

The powers of a Court to vary the terms of a trust

A consideration of in *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753

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1. Outline - the scope of section 81 of the *Trustee Act 1925* (NSW)

- 1.1 Since the decision of Campbell J (as his Honour then was) in *Stein v Sybmore Holdings Pty Ltd* [2006] NSWSC 1004; 64 ATR 325 ("**Stein's Case**"), there has been a wave of applications to the New South Wales Supreme Court seeking to amend the terms of trust deeds pursuant to section 81 of the *Trustee Act 1925* (NSW) ("**the Trustee Act**").
- 1.2 Putting aside the other integers contained in section 81 of the *Trustee Act*, the crux of the reasoning of Campbell J in *Stein's Case* was that the term "transaction" contained in subsection 81(1) of the *Trustee Act* extended to the amendment of a trust instrument. In doing so, Campbell J followed a comment (in obiter) made by Baragwanath J in *Re Philips New Zealand Ltd* [1997] 1 NZLR 93 ("**Re Philips**"), and the comments (again in obiter) by Hamilton J in *Re Bowmil Nominees Pty Ltd* [2004] NSWSC 161 ("**Bowmil's Case**").
- 1.3 The first New South Wales Supreme Court decision that disapproved of Campbell J's reasoning was that of Young AJ in *Re Dion Investments Pty Ltd* [2013] NSWSC 1941 ("**the Original Decision**"). The decision of Young AJ was considered on appeal in by Beazley P, Barrett and Gleeson JJA in *Re Dion Investments Pty Ltd* [2014] NSWCA 367; 87 NSWLR 753 ("**Re Dion**").
- 1.4 The lead judgement was given by Barrett JA, with Beazley P (at [1]) and Gleeson JA (at [117]) agreeing with Barrett JA.
- 1.5 Apart from the Court of Appeal's decision in *Re Dion*, there have only been two other superior Court decisions which have considered the scope of section 81 of the *Trustee Act*, being:
 - 1.5.1 the High Court's decision in *Riddle & Ors v Riddle & Anor* (1951-2) 85 CLR 202 (Dixon, Williams and Webb JJ, with Fullagar and Kitto JJ in dissent) ("**Riddle's Case**"); and
 - 1.5.2 the Full Court of the Supreme Court of New South Wales in *Ku-ring-gai Municipal Council v Attorney General* (1954) 55 SR (NSW) 65 (Roper CJ in Eq, Brereton and Maguire JJ) ("**Ku-ring-gai**").
- 1.6 The Court of Appeal's decision in *Re Dion* has changed the approach which is taken with respect to applications made to the New South Wales Supreme Court pursuant to section 81 of the *Trustee Act*. Now, a "real" transaction needs to be identified before the Court's jurisdiction is engaged.
- 1.7 In finding that the term "transaction" as contained in subsection 81(1) of the *Trustee Act* does not extend to the amendment of a trust deed (and, by doing so, disapproving the interpretation of that term made by a number of decisions of single judges of the New South Wales Supreme Court), a successful application must point to a "real" dealing by a trustee, and in particular:

- 1.7.1 that there is a “dealing”; and
- 1.7.2 the “dealing” is “expedient”; and
- 1.7.3 the dealing is in the management or administration of trust property; and
- 1.7.4 the dealing cannot be affected because of an absence of power.

2. The terms of section 81 of the *Trustee Act* and the UK equivalent (section 57 of the *Trustee Act 1925 (UK)*)

2.1 *Re Dion* was concerned with the application of subsection 81(1) of the *Trustee Act*, which provides that:

- (1) *Where 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, is in the opinion of the Court expedient, but the same 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 Court:*
 - (a) *may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit, and*
 - (b) *may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.*

2.2 Section 81 of the *Trustee Act* also contains subsections 81(2) to (5), which provide as follows:

- (2) *The provisions of subsection (1) shall be deemed to empower the Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees by the trust instrument, if any, creating the trust, or by law is expedient, to authorise the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorisation of the Court or the consent of the beneficiaries would be a breach of trust, and in particular the Court may authorise the trustees:*
 - (a) *to sell trust property, notwithstanding that the terms or consideration for the sale may not be within any statutory powers of the trustees, or within the terms of the instrument, if any, creating the trust, or may be forbidden by that instrument,*
 - (b) *to postpone the sale of trust property,*
 - (c) *to carry on any business forming part of the trust property during any period for which a sale may be postponed,*

(d) *to employ capital money subject to the trust in any business which the trustees are authorised by the instrument, if any, creating the trust or by law to carry on.*

(3) *The Court may from time to time rescind or vary any order made under this section, or may make any new or further order.*

(4) *The powers of the Court under this section shall be in addition to the powers of the Court under its general administrative jurisdiction and under this or any other Act.*

(5) *This section applies to trusts created either before or after the commencement of this Act.*

2.3 Other jurisdictions have similar provisions to section 81 of the *Trustee Act*. This paper only considers section 81 of the *Trustee Act*. Further, other jurisdictions have specific variation of trusts provisions – which New South Wales does not have. The variation of trusts provisions of the other jurisdictions are not considered in this paper.

