



TRUSTEES – A TIMELY REMINDER OF WHAT IS EXPECTED

A recent decision in the Victorian Supreme Court of Appeal, *Owies v JJE Nominees Pty Ltd [2022] VSCA 142 (Owies case)*, has cast a new light on how much discretion a trustee actually has under a discretionary trust deed.

A trustee has a fiduciary duty to all of the beneficiaries of the trust, and, in *Owies case*, the Court confirmed that trustees cannot simply do as they please, they “must give real and genuine consideration” to all the relevant circumstances when exercising their discretion.

In *Owies case*, there had been a marriage breakdown and one side of the family was excluded from distributions of the family trust by the other side of the family, who controlled the trustee. It was held that by excluding one side of the family without giving much thought to their circumstances, the trustee had failed to give due consideration to the circumstances of all of the beneficiaries and had therefore breached its fiduciary duties. The Court held that the distributions made by the trust were voidable and because of the history of breaches and the lack of trust between the beneficiaries, the Court removed the trustee and appointed an independent trustee.

In another recent decision, *Goulopoulos v FC of T [2022] AATA (Goulopoulos case)*, the Administrative Appeals Tribunal excluded an individual from being a director of the corporate trustee of a self-managed superannuation fund (**SMSF**).

The individual was found to have contravened a number of provisions of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)* and given the severity of the breaches, the Court determined that the individual should be disqualified from holding office in a corporate trustee.

These two cases illustrate the power of the courts to remove trustees where those trustees are not doing the right thing. In *Owies case*, it was a breach of the trustee’s fiduciary duties to the beneficiaries and in the *Goulopoulos case*, it was a breach of a number of obligations under the *SIS Act*, which proved too much for the Court

Both cases raise the question of where to draw the line. Most discretionary trusts give the trustee absolute discretion in exercising its discretionary powers and, in many cases, the trustee is not required to give any reasons for its decisions. Most family trusts also have an extensive list of beneficiaries, so does the trustee have to consider the circumstances of every beneficiary before exercising its discretion? *Owies case* was dealing with distributions to primary beneficiaries and their parents, so perhaps it is only the circumstances of the primary beneficiaries and their immediate family that needs to be considered.



In broad terms, the Court's role is to protect the interests of the beneficiaries and the assets of the trust, to ensure that the trustee administers the trust in an efficient and satisfactory manner and to ensure that the trustee exercises its powers in good faith and in a responsible and reasonable manner.

In the Goulopoulos case, there had been a number of serious breaches of the SIS Act so it was, perhaps, not surprising that the individual was disqualified from holding office, but it does raise the question of what breaches are not acceptable and how many breaches does it take to be disqualified. The principles applicable to a discretionary trustee are also applicable to the trustee of a SMSF. Accordingly, if a trustee (or director of a corporate trustee) is acting in a manner which puts the assets of the SMSF at risk or is not administering the trust in accordance with the SIS Act rules, then that trustee can expect to be removed from his or her position. Inadvertent mistakes or breaches which are easily fixed might be acceptable but a regular disregard for the SIS Act rules will not be tolerated.

At a time when family break-down is not uncommon and blended families are not unusual, Owies case is a good example of what can go wrong with family trusts and how the Court will deal with situations which would appear to favour some members of the family over others. It is therefore recommended that in any property agreement pursuant to a divorce, it is made clear as to whose benefit the family trust is to be administered in the future. If it is stated that the trust should be administered for the benefit of all the primary beneficiaries, there will need to be good grounds for the trustee not to do so.

There is concern that there are too many SMSFs which are not being administered in a proper manner. The Government wants this to change, so it is likely that there will a firmer approach to breaches of the SIS Act and it is highly likely that more individuals will be excluded from operating their own superannuation funds.

The role of a trustee (like that of a director of a company) is not passive in nature. The individual trustees or directors of a trustee company must understand their fiduciary duties and take an active role in the administration of the trust's affairs and in the exercise of the trustee's powers under the trust deed. Favouring one set of beneficiaries without having regard to the circumstances of other beneficiaries or administering the trust fund in an irresponsible manner may not only result in that individual being removed from his or her position as a trustee but could also result in a claim for damages for a breach of that trustee's fiduciary duties and/or penalties under a relevant statute.

These cases are a timely reminder of the need to consider for whose benefit and for what purpose the trust has been established. A trustee needs to separate the administration of the trust from any long-standing family disputes and must not treat a superannuation fund as his or her own private bank account.

For further information or assistance contact Murfett Legal on [+61 8 9388 3100](tel:+61893883100).

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