

PREPAID SCHOOL FEES – TRUST MONEY AND GOVERNANCE

Mowbray College (In Liquidation) (Receivers and Managers Appointed) (ACN 006 090 722) [2013] VSC 565 (“Mowbray”), in essence involved a determination of whether a trust was created for moneys which were paid as school fees in advance of the delivery of the service. However, a side issue was the governance procedures of Mowbray which were critical to the factual findings of the Court.

The purpose of the proceedings brought by the Liquidator was to seek directions pursuant to Section 511(1)(a) of the Corporations Act as to whether any moneys were trust moneys held for the benefit of those who prepaid school fees. Therefore, those amounts would not be available to creditors.

The court determined that on the facts of the case, no trusts were created in respect of prepaid school fees.

The specific issues that the Court sought to resolve were:-

- (a) whether the pre-payment of school fees into Mowbray’s operating account, which at all times was in overdraft, had the character of trust moneys; alternatively
- (b) whether two separate transfers of funds (totalling \$315,000) from the overdrawn account to a separate account had the effect of creating a trust fund for the prepaid fees.

In relation to the initial pre-payment of school fees into the overdrawn bank account, the Court held that an equitable tracing of the funds was not available because the funds had been paid into an overdrawn fund and mixed. See Global Finance Group Pty Ltd [2002] WASC 63 for a comprehensive review of this principle and authorities.

In relation to the transfers of funds to a separate account, the Court held that:
“The mere existence of a “quantined” fund is not sufficient to evince an intention to create a trust.”

The Court considered that whilst there may have been some evidence to suggest that the trust was established, the evidence was not sufficient on the balance of probabilities that there was a trust created. The Court was not persuaded that an intention to create the trust was evident.

In summary, the facts included:-

- (a) A number of witnesses including Board Members, current and former employees of which the Court considered “equivocal at best”;

- (b) The school fee notice made no reference to prepaid school fees being held on trust;
- (c) Mowbray appeared confused over whether they were required by Government regulation to hold prepaid school fees in trust. There was no such requirement;
- (d) The operating account had, for many years, been in substantial overdraft;
- (e) The purpose of the transfer of funds to the separate account was not clear, nor on whose authority the transfers were made. The separate account had been opened for many years, but its opening purpose was not known. It was in funds but also used in part to pay day to day operational expenses;
- (f) Board Member witnesses claimed there was a Board Resolution to create a trust for the transferred amounts. But the minutes did not record such a resolution. Further, there were conflicting recollections between Board Members;
- (g) There was evidence that the Board instructed a legal firm to prepare a trust document which was being negotiated with a Government school regulator but was not settled;
- (h) At the time of the appointment of the Liquidator the trust document terms had not been agreed nor executed.

Accordingly, the case paints a picture of an organisation under stress, lacking focus and direction although no doubt well intentioned. The actions and inactions of Mowbray led to a poor result for students, parents, employees and creditors.

However, from a governance perspective, it highlights the need for systems and procedures to be adhered and direction focused. There can be no excuse for the minutes failing to record the purported resolution to create a trust. This lesson was given by the High Court of Australia in the James Hardie Case (see ASIC v Hellicar & Ors [2012] HCA 17 (3 May 2012)).

Mowbray also shows that clear direction and focus is required by a Board where senior staff resign or the Board assumes responsibility for undertaking tasks. Again it is a reminder for NFP Board Members that there is a personal financial risk where organisations fail.

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