Loan accounts and estoppel

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Seemingly minor loan account wreaks havoc in a farming family's succession plan.

A recent case from the Tasmanian Supreme Court, *Dennis v Dennis*,[1] is a magnificent illustration of troubled family dynamics being played out via complex accounting and legal principles before a senior judge.

Family background

Donald and Telfer Dennis had four children, only one of whom (Nicholas) stayed and worked on the farm. 50% of the farm was owned by the DH Dennis Pty Ltd as trustee for the Donald Dennis Family Trust and 50% was owned by Donald personally.

This was the usual case of a farming family, according to Nicholas:[2]

> "… from an early age he worked in the farming business providing his labour and his business acumen without any adequate wage or remuneration, in the expectation, discussed and agreed between him and [his father], that he would succeed to the ownership and/or effective control of the farming business and its assets and goodwill upon his father's retirement."

When Donald and Telfer retired in 2007, they transferred ownership and control of the farm (valued at some $5m) to Nicholas, who in exchange, granted them a right to reside in the farmhouse for the rest of their lives, and in the event that the farmhouse was no longer appropriate, he promised to make available to them a suitable substitute residence or to pay the costs of nursing home accommodation.

To that end in 2007, having taken advice from their trusted professional advisers, Donald and Telfer entered into a succession deed with Nicholas, then transferred to Nicholas their shareholdings in DH Dennis Pty Ltd, appointed him as joint appointor and guardian of Donald Dennis Family Trust with Donald and gifted to him Donald's interest in the farm.

Consequent to this, Donald and Telfer's only assets were two loans owing to Donald — one by the Donald Dennis Family Trust of roughly $225,000 and another by DH Dennis Pty Ltd in its own right of roughly $93,000.

Donald died in 2012, his will (also dated 2007) appointed Nicholas' two brothers as executors and left the entire estate to Telfer.

Soon after the death, Telfer moved out of the farmhouse and nominated a modest substitute accommodation for Nicholas to fund for her in accordance with the succession deed. For various reasons, Nicholas refused to comply.

The proceedings

The proceedings involved a number of claims and cross claims by Nicholas, Telfer, DH Dennis Pty Ltd and Donald's executors against each other, but essentially came down to:

(1) Telfer seeking specific performance by Nicholas of his promise to make a substitute residence available to her. Nicholas' various arguments in response were not accepted by the court and Nicholas was ultimately ordered to compensate Telfer and to pay the costs of her accommodation. This aspect of the case will not be discussed here, it is mentioned to set the scene; and

(2) Donald's executors suing Nicholas and DH Dennis Pty Ltd (in its own capacity and in its capacity as trustee of the trust) for the immediate repayment of the debts owing to Donald's estate. In relation to the loan of $225,000, Nicholas discharged it before trial. But the debt of $93,000 remained owing and is central to the judgment of Estcourt J.

Debt owing to Donald by the company

Nicholas told the court that Donald promised to forgive both loans in consideration of Nicholas taking over the business and entering into the succession deed.

Nicholas' case was that both loans were to be forgiven via Donald's will or in the alternative, that the forgiveness should be implied into the terms of the succession deed. If either of these succeeded, the executors should be estopped from calling them in.

Nicholas, desperately, ran numerous arguments, including testamentary promise, breach of contract, a claim in equity, estoppel etc. He tried to bring his unpaid labour on the farm and contribution to the farm into the equation to offset the unpaid wages against the debt. He also attempted to re-categorise the trust income distributions from the trust to his parents in the 2010-12 income years as repayments of the outstanding loan.

Nicholas' lawyers put various complex technical arguments for him, but essentially this was a case about a family that had immensely trusted each other falling out over money, the elderly widowed mother being left without a roof over her head or a nest egg, and the children who were not involved in the dispute eventually having to choose a side between their mother and brother, no doubt concerned not only with the welfare of their mother, but also as to their own future inheritance.

In order to succeed, Nicholas had to prove that:

(1) Donald made the representation that the debt would be forgiven;

(2) Nicholas relied on the representation to his detriment, such as by entering

into the succession deed in reliance on his father's promise to forgive the debt. This was the most difficult element to prove because the benefit that Nicholas took under the succession deed was in excess of $5m; and

(3) the executors should be estopped from denying Donald's representation and from calling in the debt, ie the executors should release and forgive the debt for ethical reasons.[3]

Essentially, Nicholas' case was that the farm would be "given" to Nicholas debt free if he agreed to do certain things, including giving up his share of the inheritance in favour of his siblings and looking after his parents for the rest of their lives. Nicholas asserted that he had done what he had promised to Donald.

The entire case turned on the meetings, advice and files of professional advisers engaged by Donald.

Nicholas referred to meetings with Donald's lawyer and accountants where the succession issues, and specifically the loans, were discussed. It was Nicholas' evidence that forgiveness of the loans was to be part of his parents' succession plan and embodied in the succession deed, which he signed in good faith in reliance on the promise. Nicholas tendered into evidence the preliminary succession plan notes prepared by one of the accountants, which "clearly listed the proposition that the loan accounts would be forgiven via the wills".[4]

Nicholas, as a party to the succession deed, read and signed the deed, but the deed was silent as to the loans. Nicholas was not provided with a copy of his parents' wills. Nicholas gave evidence that the issue of the loans was never discussed again and Nicholas assumed that Donald had taken care of the loans in his will. Nicholas only found out that the loan forgiveness or gifting was not included in the will after Donald died.

