

Powers to amend trusts are no longer available from courts

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Abstract: To what extent can a trustee obtain from the court a power to amend the terms of the trust in the future? The practical effect of the recent decision of the Court of Appeal of New South Wales in *Re Dion Investments Pty Ltd* is that a trustee without power to amend the terms of the trust cannot obtain that power from the court. The omission of a power to amend in a trust's terms will therefore be a permanent omission, at least in New South Wales. The trustee can, however, seek specific powers by way of supplementation or overriding of the existing trust terms, even for the purposes of obtaining tax advantages, if s 81 of the *Trustee Act 1925* (NSW) is otherwise satisfied. The decision is significant as it confirms the lack of foundation of many earlier decisions that enabled a trustee to further amend a trust's terms.

Introduction

On 30 October 2014, in *Re Dion Investments Pty Ltd*,¹ the Court of Appeal² of the New South Wales Supreme Court further clarified the ability of trustees to seek additional powers from the courts under s 81 of the *Trustee Act 1925* (NSW) (Trustee Act).

Re Dion Investments Pty Ltd is of interest for a number of reasons, the primary one being what will, or will not, be a "transaction" for the purposes of s 81. The practical effect of the decision is that a trustee cannot seek from the court a general power to amend the terms of the trust going forward — an omission of such a power is now permanent in New South Wales. The trustee can, however, seek specific powers, even for the purposes of obtaining tax advantages, if s 81 is otherwise satisfied.

Background

The Dion Family Trust was established in 1973. Its current trustee, Dion Investments Pty Ltd, sought the opinion, advice or direction of the Supreme Court under s 63 of the Trustee Act to the effect that it had power to make certain amendments to the instrument by which the settlement trusts were declared. There was an alternative claim under s 81(1) of the Act conferring on Dion Investments Pty Ltd as trustee power to make amendments and certain other specific powers.

At first instance, Young AJ declined to provide the judicial advice sought³ and in

fact advised that the trustee would not be justified in proceeding on the basis that it had power to amend the trust instrument. In response to the s 81(1) claim, his Honour made an order intended to confer certain of the requested specific powers but declined the other specific powers or the power to amend generally.

On appeal, Dion Investments Pty Ltd as trustee did not press the judicial advice claim but sought the powers requested under s 81(1) of the Trustee Act (see [7]). Dion Investment Pty Ltd's proposal in relation to the s 81(1) claim was for it to be granted specific powers to:

- (1) define "year" as a period from 1 July to 30 June;
- (2) allow the trustee to pay or allocate capital gains even if no other income is derived in a year;
- (3) give the trustee broad powers to determine what is income or capital;
- (4) enable the trustee to maintain multiple income accounts and be able to credit or debit those accounts with income or capital as the trustee considered fit; and
- (5) make broader investments, including the drawing of bills of exchange and like matters,

and a provision empowering the trustee, with the consent of any appointer (though there was apparently none for the Dion Family Trust), to revoke, add to or vary all or any of the trusts, terms and conditions of the deed and to declare, revoke and vary

new trusts concerning the trust fund or any part of it, subject to the provisos against infringement of the rule against perpetuities and interference with amounts already set aside for beneficiaries.

The reason the powers were sought was to "modernise the trust deed".⁴ It was clear, however, that this was to be done to benefit under the income tax legislation. The court at [19] to [25] considered an advice of KPMG to the effect that a better tax outcome would be achieved if, among other things, the trustee of the trust had the power to classify receipts as income or capital and stream those amounts (together with franking and other credits) to particular beneficiaries. In the context of the Trustee Act, this had relevance for the reasons given at [25]:

"The question whether a beneficiary is 'specifically entitled' to a particular item thus turns on the beneficiary's actual or expected receipts 'in accordance with the terms of the trust'. And of central importance in answering the question are 'the terms of the trust deed (if any)', 'the terms applicable to the trust because of the operation of legislation, common law or the rules of equity' and powers 'conferred by the terms of the trust.' Only if some relevant entitlement can be found in or seen to be derived from such 'terms' or the exercise of a power 'conferred' by such 'terms' can advantage be taken of the streaming provisions. And importantly, the 'terms' of a trust are not confined by the content of the trust instrument (if there is one)."

It will be seen that the difference between the terms of the trust and the trust deed is an important distinction to bear in mind.

What is a transaction?

