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Trust Law Cases – June 2022

With:

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Information provided is general in nature; precise application depends on specific circumstances

Mantovani v Vanta *(No 2) – [2021] VSC 771*



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- Mantovani Family Trust established in 1976 (**Family Trust**).
- Vanta Pty Ltd incorporated on 19 May 1976 (**Trustee**).
- Trustee controlled by various members of the Mantovani family.
- Current directors of Trustee are Nicola and Salvatore.
- Teresa and Carmine are former directors of Trustee.
- Teresa's four children: Nicola, Salvatore, Carmine and Giovanni (oldest to youngest).

Mantovani v Vanta (No 2) – [2021] VSC 771



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- Original deed cannot be located with only the Schedule able to be found.
- Case revolved around dispute of the plaintiff (Giovanni) challenging his entitlement under the terms of the Family Trust.
- Over lifetime of Teresa and her husband, various properties were acquired and Giovanni (plaintiff) purported that he was told by Teresa that one of the properties would be given to him on Teresa's death (and therefore, Giovanni covered the expenses since 1979).
- Defendants in this case argued that Giovanni did not commence paying rates until the mid-1990s.
- Legal title to the 'promised property' was purportedly held by the Family Trust rather than Teresa (and therefore could not be gifted under Teresa's Will).

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- Despite no trust deed being able to be located, financial statements and tax returns for the Family Trust continued to be prepared.
- Financial statements showed distributions of the Family Trust favouring the siblings acting as director of the Trustee.
- No advisor retained fully executed copy of the original trust deed.

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- **Q1:** Is the trust deed lost?
- If yes to Q1, **Q2:** Can secondary evidence be relied upon to prove the existence and contents of the Deed?
- If no to Q2, **Q3:** Can the presumption of regularity be relied upon to save the Family Trust?
- If no to both Q2 and Q3, **Q4:** Does the Family Trust fail for uncertainty?
- If yes to Q4, **Q5:** Should a declaration be made that the Trustee holds the trust property on resulting trust for Teresa's estate?
- If yes to Q5, **Q6:** Should an order for the taking of accounts and payments of monies owed to Teresa's estate be made?

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- **Is the trust deed lost?**
 - Yes as all reasonable searches were undertaken without success.

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- Can secondary evidence be relied upon to prove the existence and contents of the Deed?
 - Quoting *Maks v Maks* (1986) 6 NSWLR 34: *I am of opinion that where the original writing is not produced and secondary evidence is relied on, **there must be clear and convincing proof not only of the existence, but also of the relevant contents, of the writing, of the same order as the proof required to establish an entitlement to the rectification of a written instrument ... the two classes of case being to my mind in relevant respects analogous.***
 - Referencing *Chase v Chase* [2020] NSWSC 1689 – text of missing document needs to be reproduced in full or sufficient corroborating evidence
 - Accepted secondary evidence from solicitor who authored trust deed and deposed terms were identical to a standard precedent, a copy of which was available

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- **Can secondary evidence be relied upon to prove the existence and contents of the Deed?**
 - Accepted where evidence that identical trusts had been established for siblings and mutual witness available to depose recollection.
 - Accepted photocopy where actions made pursuant to terms.
 - Accepted unexecuted copy in conjunction with evidence of continuous administration of the trust on terms set out in the copy
 - In this case – only proof available was Schedule and tax records/financial statements. No evidence of terms of trust identifiable as Schedule of the trust deed is insufficient to provide proof of the contents of the deed.
 - Schedule does not describe whether trust is fixed or discretionary.
 - Schedule does not provide basis in which distributions are to be made.
 - Schedule does not provide broader detail as to how the Trustee is to manage and administer the trust property.

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- **Can the presumption of regularity be relied upon to save the Family Trust?**
 - Possible where presumption relates to question of compliance with formal requirements rather than a substantive issue.
 - That is, presumption could apply in relation to lost deeds where questions arise as to formal adherence to requirements and due execution, **but expressly rejected in cases where the substantive content of a deed was in issue.**

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- **Does the Family Trust fail for uncertainty?**
 - Yes
 - Noted that majority of lost trust deed cases arise due to trustees diligently and proactively seeking Court input (as required as part of their obligations).
 - Noted disregard of Trustee in administering the Family Trust.
 - Defendants were also difficult in providing information of the Family Trust until ordered to do so.
 - Given paramountcy of a trustee's duty to ascertain and strictly adhere to the terms of a trust...[*Trustee*] has acted in breach of trust.
 - Could not allow Family Trust to continue, else it be seen as sanctioning further breaches.

