Redoing the deed

SMSF Magazine, Winter 2009 at p. 28

legal

REDOING THE DEED

SMSFs have to be established with a trust deed, but the funds are always evolving and that means the deed may need to change. **David Garde** examines what is required to amend a trust deed.

Establishment: why by deed?
In practice, SMSFs are almost exclusively established with a trust deed, which contains or effects the governing rules of the fund. The other most likely governance of a superannuation fund is through form of acts of parliament, but these rarely commence funds other than government schemes.

Retaining the provable

reduces prospects that the terms may be construed as a sham or a misunderstanding. In the case of an SMSF, a deed can demonstrate clear intent to establish the SMSF, to appoint a trustee and establish governing rules in accordance with the act.

Amendments to SMSF trust deeds
Incongruously, many older trust deeds provide that they can be amended by deed or by written, or even oral, resolutions. Trust deeds cited in the decisions of *LGSS v Egan (2002)* and *Dunstour v Irving (2000)* show that provision to amend the trust deed of an SMSF, including the governing rules with an oral resolution, has been commonplace.

Introducing that ability is irreconcilable with the effort to establish clear intent and the governing rules of the fund with a deed on establishment.

The ability to vary a deed with an oral declaration,

Establishment - why by deed?

In practice self-managed superannuation funds (SMSFs) are almost exclusively established with a trust deed which contains or effects the governing rules of the fund. The other most likely governance of a superannuation fund are Acts of Parliament but these rarely commence funds other than government schemes.

Still "governing rules" are expansively defined in section 10 of the *Superannuation Industry (Supervision) Act (C'th) 1993* (the Act) as follows:

> "governing rules" , in relation to a fund, scheme or trust, means:
> (a) any rules contained in a trust instrument, other document or legislation, or combination of them; or
> (b) any unwritten rules;
> governing the establishment or operation of the fund, scheme or trust.

It is apparent under section 19 of the Act that a regulated fund must have a trustee and must have governing rules but it doesn't follow that governing rules of a SMSF must appear in a trust deed. A deed "under seal", such as a trust deed, is a solemn document requiring attesting witnesses.

Under State law a deed is deemed to be sealed if the document is correctly signed and attested by witnesses and the document states that it is a deed or if it is expressed to be sealed (e.g., section 38 of the *Conveyancing Act (NSW) 1919* and section 73A of the *Property Law Act (Vic.) 1958)*. But just as governing rules of a SMSF need not be contained in or effected by a deed, a trust generally need not begin with a trust deed. Indeed trusts were developed by courts of Equity to prevent a legal owner treating the property as his or hers beneficially in various situations despite the lack of formality of the trust instrument, if any, on which the beneficiaries rely.

So why are the terms or "governing rules" of declared trusts such as SMSFs set out in trust deeds as a matter of practice? Creators of trusts wish to ensure that their trust will be recognised. Courts readily recognise trusts created informally but courts may also decline to recognise trusts where evidence is lacking to prove the intended trust or where the intended trust has a fatal defect such as in *Jones v. Lock* (1865) LR 1 Ch App 25 and *Milroy v. Lord* [1861-73] All ER Rep 783, 7 LT 178.

The setting out of terms of a trust formally in a deed demonstrates seriousness of intent by declaration and reduces prospects that the terms may be construed as a sham or a misunderstanding. In the case of a SMSF, a deed can demonstrate clear intent to establish the SMSF, to appoint a trustee and establish governing rules in accordance with the Act.

Amendments to SMSF trust deeds

Incongruously many older trust deeds provide that they can be amended by deed or by written, or even oral, resolutions. Trust deeds cited in the decisions of *LGSS v. Egan* (2002) NSWSC 1171, *Dunstone v. Irving* (2000) VSC 488, *NT96/409 and Commissioner of Taxation* (1998) AATA 895, *Re Bowmil Nominees Pty Ltd* (2004) NSWSC 161 and *D05-06\132* (2006) SCTA 21 show that provision to amend the trust deed of a SMSF including the governing rules with an oral resolution has been commonplace.

Introducing that ability is irreconcilable with the effort to establish clear intent and the governing rules of the fund with a deed on establishment.

The ability to vary a deed with an oral declaration, if it were to exist, is likely to be more mischievous than helpful. In the case of a dispute over a tax assessment, sub-paragraphs 14ZZK(b)(i) and 14ZZO(b)(i) of the *Taxation Administration Act (C'th) 1953* provide that the burden is on the taxpayer to show that an assessment is excessive in any review or appeal proceedings. Where the assessment turns on a supposed oral resolution then the trustee is poorly placed against the Commissioner to prove that the resolution was made.

On the other hand, in a SMSF dispute between family members, if an oral declaration could be effective it would be open to anyone interested in the SMSF to say that an oral resolution has been made which changes or alleviates their position, as it otherwise appears in the trust deed, and to have his or her claim tested on the balance of probabilities.

