SMSFAdviser

Advisers at risk where second-order consequences are missed

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

The decision in Slade v Brose [2024] NSWCA 197 provides a stark reminder of where first-order focused advice, or partially implemented advice, can have adverse consequences, says a legal specialist.

Matthew Burgess, director of View Legal, told SMSF Adviserthat estate planning is an area of focus for an increasing number of advisers.

"In many instances, particularly where there are assets held via multiple structures, a collaborative approach across specialists in accounting, financial, legal, succession and estate planning is vital to ensure a competent solution is achieved," he said.

"However, where there is a failure by any engaged adviser, or client, to understand the second-order consequences of specialist advice, this can unfortunately mean costly litigation becomes a certainty."

The Slade case involved a bitter dispute between an adult daughter and her parents as a result of an alleged failure by the parents to ensure certain farming assets were transferred to the daughter and her husband as part of a succession and estate planning arrangement.

The court heard that all family members had worked with a succession planning firm, which produced detailed minutes after each meeting setting out what was believed by the firm to have been agreed. These minutes were then also annexed to a deed of family arrangement (DOFA).

"While apparently prepared by lawyers, with the involvement of both the succession planning firm and an accountant, the DOFA was unclear as to whether it was legally enforceable," Burgess said.

"These styles of arrangements – while extremely prevalent in the approach of many advisers – are arguably gaining a notorious reputation due to the apparent desire of advisers to create enforceable obligations while often not considering any of the legal, tax or stamp duty consequences of the agreement being binding."

He explained that in this case, the DOFA suggested the document was a "guideline" and noted that "circumstances may change", indicating that it was only a non-binding statement of intention.
It also stated it was intended to be "binding as far as possible upon the heirs, executors and assigns of all the parties", or legally enforceable.

"While neither the minutes nor the DOFA were ultimately held to be themselves binding, the documentation did underpin the creation of legally enforceable rights, via the equitable principle of proprietary estoppel," Burgess said.

"This was because the DOFA was 'as close to a clear and unambiguous representation, falling short of a binding contract, that one could imagine', which created a reasonable expectation that the daughter and her husband would receive the assets as set out under the DOFA."

Estoppel refers to a legal principle that prevents a person from alleging facts that are contrary to past claims or actions. Accordingly, estoppel precludes someone from arguing anything contrary to a claim made or act done previously by that person.

Burgess explained that this indicated that the minutes and DOFA, combined with other oral promises, meant that the parents had irrevocably promised that so long as the daughter and her husband worked in the farming operations, certain properties "would all be theirs" (see Gillett v Holt [2001] Ch 210).

"In relation to the proprietary estoppel aspects, the court confirmed that proprietary estoppel need not be based on an existing legal relationship, but it must relate to identified property (usually land) owned (or about to be owned) by the party against whom the claim is being made (see Moore v Aubusson [2020] NSWSC 1466)," he said.

"It also stated that there is no presumption of detriment in proprietary estoppel situations; rather, detriment must be established on the balance of probabilities (see Sidhu v Van Dyke [2014] HCA 19). However, the concept of detriment in the context of proprietary estoppel is neither narrow nor technical (Donis v Donis (2007) 19 VR 577)."

Burgess added that the court ruled that encouragement can be a "contributing cause", as distinct from the "sole inducement" or a predominant cause. That is, the broken promises influence a party in a significant or material way, given they would have acted differently had the (induced) assumption not been held.

"It continued that an aggrieved party need not prove precisely or categorically how they would have acted differently (see Priestley v Priestley [2017] NSWCA 155); rather the question is whether, but for the relevant encouragement, the party would have acted differently," he said.

"Ultimately, the court must be satisfied that it would be unconscionable for the party who made the promises to depart from the representations made and act otherwise than in accordance with the expectations they had induced."

Burgess said one aspect of the case that arguably caused additional complexity was that during the succession planning process, the parents received advice, which they acted on, to transfer assets that were set out under the DOFA to their self-managed superannuation fund.

"The SMSF was evidently not a party to the DOFA, and indeed even if it had been, it would likely not have been bound given superannuation legislation," he said.

"How the advisers involved suggested the assets that were moved to the SMSF would be dealt with in light of the statements in the DOFA was unclear, other than references to the parents needing to 'update their wills, and review them regularly'."

He added that it is well understood by holistic estate planning specialists that superannuation assets cannot be regulated by a will.

"A key question that appears to have been ignored is what second-order consequences needed to be considered before facilitating assets that were otherwise critical to the DOFA and succession plan being transferred to the SMSF; a structure that essentially prevented many of the apparent objectives from being achieved at least in the manner anticipated under the documentation," he said.

"Interestingly, the parents chose to argue before the court that the ownership of assets via the SMSF did not, in fact, preclude them from honouring the representations in the DOFA while also arguing that they were free to depart from the representations made in the DOFA."

He concluded that it is unclear on what basis the parents and their advisers concluded they could have their SMSF bound by the DOFA.

"This aspect of the case further highlights the risks of non-specialist advisers adopting a piecemeal approach to what should otherwise be a legally enforceable (without litigation) holistic estate plan," he said