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- **Should a declaration that the Trustee holds the trust property on resulting trust for Teresa's estate be made**
 - Failed trust usually results in assets of the trust being held by the settlor.
 - 'the resulting trust arises by operation of law, as an 'automatic re-direction of the failed express trust to return any remaining trust property to the provider'.
 - Although Teresa's husband acted as settlor, Teresa settled/transferred the vast amount of property to the Trustee.
 - 'As a provider of the trust property, it is Teresa in whom the equitable interest vests and in whose favour the resulting trust has arisen'.
- **Should an order for the taking of accounts and payment of amounts found to be due to Teresa's estate be made?**
 - Yes but limit for the 6 years prior to proceeding was instituted

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- Takeaways:
 - Trust is only as good as the deed – older deeds should be reviewed carefully
 - Newer deeds should still be executed correctly, else a Court order still be required to be sought
 - Incorrect witness
 - Not executing deed
 - Beware backdating
 - Searches can include advisors, bankers, Title Office and other persons who may have needed to have the trust deed disclosed to

Cihan v Cihan – [2022] NSWSC 538



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- Cihan Family Trust established in 1997 by Mr and Mrs Cihan, with Mr Cihan as Trustee.
- Mr and Mrs Cihan had two sons, Kadir (Sam) and Memduh.
- Kadir had four children: Havva, Leyla, Mehmet and Tuba.
- Memduh had two children: Juneyt and Aylin.
- Trust assets comprised of \$40m of property.
- Trust deed included the usual terms.
- A Nominator role, however existed, with gave the power to replace the Trustee. The Nominator named was Kadir.

Cihan v Cihan – [2022] NSWSC 538



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- Mr Cihan is the plaintiff with Kadir as the defendant.
- Parties are in dispute as to the identity of the Trustee and the Nominator.
- Mr Cihan contends that changes were made such that Kadir was no longer the Nominator.
- Kadir contends that Mr Cihan was replaced with Cihan Property Pty Limited (**CPPL**) as trustee.
- Note that Mr Cihan initially sought to claim that the office of Nominator in the trust deed was ineffective or unintended but such a claim was abandoned prior to final submission.
- Focus related to a number of purported deeds signed.

Cihan v Cihan – [2022] NSWSC 538



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- **The Third Deed:**
 - Signed in March 2018
 - Mr Cihan purported to exercise his power as Trustee to replace Kadir with Memduh as Nominator.
 - Kadir was named as a party in the deed but refused to sign it.
- **The Fourth Deed;**
 - Signed around May/June 2018
 - Kadir signed a document to replace Mr Cihan as Trustee with CPPL.

Cihan v Cihan – [2022] NSWSC 538



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- Lots of family history including Mr Cihan being unable to read or speak English.
- Relationship between Mr Cihan and sons had difficulties, including Memduh's relationship with a Romanian woman (later married and then divorced).
- Relationship between Mr Cihan and Memduh improved just after the establishment of the Trust.
- Noted lawyer who prepared deed was a junior lawyer with the deed including various typographical errors (provisions repeated and numbering of items in the Schedule not lining up with references in the operative clauses).
- No time spent by lawyer explaining terms and effect of the Deed, nor point out Nominator power – argued by Mr Cihan (disputed by Kadir)

Cihan v Cihan – [2022] NSWSC 538



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- Noted desire for Trust establishment was to minimise Mr Cihan's tax.
- In 2007/2008, relations between Mr Cihan and Memduh broke down completely for 10 years
- Due to the estrangement a deed was prepared to remove Memduh as a designated beneficiary and add Mrs Cihan and Kadir's daughter.
 - Additional amendments sought to appoint an alternative trustee on the death of Mr Cihan
 - Such additional change was ineffective as it was the Nominator who had the ability to do so
 - Noted a lawyer assist with such preparation of the second deed with the Court noting that the Nominator consent was not required to vary the deed, even though the deed was drafted with Nominator consent.

Cihan v Cihan – [2022] NSWSC 538



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- Mr Cihan fell out with Kadir in 2012.
- By 2017 Mr Cihan reconciled with Memduh and the Third Deed was prepared (at the request of Mr Cihan, via Memduh).
- Third Deed also purported to add a clause acting as a balancing adjustment relating to a transfer of property made by Mr Cihan for the benefit of Kadir.
- Court noted that Nominator consent was not required to amend the terms of the Trust in the Third Deed, despite Nominator being listed as a party.
- Soon after, Kadir engaged lawyers to prepare the Fourth Deed.
- It was also noted that a change of trustee without bank consent was an event of default of the facility.