After the death, Nicholas made enquiries from Donald's lawyer and:[5]

> "… became aware … that while [Donald] had every intention of gifting the loan accounts in his will, he wanted to ensure that [Nicholas] was abiding by the terms of the Deed … [Donald] did not ever suggest [Nicholas] was not abiding by the terms of the Deed. Nor did he ever suggest that he was evaluating whether [Nicholas] was abiding by the terms."

The court's determination of whether Donald made the representation to Nicholas turned on the examination of the lawyer's and accountants' files and their evidence in court. It is instructive to examine their evidence and its presentation, because although it assisted the court in its enquiries, more thorough documenting during Donald's lifetime or clearer communication with Nicholas may have averted the need to resort to the court system altogether.

It was the lawyer's evidence that when she took instructions for the will, Donald expressed the wish to wait before deciding whether to forgive the loans. The accountant gave similar evidence. On cross-examination of Nicholas, Nicholas conceded that Donald's representation may have been uncertain as to when Donald would put the loan forgiveness in his will. The court accepted this evidence and determined that, as a result, there was no testamentary promise and no "unequivocal, unqualified promise that could found an estoppel".[6]

Although the court was able to make a determination with the assistance of Donald's professional advisers, from the authors' reading of the case, the evidence was not overwhelming and it leaves one wondering whether the loans, in fact, remained untouched intentionally or whether Nicholas, who bore the onus of proof that the loans should have been forgiven, simply could not discharge it.

Estcourt J sitting alone found that:[7]

> "After gifting everything to Nicholas in the Succession Deed, [Donald] had, as was pointed out in cross-examination, committed himself and [Telfer] to almost total dependency on Nicholas for the balance of their lives. That is to say, for a roof over their heads and for a substantial part of their ordinary living expenses. In fact, by the time the Succession Deed was executed and the things they had agreed to do had been done, including forgiveness of the company debt of about $210,000, all that they had left was the debt owed by the Company of $93,558. That was their only asset.
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> Accordingly, in my view, it is more likely than not that [Donald] at no time expressed in an unqualified or unconditional verbal statement that he would forgive the debt in his will. In my view it is more likely than not that [Donald] always had the state of mind that he apparently expressed to [the lawyer], as related in her letter of 27 May 2013. That is understandable. If the arrangements under the Succession Deed did not work out [Donald] and [Telfer] would be left with nothing. [Donald] would have known that after his death, if [Telfer] survived him, she would have been left in that same situation."

From the authors' reading of the case, it did not appear that the lawyer sought further instructions about the loans after the will was signed, it may not have been within her retainer to do so. However, there were opportunities for the professional advisers to take steps to ensure the loans were clarified and the proceedings were unnecessary. For example, Donald signed the succession deed and his will in 2007, he died in 2012. Neither Donald, nor the advisers had done anything about the loans between 2007 and 2012. A simple annual reminder to review the loans would have kept the issue at the forefront of Donald and Nicholas' minds and created clarity as to the existence or nature of the promise. If in one of the reviews, Nicholas and Donald did not see eye to eye about the loans, they would have had the opportunity to square it with one another, rather than leaving it to Telfer and the executors, who had to reconstruct the evidence without Donald's involvement.

Given there was some evidence that Nicholas relied on the succession plan notes for his information, Nicholas may have been unaware that the item of loan accounts was simply never finally concluded. It may or may not have been part of the advisers' instructions to bring this to Nicholas' attention or to keep him updated of the developments, but it would make good commercial sense to involve Nicholas and to make him part of the comprehensive discussions about his parents' intentions. If, in fact, Nicholas' compliance with the succession deed was being monitored, it would have made sense for Nicholas to know that or for the forgiveness to occur in Telfer's will if Donald wished to have Nicholas accountable right to the end.

Conclusion

From the authors' reading of the case, many arguments appeared weak and opportunistic, seeing the light of day only as a mechanism for the family to air out their grievances and misunderstandings.

The scope of the lawyer's and the accountants' briefs could not be gleaned from the reported judgment, but it is a reminder for advisers of what their briefs should include when advising about succession planning.

As advisers, we often create the scope of our own briefs through the advice given

to clients, perhaps with the benefit of hindsight, this case shows what should have been part of the advisers' briefs — keeping all parties updated about the changes and regularly tabling outstanding items. For a succession plan to work seamlessly, discussions must be ongoing, transparent and involve all parties to the agreement.

Maintenance of accurate and up-to-date records by professional advisers may also have alleviated some of the problems in this case, as testimony may have stood up better under cross-examination.

Appointing Telfer as co-appointor and guardian with Donald and Nicholas may also have assisted to secure Telfer's position. Elderly persons divesting themselves of valuable assets are taking a huge and often unnecessary risk.

And finally, it was only a matter of time before a loan account or a debt with related entity came under the judicial microscope. They are often overlooked as assets of an estate and as an estate planning tool. Their significance should not be underestimated as evidenced by the air time they received in this case.

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References

1 *Dennis v Dennis* [2016] TASSC 62.
2 *Dennis* at [4].
3 *Dennis* at [11].
4 *Dennis* at [36].
5 *Dennis* at [36].
6 *Dennis* at [44].
7 *Dennis* at [45].