2.4 Section 57 of the *Trustee Act 1925* (UK) (“**the UK Act**”) provides the following equivalent provision:

(1) *Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may be order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be borne as between capital and income.*

(2) *The court may, from time to time, rescind or vary any order under this section, or may make any new or further order.*

(3) *An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.*

(4) *This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925.*

2.5 Typical in matters in which an order pursuant to section 81 of the *Trustee Act* is determining whether there is an “absence of power”. The typical approach is to:

2.5.1 construe the terms of the instrument, and consider whether there are any other powers (at equity or in statute) which allows the trustee to do what is sought;

2.5.2 if there is doubt about the terms of the trust, then seek judicial advice pursuant to section 63 of the *Trustee Act* as to the terms of the trust (the powers, etc);

- 2.5.3 if there is a power, or another mechanism that can be used (e.g. rectification – see [20] below), then use that route; and
 - 2.5.4 if there is an absence of power, then apply for an order pursuant to section 81 of the *Trustee Act*.
- 2.6 Finally, in construing (for example) discretionary trust deeds, it should be noted that (amongst other things):
- 2.6.1 the Court of Appeal’s decision of *Kearns v Hill* (1990) 21 NSWLR 107 is authority for the proposition that where a power is widely expressed and implies flexibility, the power must be interpreted widely; and
 - 2.6.2 in *Segelov v Ernst & Young Services Pty Ltd* [2015] NSWCA 156, the New South Wales Court of Appeal confirmed that trust deeds are to be construed according to the rules of construction of contracts. Gleeson JA at [83] observed that the “... *first matter to note is that the rules for construction of contracts apply also to trusts. Accordingly, the search for “intention” is only a search for the intention as revealed in the words used by the parties, amplified by the facts known to the parties ...*”.

3. The decision of Young AJ in *Re Dion Investments Pty Ltd* [2013] NSWSC 1941

- 3.1 *Re Dion* was an appeal against the decision of Young AJ in *Re Dion Investments Pty Ltd* [2013] NSWSC 1941 (“**the Original Decision**”). The following was found by Young AJ in the Original Decision:

The proper law of the trust

- 3.2 Before relief pursuant to subsection 81(1) of the *Trustee Act* was sought, two initial issues were considered in the Original Decision, being:
- 3.2.1 what was the proper law of the trust?
 - 3.2.2 if the proper law of the trust was that of Papua New Guinea, then did the New South Wales Supreme Court have jurisdiction (and could relief be obtained pursuant to the *Trustee Act*)?
- 3.3 After finding that the proper law of the trust was Papua New Guinea ([28] of the Original Decision), Young AJ at [32] to [37] considered that notwithstanding that the proper law of the trust was not that of New South Wales (but rather Papua New Guinea), the New South Wales Supreme Court had jurisdiction (and could therefore exercise its powers pursuant to the *Trustee Act*). This was because:
- 3.3.1 the statute (i.e. the *Trustee Act*) was wide enough to cover trusts which have a substantial connection with New South Wales, then that statutory power could

be exercised notwithstanding that the proper law of the trust is not that of New South Wales ([32] of the Original Decision); and

3.3.2 the jurisdiction is where the trustee is within the jurisdiction, so that the New South Wales Supreme Court has *in personam* jurisdiction over the trustee ([34] of the Original Decision).

3.4 The Court of Appeal did not disturb Young AJ's findings with respect to either the proper law of the trust, or the power of the New South Wales Supreme Court to apply the *Trustee Act*.

The terms of the trust deed – whether there was a power to amend / vary in the trust deed

3.5 After the jurisdiction of the New South Wales Supreme Court was settled, judicial advice was obtained as to the scope of a power contained in the trust deed, and in particular, whether the power permitted a variation to the trust instrument. The relevant power was found in clause 15 of the trust deed and provided that:

Thomas Dion, Edward Dion, Charles Dion, Ernest Sidney Dion, Leslie Frank Dion or Rose Dion or any of them may at any time with or without the consent of the Trustee by deed revoke all or any of the trusts hereby declared and declare other trusts of the settled property and income derived therefrom in favour of such person or persons as the said Thomas Dion, Edward Dion, Charles Dion, Ernest Sidney Dion, Leslie Frank Dion or Rose Dion or any of them shall in their absolute discretion determine with or without a like power of revocation and variation PROVIDED THAT no trusts so declared may be declared in favour of the Settlor, the Trustee or the beneficiary who declares such trusts and they shall not nor shall any of them derive any benefit of any kind by virtue of trusts so declared and any benefit which they or any of them would have derived from any such trusts so declared shall pass to and be vested in the Beneficiaries in equal shares PROVIDED FURTHER that no trusts shall be or be capable of being so declared which are in contravention of the rule against perpetuities.