However given the recent NSW Supreme Court case of *ING Funds Management Ltd v ANZ Nominees Ltd; ING Funds Management Ltd v Professional Associations Superannuation Ltd* [2009] NSWSC 243 (3 April 2009) it is unlikely that that a mere oral or even a mere written resolution could be effective to vary a deed poll, which a SMSF trust deed indisputably would be. From para. 68, Barrett J. elaborates on the types of deeds and how they can be amended:

> 68 The status of the constitution as a deed poll says much about the way in which it is capable of being modified.
> 69 In *Chelsea and Walham Green Building Society v Armstrong* [1951] Ch 853, Vaisey J considered the difference between a deed inter partes and a deed not inter partes (which may or may not be a deed poll):
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> > "[T]he deed inter partes is essentially a private arrangement; whereas a deed not inter partes, and in particular a deed poll, is a matter of public record and is announced not to the whole world in the sense that everybody is concerned in it, but to the world who are concerned, or who are interested, in what is being done."

70 Vaisey J then quoted with approval a statement in the second edition (1928) of "Norton on Deeds" at 29:

> "A deed poll could always be sued on by any person with whom the covenant was made, and an indenture not inter partes is for this purpose a deed poll."

71 Classes of non-parties who typically derive rights under deeds poll are beneficiaries under a declaration of trust created by deed (see, for example, *Oakes v Commissioner of Stamp Duties (NSW)* [1954] AC 57) and creditors to whom a guarantee is extended by deed poll (an example is found in *Re A&K Holdings Pty Ltd* [1964] VR 257). An entitlement may be claimed under a deed poll by a person within the relevant class only upon satisfaction of any condition that the deed attaches to the entitlement: *Macdonald v Law Union Fire & Life Insurance Co* (1874) LR 9 QB 328....

It has perhaps been better understood that an agreement between parties for consideration entered into as a deed "inter partes" can only be altered by another deed. Barrett J. continues:

72 In the case of a deed inter partes - in essence, a deed embodying the contract of its parties - there can be no variation except by another deed. The common law rule was stated by Bosanquet J in West v Blakeway [1841] EngR 591; (1841) 2 Man & G 751; 133 ER 940 (at ER 949): a contract under seal cannot be varied by parol contract.

(A parol contract is a contract that is either oral or in writing not under seal.)

73 Tindal CJ (also at ER 949) referred to the maxim unumquodque ligamen dissolvitur, eodem ligamine quo et ligatur (or, as it appears in R H Kersley, "Broom's Legal Maxims", 10th edition (1939) at 592, nihil tam conveniens est naturali aequitati quam unumquodque dissolvi eo ligamine quo ligatum est: "nothing is so consonant to natural equity as that every contract should be dissolved by the means which rendered it binding"). The Lord Chief Justice then said:

> "But in the case of a covenant the whole matter is under the seal of the party; and the contract into which he has entered can be discharged only by an instrument of the same nature as that by which the contract was created."

74 The matter was put thus by S M Phillipps and A Amos in "A Treatise on the Law of Evidence", London, 1838, at 774:

> "Where, however, the parties have defined the terms by a writing under seal, (which must be taken to be made with great care and formality,) the policy of the law will not permit it to be altered by matter of a lower nature."

If a deed "inter partes" can only be altered effectively at law by another deed, is a deed poll, such as a SMSF trust deed, any different? Circumstances justifying an informal change to a matter of public record announced to the world concerned with it are not readily identifiable. Longstanding authority also indicates not; Barrett J.continues:

76 In the case of a deed poll or other deed not inter partes, the position must be the same, so that neither abrogation nor variation of the covenant (if possible at all) can be achieved except by another covenant created with the same "great care and

formality" and in the same way as that sought to be abolished or varied. In *Hougham v Sandys* [1827] EngR 871; (1837) 2 Sim 95; 57 ER 725, an appointment by deed poll of 20 June 1760 was held to be "null and inoperative" because the relevant power of appointment had been exercised again by deed poll of 14 April 1761 which expressly revoked the first. Taken together, the two deeds executed and delivered by the appointor produced a situation where the second superseded the first.

77 If a person has covenanted by deed poll in favour of a class in such a way that the members of the class for the time being are to have the continuing benefit of the covenant, any variation of the covenant, assuming that it may be made at all, must require the creation of a new covenant by like deed. The case might be viewed as one in which a new and different covenant in favour of the class (that is, the original covenant, as varied) replaces the original covenant.

Trustees who have attempted to amend a trust deed of a SMSF by a mere oral or a mere written resolution are thus in an awkward position for it is open to auditors, the Australian Taxation Office, members, banks or other parties concerned in the superannuation fund to claim that the resolution has not amended the trust deed. Whatever action, taken on the misplaced assumption that the oral or written resolution was effective to amend the deed, may, in fact, be unlawful and unauthorised under the terms of the unamended trust deed.

Depending on the power of amendment contained in the trust deed, and the timing of amendment it describes, there are often opportunities to validate amendments purportedly done in this manner with a belated deed.

