Holistic estate planning critical in family arrangements

Matthew Burgess *VIEW LEGAL*

Context

Anecdotally, estate planning is an area of focus for an ever-increasing number of advisers across all key professions.

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

However, where there is a failure by any engaged adviser or the client to understand the second order consequences of specialist advice, this can unfortunately mean costly litigation becomes a certainty — together with a range of other risks; including (potentially) for the advisers involved.

Risks when estate planning is not holistic

The decision in *Slade v Brose*[1] provides a stark reminder of where first order focused advice, or partially implemented advice, can have materially adverse consequences.

The case involved a bitter dispute between an adult daughter (with her husband) against her parents, primarily as a result of alleged broken promises by the daughter's parents to ensure certain farming assets would be transferred to her (and her husband) as part of a succession and estate planning arrangement.

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. These style 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.

In this case the DOFA in certain places used words such as the document being a "guideline" and noting that "circumstances may change" (that is, indicating that it was only to be a non-binding statement of intention), while also stating it was intended to be "binding as far as possible upon the heirs, executors and assigns of all the parties" (that is, legally enforceable).

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

That is, the minutes and DOFA (combined with other oral promises) meant that the parents of the daughter had irrevocably promised that so long as the daughter and her husband worked in the farming operations that certain properties "would all be theirs" (see *Gillett v Holt*[2]).

Proprietary estoppel

In relation to the proprietary estoppel aspects the court confirmed:

- Proprietary estoppel need not be based on an existing legal relationship, but it must relate to identified property (usually land) owned (or, perhaps, about to be owned) by the party against whom the claim is being made (see *Moore v Aubusson*[3]).
- 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*[4]) However, the concept of detriment in the context of proprietary estoppel is neither narrow nor technical.[5]

- Encouragement can be a "contributing cause", as distinct from the "sole inducement" or a predominant cause — if the broken promises influence a party in a significant or material way if they would have acted differently had the (induced) assumption not been held.
- An aggrieved party need not prove precisely or categorically how they would have acted differently (see *Priestley v Priestley*[6]); rather the question is whether, but for the relevant encouragement, the party would have acted differently.
- 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.

Related entities

One aspect of the factual matrix that arguably caused material 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 (SMSF).

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 the superannuation legislation. 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".

As is well understood by holistic estate planning specialists, 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).

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). It is unclear on what basis the parents (and their advisers) concluded they could have their SMSF bound by the DOFA, and arguably 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.

Risks for advisers

Another sobering case in the context of the risks potentially faced by advisers in the estate planning arena is the decision in *Robert Bax & Associates v Cavenham Pty Ltd*.[7]

While the case itself was not directly related to a DOFA, it provides a stark reminder of the issues that can arise for professional advisers, particularly lawyers, working in estate planning areas.

Relevantly, the decision confirmed the following key points:

- Even where a lawyer's retainer appears to be limited to the formal or mechanical tasks of the legal documentation required, to fulfill their duties to the client a competent lawyer must ascertain the extent of the risk the client wishes to assume in the transaction, evaluating the extent of the risks involved in the transaction and advising accordingly.
- The existence of a duty to advise does not depend on advice or information being specifically sought by the client. In particular, a lawyer is obliged to explain and advise the client as to the effect of the legal documents, at least in situations where the client's ordinary business does not include transactions of the kind in question.
- This is particularly so given that much modern legal documentation, such as mortgages and commercial leases, is virtually unintelligible even to well-educated lay people. Yet generally speaking, the law binds people to documents they sign, whether read or not. It is for this very reason that a lawyer's explanation and advice is so essential. In this regard, often it is just as important for a client to know what a document does not contain.
- Thus in this case, the lawyer's duties went well beyond altering an existing loan agreement; producing instruments of mortgage in standard form; stamping the documents and registering the mortgages if requested. Rather the duty extended to ascertaining the client's understanding of the transactions it was proposing to enter, its commercial aims and the degree of risk it was prepared to take.
- The duty also extended to advising on matters such as the desirability of ensuring that no loan monies were advanced until the loan agreements and mortgages were stamped and the mortgages registered as first mortgages. In this regard, the structure of the arrangements implemented before the lawyer's retainer commenced were clearly relevant and should have been considered.
- Similarly, in relation to the revenue consequences of legal documentation being prepared, the lawyer

drafting the documents has a duty to advise a client on the tax consequences or, alternatively, advise the client to obtain tax advice from a specialist tax lawyer (see *Ralston v Jurisich*[8]).

