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Vestey Trusts invalid - The Federal Court agrees with the ACCC, ASIC, ATO (... & A Current Affair)

by Matthew Burgess, Director, View Legal

The asset protection strategy often referred to as a 'gift and loan back' arrangement (and various iterations of it) has arguably had a chequered history.

Background

One purported version of the 'synthetic' wealth transfer approach has attracted particular attention in recent years.

Branded as the 'Vestey Trust' or the 'Master Wealth Control Package', the arrangement in question was promoted as part of a wider property and investment offering that promised advice on 'how to locate and invest in undervalued property, undertaking property developments, locating undervalued businesses, renovating for profit and how to secure and grow your wealth'.

The scheme was offered by the 'DG Institute', founded by a solicitor and barrister named Dominique Grubisa.

Attacks

In 2021 concerns about the approach were publicised on the television program 'A Current Affair'.

In April 2022, ASIC banned Grubisa for four years following findings that she claimed to hold Australian financial services and credit licences when she did not, and that she was not a fit and proper person to engage in financial services or credit activities (see 22-079MR).

The AAT subsequently set aside the ban on the basis that while it was satisfied that grounds existed to make the banning orders, it was not satisfied the discretion should be exercised (see Grubisa and Australian Securities and Investments Commission [2023] AATA 3328).

In December 2022, a productised version of the arrangement gained the attention of the Tax Office in their release labelled QC 71175 (22 December 2022).

Titled 'SMSFs and schemes involving asset protection' the Tax Office confirmed its view that as a threshold issue the arrangement promoted was unnecessary because the superannuation system already protects SMSF assets from creditors.

QC 71175 then went on to detail a range of tax and superannuation concerns with the solution.

'Real Estate Rescue Program'

In April 2024, the ACCC has successfully attacked all key aspects of the approaches of the DG Institute in the Federal Court decision of Australian Competition and Consumer Commission v Master Wealth Control Pty Ltd [2024] FCA 344.

A significant portion of the case was focused on the strategy the ACCC summarised as follows (accepted as accurate by the court) and promoted as the 'Real Estate Rescue Program' (which generated circa $8.9M in revenue over 4 years):

(a) identifying of homeowners who may be in financial distress, including by monitoring court lists to identify possession, divorce or probate proceedings;

(b) contacting such homeowners with a view to reaching agreement for the program participant to purchase the homeowner's property below market value, or being authorised to sell the property and retain the proceeds above a certain amount;

(c) the strategy was promoted as being one which would allow participants to acquire a property below market value and sell it for a higher amount, while allowing the homeowner to receive the benefit of part of the value of the equity held by the homeowner in the property, which the promotional materials indicated the homeowner would not otherwise receive in the event of a forced mortgagee sale.

The court concluded that the scheme was knowingly in contravention with Australian Consumer Laws and was conduct which was false and misleading.

Vestey Trust

In relation to the tax effective asset protection product prompted via the 'Master Wealth Control' program (which generated circa $9.2M in revenue over 4 years), of setting up a structure described by DG Institute as an 'impenetrable Vestey Trust' or 'asset protection trust' the court similarly accepted the concession during the trial by the defendant that the obvious flaws in the solution meant that the representations promoting it were also false and misleading.

In particular the court observed:

1. While not raised by the ACCC, the strategy was noted as being wrongly attributed to the well known Vestey family from the UK, who never entered into arrangements analogous to those promoted.

2. A purported assignment made without consideration validly assigns any existing debts or other choses in action, but is ineffective to assign any rights in relation to mere expectancies or possibilities of future entitlement (see Norman v Federal Commissioner of Taxation (1963) 109 CLR 9).

3. The Vestey Trust scheme was summarised, at its most basic level, as follows:

(a) a discretionary trust would be created and controlled by the client;

(b) 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;

(c) 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; and

(d) 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.

4. There was an obvious flaw with the structure stated to be designed to protect the client's property from creditors, in that 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. 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.

5. There was a lack of legal competence demonstrated by Grubisa with the arrangements, including the:

(a) claim in promotional material that the trust deed contained a prohibition on the trustee borrowing (which did not in fact appear in the deed);

(b) failure to appreciate that the assignment would be effective only in relation to existing debts and not in relation to all future income; and

(c) infelicity of referring in a 'Declaration and Acknowledgment' and elsewhere to a mortgage only over the client's 'equity in the property'.

6. Despite the above errors perhaps being able to be overlooked, the overriding obvious flaw (of most of the client's equity in their property not in fact being protected by the scheme), was held to be a 'matter of commonsense which would be readily appreciated by anyone with elementary legal knowledge'.

7. In particular, the fact that the loan secured by the equitable mortgage would be most unlikely to reach the value of the client's assets for a very substantial period of time (if ever) was so obvious that it was held that Grubisa must have been aware of it when conceptualising, drafting and implementing the structure.

Accountants' role not a defence

While it was accepted that clients were encouraged to consult their accountants (a key part of the defence against liability), this aspect was held to be irrelevant to Grubisa's culpability.

This was because accountants for clients were only provided a 'briefing paper', which made no reference to the loan by the trustee to the client or how it would arise over time, other than to state that 'Available equity will effectively be mortgaged to the hilt to the Trust'.

A statement that was false, and reflected the obvious flaw in the structure, although that flaw would have only been apparent to an accountant only if they had also been given the whole package of transaction documents and associated commentary (rather than merely the briefing paper).

Sharrment case not authority

Finally, 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 also held to be false and misleading.

In particular, 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.

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).