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Lifestyles of the rich and famous - issues in the administration of trusts

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Purpose of this Seminar

- ▶ The purpose of this seminar is to consider:
 - ▶ recent decisions of superior Australian Courts that involve disputes in relation to the administration of trusts.
 - ▶ The focus will be on the principles that emerge from those decisions that could be used to inform and assist practitioners in advising parties to a trust arrangement including trustees, beneficiaries, guardians & appointors.

Recent Decisions

- ▶ FCT v Bendel [2025] FCAFC 15
- ▶ Hitchcock v Pratt Group Holdings Pty Ltd atf Pratt Family Holdings Trust [2024] NSWSC 1292
- ▶ In the Matter of application by Berry atf EM McPherson Settlement [2024] VSC 744
- ▶ OTHER CASES - depending on time
- ▶ In the Matter of Gainer Associates Pty Ltd [2024] NSWSC 1138
- ▶ In the Matter of the Estate of Nicola Stagliano, Lyttleton (executor) v Stagliano & Ors [2025] VSC 39
- ▶ Gengoult-Smith v Petela Nominees Pty Ltd atf Gengoult-Smith Family Trust [2024] VSC 189

FCT v Bendel

- ▶ The issue on appeal concerned the construction of s 109D(3) of Division 7A of the ITAA 1936 - which contains a definition of “loan” for the purpose of Div 7A.
- ▶ On the facts a trustee had passed resolutions resulting in a corporate beneficiary becoming presently entitled to part of the income of the trust, but the trustee had not paid that entitlement to that beneficiary.
- ▶ The corporate beneficiary was presently entitled to a share of the net income of the Trust - it necessarily followed that it had a vested interest in and present legal right to demand and receive payment of that share.
- ▶ The beneficiary had not called for payment of that share and the trustee had not performed its duty to set aside an amount equal to that share and hold it on a separate trust absolutely for the beneficiary - hence the beneficiary had “an unpaid present entitlement” - UPE.

FCT v Bendel

- ▶ Division 7A “expands the operation of section 44(1) of the ITAA 1936 by treating certain transactions between a private company and its shareholder or associate as a payment of a dividend by the company to the shareholder or associate -

Only to the extent to which the company has a distributable surplus.

- ▶ The kinds of transactions treated as the payment of dividends are identified in section 109B of the ITAA1936 as including:
 - (b) the loan of amounts by the company to a shareholder or shareholder’s associate (ss 109D and 109E).

FCT v Bendel

- ▶ The word loan is defined in very broad terms to include:
- ▶ (a) an advance of money;
- ▶ (b) a provision of credit or any other form of financial accommodation;
- ▶ (c) a payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an express or implied obligation to repay the amount; and
- ▶ (d) a transaction (whatever its terms or form) which in substance effects a loan of money.

FCT v Bendel

- ▶ Held:
- ▶ A “loan” for the purpose of s 109D(3) requires a transaction which creates an obligation to repay an amount or which in substance effects an obligation to repay. The creation of an obligation to pay an amount is not sufficient.
- ▶ Ordinarily the relationship between beneficiary and trustee is distinguishable from the legal relationship between debtor and creditor. However, the equitable relationship of trustee and beneficiary can be overlayed with the legal relationship of debtor and creditor.
- ▶ However, section 109D(3) requires more than the existence of a debtor-creditor relationship. It requires an obligation to repay and not merely an obligation to pay.

FCT v Bendel

- ▶ The Commissioner contended before the Tribunal that the non-exercise by the corporate beneficiary of its right to call for payment of its present entitlement amounted to the provision of financial accommodation. The Commissioner contended that the beneficiary had consented or acquiesced to the Trustee not paying the present entitlement by making a decision to refrain from calling for payment.
- ▶ However, the consensual arrangement relied upon by the Commissioner did not involve the payment of a sum by or at the direction of the beneficiary that was required to be repaid.
- ▶ It followed that section 109D is not satisfied even though a debtor-creditor relationship was created by the trustee resolution and the entry in the trust accounts - there was no loan or creation of an obligation to repay an amount as opposed to an obligation to pay.

