the legal rights or obligations which they give the appearance of creating," said Burgess.

"There was no suggestion of any express arrangement or understanding that the transactions were not to take effect according to their terms, and there was a real debt created - attributes essentially missing from the Vestey Trust arrangements as documented.

"Further, the Sharrment case did not consider any of the types of key documents featured in the Vestey Trust arrangement such as promissory notes, declaration and acknowledgments, notices of assignment or caveats."