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SMSF trustees acting badly – further disqualification cases

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

Several recent court decisions highlight the expectations of SMSF trustees in regard to legislative obligations.

Matthew Burgess, director of View Legal, said the role of trusteeship of any entity is one the courts have regularly highlighted as requiring conduct of the highest standards and the decision in Fitzmaurice and Commissioner of Taxation (Taxation) [2019] AATA 2217 provides a helpful example.

Burgess said the case involved a range of breaches of the legislation, including lending money to a member, breaching the sole purpose test, the early release of benefits where the member did not satisfy the statutory test for financial hardship and the late lodgement and failure to lodge annual returns.
It also involved the failure to make and maintain investments at arm's length, failing to keep an up-to-date market valuation of the major asset of the fund and finally, record keeping failures.

"The court confirmed that on the facts the trustee did not have a proper understanding of the role of a trustee and the duties owed by a trustee and a director of a trustee company and that there was no suggestion of dishonesty or intention to defraud on the part of the trustee was irrelevant; their incompetence and a lack of acceptance of responsibility was telling," Burgess said.

"Ultimately, the trustee was held to have an insufficient understanding, insufficient skill and a lack of the required diligence to be a trustee of an SMSF. In disqualifying the trustee the court also confirmed the trustee was not a fit and proper person to be a trustee of an SMSF – itself a further ground supporting the disqualification."

Burgess continued the court stated that unclear verbal advice from the accountant for the SMSF was not something that was appropriate to rely on, partly because the primary responsibility for compliance lies with the trustee of an SMSF, not the advisers to the fund.

In a similar case, Goulopoulos and Commissioner of Taxation [2022] AATA 2540, the nature, seriousness and number of contraventions were held to be sufficient grounds for disqualification of the trustee.

He said in this case the breaches included a breach of prescribed operating standards (section 34 SIS Act); the failure of the requirement to lodge annual returns (section 35D); a breach of sole purpose test (section 62); lending to members (section 65); contravention for acquisition of certain assets from members (section 66); contravention for borrowing (section 67); a breach of in-house asset rules (section 84); and requirement that investments are on arm's length basis (section 109).

“The court confirmed that the trustee demonstrated ‘that he preferred to take actions that suited his own convenience and comfort, rather than doing what he understood was right’. Furthermore, while the trustee had expressed some remorse or contrition for what occurred, this appeared to be in relation to the fact of disqualification; as opposed to any acceptance of the wrongfulness of the conduct,” Burgess noted.

“Given that the court concluded that on the balance of probabilities it was likely that the trustee would deviate from the standards required as a responsible officer, disqualification was appropriate (see Stasos v Tax Agents Board (1990) 21 ATR 974).”

He added this was despite the trustee offering to undertake an education course with an eligible provider, provide an enforceable undertaking to stop the behaviour that led to the contraventions and put in place strategies to prevent contraventions occurring again.

“The court concluded that the suggested strategies were not spelt out in detail, and so far as they were, they did not in fact mitigate the risk of future contraventions,” Burgess said.

Another recent decision in Sherallene Alicer and Joshua Ramos and Commissioner of Taxation (Taxation) [2026] ARTA 34 provides further context in this area.

“The case followed a (claimed) relationship breakdown between the spouses who were the trustees of the SMSF, there were 244 breaches of SIS, leaving the fund with at one point a bank account balance of less than $1,500,” Burgess said.

“In confirming the ATO’s decision to disqualify the couple as trustees, the tribunal noted that this was not a case involving isolated or minor withdrawals where the SMSF remained substantially intact – rather, for a prolonged period of time there were virtually no funds available and the impact on the SMSF was profound and went directly to the seriousness of the contraventions which involved key prohibitions in SIS and ongoing operational matters, and in some instances could see convictions for criminal offences.”

The court also stated that while accepting the spousal relationship breakdown and Covid were distressing and created financial insecurity, these trials did not explain the withdrawals that predated those events – and further, to the extent that loans were advanced to meet the costs of home renovations, reflected discretionary spending which sat uneasily with the preservation objective that underpins the superannuation regime.

“The decision noted that when considering SMSF trustee disqualification situations some, but only limited, weight should be given to assertions of remorse and reform and that difficulties in accessing information from third party administrators, such as for crypto currency investments, do not relieve trustees of their statutory obligations. Instead, reasonable steps must be taken to lodge returns in a timely manner and repeated non-compliance reflects more than mere administrative oversight,” Burgess said.

"Ultimately, the court noted, the superannuation regime is designed to operate notwithstanding pressures such as relationship breakdown and adverse macroeconomic events, and if trustees were permitted to access an SMSF's assets whenever confronted with financial difficulty, the integrity of the scheme would be undermined."