FCT v Bendel

- ▶ Note the serious risk of section 100A - see
 - ▶ The decision of the Full Federal Court in FCT v Guardian AIT [2023] FCAFC 3.
 - ▶ The decision of the Federal Court in BBlood Enterprises Pty Ltd v FCT [2022] FCA 1112.
 - ▶ The Commissioner's public statements in TR 2022/4 & PCG 2022/2 on how the ATO will use its resources to attack reimbursement agreements involving trust distributions.

Hitchcock v Pratt Group Holdings Pty Ltd

- ▶ The applications before the court related to what is colloquially known as a “pleading dispute”, in which the Plaintiff sought leave to file a proposed further amended statement of claim and proposed amended reply, while the Trustee sought to have parts of the Plaintiff’s amended statement of claim and reply struck out.
- ▶ The Plaintiff, aged 27, is a child of the late Richard Pratt, who died on 28 April 2009, and Shari-Lea Hitchcock. The first defendant is the trustee of the Pratt Family Holdings Trust. The second, third and fourth defendants (respectively, Anthony Pratt, Heloise Waislitz and Fiona Geminder) are the children of Mr Pratt and Jeanne Pratt. They are, in ordinary parlance, half-siblings of the Plaintiff.

Hitchcock v Pratt Group Holdings Pty Ltd

- ▶ The Plaintiff claims that she is a discretionary object of the Trust. That is despite the fact that, over two decades ago, the Trustee purported to enter into a deed by which it exercised a power to exclude the Plaintiff as a General Beneficiary of the Trust - that deed of exclusion is contested.
- ▶ In her amended statement of claim, the Plaintiff seeks the following by way of final relief: (i) declarations that she is a discretionary object of the Trust and that the exclusion deed is void; (ii) an order that the Trustee provide copies of certain trust documents, including the trust deed(s), financial reports and general ledgers of the Trust, bank statements of the Trustee and documents recording distributions from the Trust, or, alternatively, an account in common form be taken and rendered to the Plaintiff; and iii) equitable compensation (arising from alleged losses of potential distributions from the Trust).

Hitchcock v Pratt Group Holdings Pty Ltd

- ▶ Held - the allegations of fraud or dishonesty should be struck out - partly because of the finding that the equitable compensation claim is not arguable and partly a consequence of the finding that the alleged breaches to which the allegations relate cannot give rise to an inference of fraud or dishonesty.
- ▶ Despite the Plaintiff's allegations that the Trustee engaged in dishonest conduct - the Plaintiff has not sought relief that would have the effect of either requiring the Trustee to re-exercise its discretion in respect of the relevant years, or an order to have the Trustee removed and a new trustee re-exercise that discretion.
- ▶ Whilst the Court decided that the “substantial” relief sought by the Plaintiff through equitable compensation cannot be pursued, the remaining declaratory and other relief sought would still provide some forensic utility going forward.

Hitchcock v Pratt Group Holdings Pty Ltd

- ▶ In dealing with the pleadings, the Court considered a number of principles including:
- ▶ Pleading fraud and dishonesty - paragraphs 115 and following
- ▶ The proper purpose rule (or fraud on power) and the power of exclusion
 - ▶ What is the proper purpose rule - Paragraphs 165 and following
 - ▶ Purpose and motive distinguished - Paragraphs 178 and following
 - ▶ Good faith and proper purpose distinguished - Paragraphs 180 and following
 - ▶ Purpose of the power of exclusion - Paragraphs 183 and following
- ▶ Whether the Plaintiff's alternative case that the Trustee by its conduct has acknowledged or affirmed the Plaintiff's status as a General Beneficiary, or waived its right to rely upon the purported exclusion, arguable?