“A point extensively explored in argument before [the] Court [was] whether amendment of the trust deed is a ‘transaction’ for the purposes of s 81.” That was because the general power to amend the trust terms did not fall within the other descriptors of s 81 of the Trustee Act. Justice Barrett said at [88]:

“The court may, under s 81(1), ‘confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose’ of effecting, ‘in the management or administration of any property vested in trustees’, ‘any sale, lease, mortgage, surrender, release or disposition, or any purchase, investment, acquisition, expenditure or transaction’ that cannot be effected ‘by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law’.”

The dealings that may thus be facilitated by a court fall into two classes:⁵

- (1) “any sale, lease, mortgage, surrender, release, or disposition”, each of which describes a dispositive act of an owner of property by which the property or some interest in it passes or accrues to another person; and
- (2) “any purchase, investment, acquisition, expenditure, or transaction”, all of which but “transaction” concentrate principally on ways of deploying money.

The court held at [91] that:

“‘Transaction’, of itself, does not imply an outlay of money. Nor should any such limitation be taken to be indicated by the fact that the reference to ‘transaction’ comes immediately after references to ‘purchase’, ‘investment’, ‘acquisition’ and ‘expenditure’. A ‘transaction’ that in fact involves an outlay of money is certainly in contemplation. But so too, in my view, is one that does not.”

The question became, therefore, whether the power to amend in the future was a “transaction”. After considering a number of recent cases (largely in New South Wales but also interstate and foreign) on the issue, the court held that granting a trustee the power to amend the terms of the trust was not a “transaction” for s 81 purposes. Although lengthy, much of the passage of [97] to [100] bears repeating:

“Conferral of specific new powers pursuant to s 81(1) should not be by way of purported grant of authority to amend the trust instrument so that it provides for the new powers. Rather, the court’s order should directly confer (and be the

sole and direct source of) the powers which then supplement and, as necessary, override the content of the trust instrument. And, of course, the only specific powers that can be conferred in that direct way are those that fall within the s 81(1) description concerned with management and administration of trust property.

If the power to be given to the trustee is not a specific power with respect to a particular dealing (or dealings of a particular kind), but, rather, a wide discretionary power to alter the terms of the trust as the trustee thinks fit, the case is not within s 81(1) ...

If, under the guise of giving the trustee a power to undertake a ‘transaction’ of amending the trust deed by adding a comprehensive and virtually unrestrained amendment provision, an order is made that purports to put the trustee into a position from which it can make all and any alterations to the terms of the trust it thinks desirable, the court takes the impermissible course of both appropriating to itself and giving to the trustee a ‘general power to depart from the precise directions ... that a settlor thought proper to declare (*Downshire*⁶ at 247). Because there is no ‘proposed transaction ... which is specifically related to the management or administration by trustees of trust property, *quoad* property’ (*Downshire* at 252), the matter is not within the scope of the section.

For these reasons, I share the opinion of the primary judge that the post-1997 decisions that have proceeded on the basis that variation of the terms of a trust is, of itself, a ‘transaction’ within the contemplation of s 81(1) rest on an unsound foundation. The court is not empowered by the section to grant power to the trustees to amend the trust instrument or the terms of the trust. It may only grant specific powers related to the management and administration of the trust property, being powers that co-exist with (and, to the extent of any inconsistency, override), those conferred by the trust instrument or by law.”

The court allowed the appeal to the extent that the five specific powers were granted, but declined to empower Dion Investments Pty Ltd to further amend the terms of trust (see [108] to [110]).

Various cases⁷ now no longer represent the law in New South Wales. That is, a trustee without power to amend the terms of the trust cannot obtain that power from the court. The omission of a power to amend in a trust’s terms is therefore a permanent omission, at least in New South Wales.

Justice Barrett also confirmed three further matters on the way to resolving the issues before the court.

Overriding or supplementing – no variation

First, the court made clear that it was not amending the terms of the trust instrument, but allowing specific powers that supplement — or, if in conflict, override — the terms of the trust. At [109], Barrett JA said:

“As to [the specific powers], the primary judge correctly rejected the proposition that an order under s 81(1) could empower the trustee to amend the trust deed by incorporating new terms as proposed. A result generally sought by Dion Investments Pty Ltd may, however, be achieved by orders under s 81(1) that directly confer powers which supplement and, as necessary, override the provisions of the trust instrument.”

Applications under s 81(1) of the Trustee Act, therefore, are properly seen as obtaining additional powers to supplement or override, rather than amend, existing terms of the trust (usually, but not necessarily, set out in a trust instrument).

