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Advisers reminded of inherent risks with unit trusts: legal specialist

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

A recent NSW legal case has highlighted the importance of adequate and detailed documentation for unit trusts, a legal specialist has said.

Matthew Burgess, director of View Legal, says specialist advisers are usually well aware of the importance of legal documentation for unit trusts, knowing that without appropriately drafted, legally enforceable documentation, often the only remedy will be battling things out in court.

He said the recent decision in David & Ros Carr Holdings Pty Ltd v Ritossa [2025] NSWCA 108 was another timely reminder.

Burgess said this case centred on a unit trust – a structure often used by SMSFs – the units in which were owned by two discretionary trusts.

"The unit trust had a corporate trustee and owned a farming property. Despite repeated recommendations from advisers to the parties, no unitholders' agreement had been implemented."

He said the court heard that the lawyers who prepared the trust deed specifically advised the unitholders to consider issues such as an exit strategy and voluntary exits that could allow a unitholder to exit the trust on the basis that the other unitholders have to buy out their interest on certain terms.

"The trust deed had provisions that were rafted to meet the NSW fixed trust definition, critical for land tax purposes, and which provided that 'the Unit Holders are presently entitled to the Income [and Capital] of the Trust' and 'may require the trustee to wind up the trust and distribute the trust property or the net proceeds of the trust property'."

However, following a breakdown in relations between the unitholders, one developed a range of arguments to force an exit from the structure.

"In rejecting all arguments, the court confirmed firstly that provisions designed to achieve NSW fixed trust status only permitted the trustee to wind up the trust where all unitholders were acting collectively, rather than individually," Burgess said.

"That is, the purpose of this style of clause is only to create an equitable estate for the unitholders as a fixed trust, and thereby eligible for the tax-free threshold under the Land Tax Management Act 1956 (NSW)."

He said the clause did not allow a unitholder to unilaterally wind up the trust and claim their own interest (see CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic) [2005] HCA 53 and Vanderstock v Victoria [2023] HCA 30) in contrast to Sayden Pty Ltd v Chief Commissioner of State Revenue (2013) 83 NSWLR 700 where it was held a single unitholder could force the wind up of a unit trust.

Burgess said the court said a deadlock in the operation of a corporate trustee or a breakdown in the relationship between its managers does not constitute, of itself, oppression under sections 232 and 233 of the Corporations Act (see Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd [2001] NSWCA 97).

“Rather, the deadlock must lead to further consequences. That is, mere differences in opinion as to the sale of investments, the unpleasantness of board meetings, and delays in the finalisation of leases, are insufficient to enliven the section (see Wayde v NSW Rugby League Ltd(1985) 180 CLR).”

“The fact that the parties were aware of the risks when setting up the structure if they had disagreements, reinforced the conclusion that it was inappropriate for the court to force the wind up of the trust.

Furthermore, the Corporations Act provisions where a company merely acts as trustee of a trust should be used only in exceptional cases (see Zong v Lin [2022] NSWCA 136 and Wain v Drapac[2012] VSC 156), given that these rules effectively override what is otherwise available at trust law.”

The court also stated that a member of a trustee company, who happens also to be a beneficiary of the trust and whose real complaint was about what was happening with the management of trust assets, does not, on that basis, fall within the ambit of the oppression rules under the Corporations Act.

“Here, the shares in the trustee company were owned by individual beneficiaries of the discretionary trust unitholders, further breaking the nexus required. That is, a discretionary object of one of the discretionary trusts which was a unitholder had no standing to complain of any oppression,” Burgess said.

Courts could generally intervene and order the winding up of a company if the majority of shareholders conducted affairs in a manner that is unfairly prejudicial or oppressive.

“Particularly in closely held companies with quasi-partnership characteristics, the expectations of mutual cooperation and fairness should be upheld. This means that even if actions are legally permissible under company law, they can still be deemed inequitable if they violate the personal relationships and understandings between the shareholders,” Burgess said.

“However, the court confirmed that this rule concerns the scope of the statutory power to wind up a company, rather than a proposition at general law that a trust can be terminated where there has been a breakdown in an original relationship of mutual trust and confidence. That is, no such general law proposition can be developed by analogy with the rights created by statute.”

The decision also noted that, given the purpose of the court is to preserve trusts and not destroy them, a receiver cannot be appointed in the court’s inherent jurisdiction over trusts to terminate it merely because there has been a breakdown in mutual trust and confidence.

“This conclusion was reinforced by the fact that, if adopted, it would create rights which would allow unitholders with immaterial interests to unilaterally force the wind up of trusts; a commercially inappropriate outcome,” he said.

“[The court stated] it was important in this regard to focus on the form of investment structure chosen by the parties, as opposed to the 'commercial reality' of an investment by two families. A key factor was that the two families who wished to co-invest made a conscious decision with the benefit of advice not to establish a partnership or an unincorporated joint venture or a simple company all of which may have allowed one party to unilaterally force an exit.”

The ruling continued that using analogies to how standalone companies are treated was inappropriate where a unit trust was the chosen investment vehicle.

“Where a company is dysfunctional or relations between its directors have irretrievably broken down, it may be wound up. If trustees cannot, or will not, administer a trust, a court may order their removal and replacement, and the point of doing so is so that the trust may be continued,” Burgess said.

“The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee (see Miller v Cameron (1936) 54 CLR 572).

Likewise, if the trust assets are in jeopardy, a receiver may be appointed, but again, the purpose is to preserve the trust.”

Companies and trusts are very different – one is a legal person, the other is a relationship.

“Companies are capable of perpetual existence, while in contrast, private trusts in most jurisdictions 'do not and cannot live forever'. In part, the mortality of private trusts is because a trust is a relationship, rather than a legal entity, and in part it is because of the rule against perpetuities and its statutory modifications,” Burgess said.

“A private trust must vest, and it is perfectly open to the settlor of a trust to insert a power of revocation. Indeed, if the trust is to be deployed as a managed investment scheme, then it must make adequate provision for winding up the scheme (see Corporations Act section 601GA(1)(d)).

“It is also perfectly open to a settlor of a trust not intended to be a managed investment scheme not to include a power of revocation. Ultimately, a trust is a 'very flexible institution' (see Trident General Insurance Co Ltd v McNiece Bros Pty Ltd [1988] HCA 44) and should not be automatically treated in the same manner as a company even if the trustee is a company.”