McPherson Settlement

- ▶ By a Deed of Settlement dated 27 June 1972, Barbara and David Hamer, now deceased, caused a Trust to be established. Ethel McPherson settled \$100 on the trustee to be held on trust for beneficiaries including Barbara and David Hamer and their children and remoter issue.
- ▶ Shares in a family investment company, Barham Pty Ltd, were also transferred to the Trust and over time the assets of the Trust grew to around \$20 million.
- ▶ The Trust was established on the advice of accountants, and in response to concerns about ongoing management of the family financial affairs. Barbara Hamer had been concerned to ensure that there were appropriate financial arrangements in place, after experiencing the unexpected death of her father William, Ethel McPherson's husband, at a time when he had not made plans for the family's future business and financial position.

McPherson Settlement

- ▶ The current Trustee, David Berry, applied for orders pursuant to s 63A, alternatively s 63 of the Trustee Act 1958 (Vic) approving the extension of the vesting date of the Trust, which was 30 June 2030 at the latest.
- ▶ The Deed contained no general power of amendment, so that the Trustee is unable to make the changes sought without authorisation of the Court.
- ▶ Approval was also sought for the following changes to the Deed (a) widening the class of beneficiaries under the Trust to include companies and trusts; (b) to give the Trustee a power to choose the method for determining the 'net income' and 'income' of the Trust; (c) to give the Trustee a power to stream the income of the trust; (d) to give the Trustee the power to hold amounts of income or capital that have been allocated to beneficiaries on sub-trust, separately from other Trust assets; and (e) to insert a general power of amendment.

McPherson Settlement

- ▶ The nature of the amendments for which approval was sought raised the following matters for consideration:
- ▶ (a) the principles to be considered in determining whether it is appropriate to exercise powers under s 63A of the Trustee Act;
- ▶ (b) whether an extension of the vesting date of the Trust is for the benefit of the Relevant Beneficiaries, and fair and proper;
- ▶ (c) the appropriate form of any substituted vesting date clause and perpetuity period, having regard to whether the Court has power to approve a change from a common law perpetuity period to a set number of years, having regard to s 5 of the Perpetuities and Accumulations Act 1958 (Vic);

McPherson Settlement

- ▶ (d) whether it is to the benefit of the Relevant Beneficiaries, and fair and proper, to amend the Deed to widen the class of beneficiaries to include companies and trusts in which beneficiaries have an interest, where existing beneficiaries are limited to natural persons who are descendants of the settlor's daughter and husband;
- ▶ (e) whether the broadening of the beneficiary class would constitute a resettlement of the Trust rather than a variation, or would destroy the 'substratum' of the Trust;
- ▶ (f) whether it is appropriate to approve variations to the Trust which are primarily or solely directed to avoiding adverse tax consequences or achieving advantageous tax outcomes for the Trust or beneficiaries;

McPherson Settlement

- ▶ (g) whether it is appropriate to approve new powers in the Trustee enabling the streaming of income and capital of different classes, and allocation of expenses or outgoings against different classes of income or capital, to define 'income' and 'net income' of the Trust, and to include a clause in the Deed enabling the Trustee to set aside amounts allocated in favour of particular beneficiaries, to be held on a sub-trust;
- ▶ (h) whether it is appropriate to include a new general power of amendment in the Deed; and
- ▶ (i) whether if the amendments cannot be authorised by the Court pursuant to s 63A of the Trustee Act, they could be authorised pursuant to s 63 of the Act.

McPherson Settlement

- ▶ The Court held that it is appropriate to approve the proposed arrangement insofar as it seeks amendments to the Deed:
 - (i) to extend the vesting date and provide a perpetuity period of 80 years, and (ii) to introduce the amendments relating to streaming powers of the Trustee to streaming of income, and holding property on sub-trust, and defining income and net income.
- ▶ The Court (i) approved the amendment of the definition of ‘beneficiary’, subject to certain qualifications as to the wording of the amendment; But (ii) concluded that it is not open to approve the introduction of a general power of amendment of the Deed.