Terms of trust vs trust deed

Second, at [40] to [48], Barrett JA took time to explain that, while it may be commonplace and convenient to speak of amending a trust deed, what actually occurs is a supplementation of the terms of the trust. His Honour summarised it thus at [44]:

“It is, of course, commonplace to speak of the variation of a trust instrument as such when referring to what is, in truth, variation of the terms upon which trust property is held under the trusts created or evidenced by the instrument. A provision of a trust instrument that lays down procedures by which it may be varied is, of its nature, concerned with variation of the terms of the trust, not variation of the content of the instrument, although the fact that it is the instrument that sets out the terms of the trust does, in an imprecise way, make it sensible to speak of amendment of the instrument when the reference is in truth to amendment of the terms of the trust.”

This is confirmed by the tax consideration, where it is the terms of the trust together with the relevant legislative, common law or equitable influences thereon that determine a specific entitlement.

His Honour concluded this reasoning at [48] in the following way:

“Whether one is dealing with exercise of a power of variation or amendment conferred by the settlor and stated in the trust instrument, the species of consensual variation based on the *Saunders v Vautier* principle or the court’s response to some emergency, the situation is never one in which the

provisions of the trust instrument made between settlor and trustee are altered. Rather, there is a variation or supplementation of the terms of the trust derived from that instrument or the powers of the trustee conferred by that instrument. Shorthand references to amendment of a trust deed must be understood accordingly.”

It is therefore important to remember that we are considering additions to the terms of any given trust, rather than the form of the instrument that may have established the trust.

Value of trust fund for leave to appeal

Third, and finally, it was confirmed that it is the value of the corpus of the particular trust that is relevant for determining whether leave to appeal is required. By s 101(2)(r)(ii) of the *Supreme Court Act 1970* (NSW), an appeal to the Court of Appeal requires leave unless it “involves a matter at issue amounting to or of the value of \$100,000 or more”. The court at [5] confirmed⁸ that:

“Contrary to the position taken by *Dion Investments Pty Ltd*, there is no requirement for leave to appeal. This follows from the fact that, according to the material before the primary judge, the value of the trust property far exceeds the threshold of \$100,000 referred to in s 101(2)(r)(ii).”

Understandably, in the absence of confirmation on this point, counsel for *Dion Investments Pty Ltd* sought leave to ensure the argument that seeking a power to deal with property does not include the value of that property was not fatal to the appeal.

Conclusion

Re Dion Investments Pty Ltd is significant as it confirms the lack of foundation of many earlier decisions that enabled a trustee the power to further amend a trust’s terms. A trustee’s only recourse under s 81(1) of the *Trustee Act* is to seek specific powers by way of supplementation or overriding of the existing trust terms. The trustee of any trust the terms of which omit the power to amend, revoke or vary will have a much more difficult time “modernising” the trust terms following this decision. Given *Dion Investments Pty Ltd* was the only party, and is presumably satisfied with the orders made, no special leave is likely to be sought. This decision will therefore stand for the foreseeable future.

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References

- [2014] NSWCA 67.
- Per Barrett JA, Beazley P and Gleeson JA agreeing at [1] and [117], respectively.
- Re Dion Investments Pty Ltd* [2013] NSWSC 1941.
- Mr LF Dion, a director of the corporate trustee, deposed it was to “modernise the trust deed to empower the trustee of the trust to better manage the trust property for the benefit of the beneficiaries, such as by allowing the trustee to separately identify and distribute different types of income and capital with consequential taxation benefits”.
- See *Re Dion Investments Pty Ltd* at [89] and [90] per Barrett JA.
- Re Downshire Settled Estates* [1953] Ch 218.
- See, for instance, in New South Wales, *Re Bowmil Nominees Pty Ltd* [2004] NSWSC 161 per Hamilton J, *James N Kirby Foundation Ltd v Attorney-General (NSW)* (2004) 62 NSWLR 276 per White J, *Stein v Sybmore Holdings Pty Ltd* [2006] NSWSC 1004 per Campbell J (as his Honour then was), *Re NSFT Pty Ltd* [2010] NSWSC 380 per Biscoe AJ, *Barry v Borlas Pty Ltd* [2012] NSWSC 831 per White J, and *Re Grant* [2013] NSWSC 1603 per Slattery J; and elsewhere *Colonial Foundation Ltd v Attorney-General (Vic)* [2007] VSC 344 per Smith J, *Hutchinson v Attorney-General* [2009] VSC 551 per Habersberger J, and *Ballard v Attorney-General* (2010) 30 VR 41 per Kyrrou J.
- Citing *Beck v Henley* [2014] NSWCA 201 at [58] per Leeming JA (Beazley P and Sackville AJA agreeing at [1] and [97], respectively).