Cihan v Cihan – [2022] NSWSC 538



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- Steps were taken to obtain bank consent, but due to the dispute, steps were taken by the bank to freeze the trust's account.
- Further comments about the registration requirements of change of trustees as required in New South Wales were noted in the case.
- Various witnesses were then called to bring evidence as to the various deeds prepared and signed

Cihan v Cihan – [2022] NSWSC 538



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- **Validity of Third Deed**

- Nominator consent required to change Nominator?
 - Court produced clause relating to Nominator pointing out typos which included:
 - ‘*Schedul,6,*’
 - ‘*after excluding the person*’
 - Referencing Schedule 6 and Schedule 7, when it should have been a reference to Schedule 5
 - Trust deed did not require Nominator consent to change Nominator role
- Considered cases of *Jenkins v Ellett and Kearns* which argued doing so would destroy the ‘substratum of the trust’.
- Took the black law reading of the deed noting the trust deed did not require the Nominator to consent.
- Issue was that the drafting of the Third Deed was expressed such that it required Kadir, as Nominator, to sign to execute the operative provisions
- Court considered what would happen if Third Deed drafted differently.

Cihan v Cihan – [2022] NSWSC 538



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- **Validity of Fourth Deed**

- Appropriate exercise power of the Nominator
- Question was whether the Nominator was fraudulent to exercise power in the way he did.
- Noted *Baba v Sheehan*: *In the context of a modern discretionary trust, his Honour stated that use by an appointor of a power to replace the trustee so as to maintain or exercise control over the trust will not necessarily be inconsistent with the purpose for which the power was conferred*
- Further, no suggestion of sham I this case.
- Noted emails between parties admitted as consideration in determining purpose of exercising power
- Although power exercise appropriately, Fourth Deed not effected as it was not registered and serviced to the Trustee (*as how could the current Trustee know the Nominator exercise their power to remove the current Trustee*).

Cihan v Cihan – [2022] NSWSC 538



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- **Validity of Sixth Deed**

- Signed as a deed poll by Mr Cihan appointing him and Memduh as joint Nominators with Kadir (decisions to be made by simple majority).
- No Nominator consent required, and either way, document signed by Mr Cihan solely

Cihan v Cihan – [2022] NSWSC 538



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- Takeaways:
 - Structure any Appointor/Principal/Guardian role correctly
 - Review such roles
 - Succession provisions important
 - Interpreting terms of deed 'can be an art' and not easy
 - Stay away from family disputes!
 - Consideration goes further than the contents of the deed (i.e. is there fraud?)
 - Making changes to trusts can be complex

Guardian AIT- [2021]

FCA 1619



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- Section 100A case at the end of 2021.
- In 2012 and 2013 income years:
 - Trust made corporate beneficiary presently entitled to income (recorded as a UPE) - \$2.6m.
 - Corporate beneficiary paid income tax by drawing down on the UPE - ~\$800K.
 - Corporate beneficiary would declare a fully franked dividend to its shareholder (also the Trust) and have the UPE offset against the dividend - \$1.8m.
 - The amount was then distributed to a non-resident beneficiary of the trust.
- In 2014, a Division 7A loan was entered into.
- Section 100A assessments made for 2012, 2013 and 2014 income years.

Guardian AIT– [2021] FCA 1619



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- ATO arguing that a reimbursement arrangement was entered into as the Trust made the corporate beneficiary entitled on the basis that the foreign beneficiary would ultimately benefit from the income.
- Had the income gone to the foreign beneficiary, he would have been liable to pay tax at 47% on the trust distribution
- There were strong asset protection and risk minimisation tones that drove the decisions of the foreign beneficiary, and hence any application of section 100A amounted to ordinary family and commercial dealings
- **Spoiler** – Logan J disagreed with the ATO.

Guardian AIT– [2021] FCA 1619



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- Was there an agreement that the corporate beneficiary be made presently entitled to the Trust income and the foreign beneficiary receive the benefit?
- Was the agreement in the course of ordinary family or commercial dealings and thereby excluded from 100A?
- Was there a purpose to reduce or eliminate the foreign beneficiary's tax liability?