- In relation to this obligation to provide tax advice, the decision in *Hurlingham Estates Ltd v Wilde & Partners*[9] is also relevant. In this case a conveyancing lawyer (who had no tax knowledge) documented a transaction in a manner that caused a significant tax impost — despite the availability of an alternative structure that would have legitimately avoided the cost.
- The court held that the lawyer should have insisted the client obtain tax advice, even though the law firm was not asked to provide tax advice and had assumed the client would have obtained taxation advice on the transaction from its accountants.
- Furthermore, the law firm's claim that they believed their retainer expressly excluded tax advice was disregarded due to their failure to document the terms of the engagement in writing. Indeed it was held that even if the client had agreed verbally to exclude tax advice from the retainer, this would not have been binding on the client as it would not have been fully informed consent.
- Arguably however the outcome in this case was at least partly due to an apparent motivation for the failure to ensure that the customer obtain specialist advice being the lawyer's fear of losing their retainer (see *Hurlingham Estates Ltd v Wilde & Partners*[10]).
- The rules in this area also mean that specialist firms must provide any advice reasonably necessary in order to protect a client's interests — whether expressly requested as part of an engagement or not (see *Tip Top Dry Cleaners Pty Ltd v Mackintosh*[11] and *Carmody v Priestley & Morris Perth Pty Ltd*[12]).

Conclusion

In the modern era, holistic estate planning is arguably founded in the Pareto Principle (or so called "80–20 Rule") — that is the vast majority (often more than 80%) of wealth for many people cannot be regulated via their will.

Holistic estate planning embraces the fact that while wills are always necessary; they are rarely sufficient. Strategically developed wills can however provide a starting point to then create a holistic estate plan.

A properly implemented holistic estate plan uses a range of strategies unrelated to the will to manage wealth controlled via structures such as trusts, companies and superannuation funds.

Ultimately, for any adviser working in estate planning, they must choose either to specialise in holistic estate planning; or actively ensure they work collaboratively with advisers that do so.

Matthew Burgess
Director
View Legal
matthew.burgess@viewlegal.com.au
https://viewlegal.com.au/

Footnotes

1. *Slade v Brose* [2024] NSWCA 197; BC202410764.
2. *Gillett v Holt* [2000] EWCA 45; [2001] Ch 210; [2000] 3 WLR 815.
3. *Moore v Aubusson* [2020] NSWSC 1466; BC202010378.
4. *Sidhu v Van Dyke* (2014) 251 CLR 505; 308 ALR 232; [2014] HCA 19; BC201403537.
5. *Donis v Donis* (2007) 19 VR 577; V ConvR 54-737; [2007] VSCA 89; BC200703434.
6. *Priestley v Priestley* [2017] NSWCA 155; BC201705056.
7. *Robert Bax & Associates v Cavenham Pty Ltd* [2013] 1 Qd R 476; [2012] QCA 177; BC201204694.
8. *Ralston v Jurisich* (2017) 105 ATR 114; [2017] NSWCA 63; BC201702334.
9. *Hurlingham Estates Ltd v Wilde & Partners* (1996) 37 ATR 261; [1997] 1 Lloyd's Rep 525.
10. Above.
11. *Tip Top Dry Cleaners Pty Ltd v Mackintosh* (1998) 98 ATC 4346; 39 ATR 30; BC9801003.
12. *Carmody v Priestley & Morris Perth Pty Ltd* (2005) 30 WAR 318; [2005] WASC 120; BC200504173.