Variation of the trustee

It can also easily be overlooked that the appointment, resignation or removal of a trustee of a SMSF commenced by a trust deed should also take effect by deed, for the same reasons and even if the trust deed does not explicitly say so; for the appointment, resignation or removal purports to alter the party or parties to the trust deed.

Where a SMSF has a corporate trustee and there is change in the directors of the trustee then this is not a change to the trust deed which needs to be documented by a deed for the corporate trustee continues as trustee and as a party to the trust deed.

When a change in the trustee of a SMSF occurs a series of formalities needs to be attended to, including making a notification to the Australian Taxation Office to comply with Regulation 11.07A in the Regulations to the Act within twenty-eight days of the change.

Which deeds of amendment work?

As SMSFs are indefinitely continuing superannuation funds that are expected to undergo change as described by the High Court in *Commissioner of Taxation v. Commercial Nominees of Australia Limited* [2001] HCA 33, a wide variation power in the trust deed is essential. For reasons of cost, efficiency and clarity the total method as effected to the fund in that case, to the extent it is supported by the power of variation in the trust deed of the SMSF, will often be the appropriate way to

amend the trust deed of a SMSF especially after a major reform of the law such as the 2007 Simpler Super measures. The total method involves the replacement of the governing rules with a new set of rules unrelated to and so unburdened by the rules they replace rather than just the particular rules that trustee seeks to update.

A power of amendment of a SMSF, or any other express trust, is the ongoing basis for the evolution of the trust and it needs to remain as a term of the trust. So, strictly speaking, it needs to remain as a provision of the amended trust deed of a SMSF, along with any other provisions that cannot be amended under the power of amendment, after an otherwise total replacement of the governing rules. Amendment of the power of amendment itself may be possible but unlikely if the amendment provision itself does not expressly permit it; in *Jenkins v. Ellett* [2007] QSC 154 (26 June 2007), Douglas J. stated:

> [15] The scope of powers of amendment of a trust deed is discussed in an illuminating fashion in Thomas on Powers (1st ed., 1998) at pp. 585-586, paras 14-31 to 14-32 in these terms:
> "In all cases, the scope of the relevant power is determined by the construction of the words in which it is couched, in accordance with the surrounding context and also of such extrinsic evidence (if any) as may be properly admissible. A power of amendment or variation in a trust instrument ought not to be construed in a narrow or unreal way. It will have been created in order to provide flexibility, whether in relation to specific matters or more generally. Such a power ought, therefore, to be construed liberally so as to permit any amendment which is not prohibited by an express direction to the contrary or by some necessary implication, provided always that any such amendment does not derogate from the fundamental purposes for which the power was created ....It does not follow, of course, that the power of amendment itself can be amended in this way. Indeed, it is probably the case that there is an implied (albeit rebuttable) presumption, in the absence of an express direction to that effect, that a power of amendment (like any other kind of power) cannot be used to extend its own scope or amend its own terms. Moreover, a power of amendment is not likely to be held to extend to varying the trust in a way which would destroy its 'substratum'. The underlying purpose for the furtherance of which the power was initially created or conferred will obviously be paramount."

So it is plausible that a trust deed of a SMSF with an amendable power of amendment could be amended by a deed of amendment which alters the power of amendment provision so that it is no longer amendable. When the trustee comes to do a further deed of amendment then that amendment may not be effective if it to purports to amend the power of amendment provision say to amend it back to being amendable again despite the original amendable power in the trust deed. It is therefore suggested that the better practice is to consistently “lift” the power of amendment provision from the trust deed, that is the first deed in the chain of deeds, along with any (other) unamendable provisions, into each otherwise total deed of amendment and that each deed, in what will be a chain of deeds, recite the trust deed and each prior amendment and variation of the trustee that alters the trust deed.

Where the power of amendment provision is not expressed to be amendable then a lift of the power of amendment to a total deed of amendment is most likely required so the deed of amendment adheres to the trust deed and is to be effective based on *Jenkins v. Ellett*.

As stated at the outset, the objective of using a deed to evidence a SMSF is to prove with some certainty that the fund is as it is documented. Retaining the provable certainty of a chain of SMSF deeds where amendments and variations occur sporadically is a task that requires sound legal skills. A deft use of recitals may prove to be vital in a case where one of the deeds in the chain of deeds of a SMSF has been lost.

Without this certainty the trustee is in no position to say that the fund has been administered in accordance with the governing rules. Similarly the auditor of the Fund cannot conclude that the accounting policies of the fund are consistent with the financial reporting requirements in the governing rules. Neither of them will know what the governing rules are.

Conclusion

It is not obligatory to implement a SMSF with a trust deed but once a trust deed is used the parties commit to the regimen of deeds. This regimen can be conspicuously demanding. The formalities may not always be appreciated but a failure to adequately adhere to them can significantly disadvantage the trustee, the auditor, members, banks or other parties interested in the fund. The strictures of deeds are by no means overwhelming. Thus they are worth adhering to with capable professional assistance so the prospect of uncertainty about the governing rules or other problems with defective SMSF deeds do not arise.