



LEGACY LAW

Protecting the assets in your family tree

## Article – Caveat Auditor

As lawyers in the area of wealth, we always read cases for interesting legal issues that affect us and our clients. However, two recent cases resonate for the people who refer clients to us.

They are interesting because they show the risk to people who are not even giving the advice arising where investments may go down as well as up. An Irish expression is, “it could have happened to a bishop” and, as we now know, sometimes it could have been done by a Bishop. To this, we can now add “it could have happened to an auditor”.

The first case is *Ryan Wealth Holdings Pty Ltd v Baumgartner [2018] NSWSC 1502* which arose from a divorcee, Ms Crittle, entrusting her \$7m property settlement with a Mr Moylan from Charlestown near Newcastle. She met Mr Moylan because her lawyer Mr Turnbull of Turnbull Hill Lawyers had offices on the same floor as him and introduced her. You can see how this can happen but it is rarely in the client’s best interests.

Audits are sometimes considered high level reviews of other people’s advice and decisions but when things go bad lawyers will look to who to blame. The person who has to pay is not always the bad guy. In this case, the investments were worth nothing and most of the key companies were in liquidation, the advisers Mr Moylan and Mr Hill were bankrupts and professional indemnity policies had lapsed, so they initiated proceedings against their auditor Baumgartner Partners.

Baumgartner Partners undertook audits for the fund making the investments for the financial years ending 2007 to 2009. Their problem was that the investment strategy for those years was bland to the point of meaningless. It said the strategy for each investment class was “a normal investment range for each type of investment shall be: ... 0% to 100%”. We act for many excellent investment managers and they all put a huge amount of effort and intellectual capital into the design of their asset allocation. It is considered the holy grail. So, when there is a bad strategy, it looks terrible.

The auditors claimed Ms Crittle was only entitled to an award of nominal damages of \$300 in total for the admitted breach of the retainers. The Court found the client Ms Crittle 10% responsible and the auditors 90% responsible in this case. 90% amounted to \$2,034,126 plus costs. Of that the Court found that Moylan Business Solutions Pty Limited should be responsible for 20%. Still, a lot of money no matter who is counting it!

The lesson is to be very careful who you introduce to clients and to be very careful in your retainer with clients.

In another recent case, the NSW Court of Appeal in the case of *Cam & Bear Pty Ltd v McGoldrick [2018] NSWCA 110*, was asked to consider where the actions of an SMSF

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auditor, John McGoldrick, caused the losses suffered by an SMSF. The trustee of the SMSF, Cam & Bear, was established for Dr Lance Bear and his wife,

Ms Jennifer Campbell. Dr Bear and Ms Campbell were directors of the trustee for the SMSF.

Some years after the fund was established, a close friend of Dr Bear, Mr Anthony Lewis, who conducted a finance business, offered to manage the fund's investments. Sadly, this was not Dr Bear's best decision and the Court found, "The damage was, as made clear in the judgment on liability, caused by the conduct of LSL Holdings, Mr Tony Lewis and Databank (if they be different)."

We applaud funny names like "Cam & Bear" mainly because we love cheese. However, no-one was laughing except perhaps the lawyers after the initial seven day hearing and then the appeal.

The main issue was whether the auditor should have looked behind a description in the accounts of "cash – LS Holdings P/L" to see whether it was cash or cash equivalents. LS Holdings P/L was of course the vehicle for Mr Lewis. The poor Doctor had to give evidence as to his inferior understanding of investments and even cash. These were more correctly loans to that company but not necessarily recoverable.

Again, 10% of the loss was attributable to the trustee and 90% to the auditor but arguably Mr Lewis was more to blame.

We may complain that the bad guys got away again but these decisions are not surprising to those us who read the cases and act in them. The practical solution is to have advisers that will be around to assist if things do not go to plan.

We know that most investment strategies for SMSFs are vague and not prepared by specialists in asset allocation. That is a form of madness and, in our experience, people who set up Self-Managed Superannuation Funds sometimes suffer from taking their own advice or that of friends. We commend professional advisers and can give names if you contact us directly.

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