Guardian AIT– [2021] FCA 1619



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- Was there an agreement that the corporate beneficiary be made presently entitled to the Trust income and the foreign beneficiary receive the benefit?
 - An agreement must predate the present entitlement of a beneficiary, such that there is a connection between the agreement and the present entitlement. The agreement must also provide for the payment of money or other benefit to another person.
 - A connection based on legal or factual hypotheticals (a hypothetical contingency) is not sufficient to create a reimbursement agreement.
 - Only the trustee and the other person need to be parties to the agreement (the presently entitled beneficiary need not be).
 - An agreement does not need to be legally enforceable, and may in fact be quite informal if it includes the requisite features.

Guardian AIT– [2021]

FCA 1619



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- Was there an agreement that the corporate beneficiary be made presently entitled to the Trust income and the foreign beneficiary receive the benefit?
 - Foreign beneficiary (Mr Springer) embarking on a transition to retirement in June 2012
 - He wanted to ‘simplify his life’
 - Historical trading activities noted as a risk from an asset protection perspective (due to a business not being successful).
 - Wanted to minimise risk of trading carrying over to retirement.
 - Evidence of Mr Springer ‘spontaneous, unpretentious, compelling candour’.
 - Introduction of corporate beneficiary explained by asset protection driver.
 - No contemporaneous document evidencing that the corporate beneficiary was to be used as a vehicle for streaming dividend payments.
 - New corporate beneficiary which had never traded and never would achieved desire of risk minimisation.

Guardian AIT– [2021] FCA 1619



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- Was there an agreement that the corporate beneficiary be made presently entitled to the Trust income and the foreign beneficiary receive the benefit?
 - Corporate beneficiary also offered advantages in even Mr Springer had a fractious relationship with his sons and wife.
 - Noted that use of corporate beneficiary with a discretionary trust *'does not necessarily bear the stamp of tax avoidance'*.
 - In this case, the incorporation of the corporate beneficiary was nothing more than an ordinary family or commercial dealing.
 - Judge accepted corporate beneficiary was incorporated for wealth accumulation, and the facts supported that claim (as the assets increased year on year).
 - **On consideration of the above, no agreement could have been determined to have been made in June 2012.**
 - NB: Even if there was such an agreement, noted agreement did not provide for money or property to be paid to Mr Springer in June 2012.

Guardian AIT– [2021] FCA 1619



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- Was the agreement in the course of ordinary family or commercial dealings and thereby excluded from 100A?
 - The adjective ordinary is used in contradistinction from dealings that are extraordinary, and refers to a dealing which contains no element of artificiality, instead occurring naturally.
 - The introduction of a corporate beneficiary for risk minimisation may be nothing more than an ordinary family or commercial dealing in circumstances where it is done for the familial and commercial advantages of such flexibility (see earlier note regarding use of corporate beneficiary and discretionary trust).

Guardian AIT– [2021]

FCA 1619



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- Wait and see outcome of any appeal.
- NB ATO comments on 100A not apply on a retrospective basis.
 - *“There’s a lot of safeguards in 100A that take out arrangements that shouldn’t be within our scope and it shouldn’t be applied to absolutely everything,”*
 - *“The key message is that we are focusing on the rules and the law. We should look at the green zone because that’s where the majority of taxpayers are actually going to be”*
- Case looked at advice of accountant, so if intending to rely on case, ensure your systems are set up appropriately

Rinehart v Rinhart – [2022] NSWSC 66



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- Ms Biana Rinehart sued to remove Ms Gina Rinehart in 2011 as trustee of the Hope Margaret Hancock Trust.
- Gina resigned as trustee in 2015 before the application to remove her could be determined.
- Court made orders appointing Bianca as the new trustee, vesting in her the assets and property of the trust, and requiring all documents of the trust in Gina's possession, custody or power to be produced to Bianca within 28 days.
- Gina opposed production of various documents sought, claiming such documents were not documents of the trust and that Bianca's application was an abuse of process. Although rejected in first instance, the Court initially accepted her fallback argument that to produce the documents would involve a breach of her duties as director of one of the companies which the trust holds shares.

Rinehart v Rinhart – [2022] NSWSC 66



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- Outgoing trustee must deliver all trust documents to the new trustee.
- Documents that the trust jointly owns are still trust documents to be delivered.
- Former trustees have a duty to co-operate and make correspondence available promptly to the incoming trustee (unless they can show why they are excused from the obligation).
- Potential misuse of trust documents is not a reason to withhold the production of documents.
- New trustee is entitled to review trust documents and investigate any breach of trust.

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