3.6 Only one of the donees of the power was still alive.

3.7 The power contained in clause 15 clearly a power to revoke and declare. The person exercising the power of new declaration could not benefit under the newly declared trusts. What was also unclear was the use of the term "... like power of revocation and variation ..." when describing the new trust, and whether the term "... like power of ... variation ..." meant that clause 15 was also a power of variation.

3.8 Young AJ considered that a power powers to revoke and declare are different from powers to vary, although there may be overlap between the various powers ([40] of the Original Decision). Young AJ at [44] concluded that the powers contained in clause 15 of the trust deed did not encompass a power to vary as:

... there is only one person still alive who has the power of revocation and amendment. If those powers are exercised the new trust declared must exclude the persons who exercise the power of amendment from any benefaction. It would not seem appropriate that a person should be entirely excluded from benefit which would not normally occur with a mere power of variation.

Modernising the trust deed – orders sought pursuant to subsection 81(1) of the Trustee Act

- 3.9 On the basis that the trust deed did not contain a power to amend, orders were sought pursuant to subsection 81(1) of the *Trustee Act* to “modernise” the trust deed, by inserting additional powers. The majority of the powers sought related to the “streaming” provisions contained in the *Income Tax Assessment Act 1997 (Cth)* (“**the 1997 Act**”), which would allow the trustee of the Trust to separately identify, and stream (different categories of) income and capital of the Trust, along with any taxation advantages that may travel with such streamed / distributed amounts.
- 3.10 Pursuant to the relevant provisions, if a trust deed permits streaming, and the trustee distributed a capital gain or franked distribution to a ‘specifically entitled’ beneficiary, then Subdivisions 115-C and 207-B of the *1997 Act* operate to include an amount referable to each capital gain or franked distribution in the beneficiary’s (or trustee’s) assessable income.
- 3.11 For example, section 207-58 of the *1997 Act* deals with ‘... *when a beneficiary of a trust estate is ‘specifically entitled’ to an amount of a franked distribution ...*’. A ‘specific entitlement’ for a beneficiary requires the beneficiary to receive a ‘share of net financial benefit’, which in needs to be ‘... *in accordance with the terms of the trust...*’.
- 3.12 Subsection 207-58(2) of the *1997 Act* provides that ‘... *something is done in accordance with the terms of the trust if it is done in accordance with ... the exercise of a power conferred by the terms of the trust; or ... the terms of the trust deed ..., and the terms applicable to the trust because of the operation of legislation, the common law or the rules of equity*’.
- 3.13 There are similar provisions which deal with the flow-through of capital gains (i.e. to beneficiaries who are ‘specifically entitled’), and the 50% capital gains tax discount which is attracted to such capital gains, pursuant to section 115-228 of the *1997 Act*.
- 3.14 The “substance” of the application was explained by Barrett JA at [27] in *Re Dion* as:
- In substance, the desire is twofold: first, to cause the specific provisions concerning matters of accounting, allocation and “streaming” to be included in the trust instrument; and, second, to cause the instrument also to contain a provision allowing comprehensive alteration of the terms of the settlement trusts by unilateral action of the trustee.*

- 3.15 Broadly speaking, there were five (5) powers which were proposed to be included, being (at [107] and [26] in *Re Dion*):
- 3.15.1 to adopt a system of accounting based on a “year” from 1 July to 30 June;
 - 3.15.2 to pay or allocate to any beneficiary any amount of capital gain, notwithstanding that there is no amount of income to be distributed in any particular “year”;
 - 3.15.3 to decide what is income and what is capital in any particular “year”;
 - 3.15.4 to maintain multiple income accounts, to credit each income receipt to one or more of the income accounts; to credit any capital gain (that is, a part of capital receipts as assessable income for tax purposes) to one or more of the income accounts and to credit and debit certain other items to the income accounts; and
 - 3.15.5 a comprehensive power to revoke, add 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 of:
 - (a) against infringement of the rule against perpetuities; and
 - (b) interference with amounts already set aside for beneficiaries.
- 3.16 There were also other administrative powers sought, and given by Young AJ (e.g. an extended power to mortgage, etc).
- 3.17 In considering the powers under subsection 81(1) of the *Trustee Act*, Young AJ declined the relief (apart from minor administrative powers which relate to financing, etc). The relief was declined on the basis that:
- 3.17.1 the act of amending the terms of the trust deed was not a “transaction” pursuant to subsection 81(1) of the *Trustee Act*; and
 - 3.17.2 the Court could only approve of advantageous dealings which only incidentally affect beneficial interests.

4. Reliance by Young AJ on *In re Downshire Settled Estates* [1953] Ch 218

- 4.1 An issue that Young AJ had at first instance was that an order pursuant to section 81(1) of the *Trustee Act* could only incidentally affect beneficial interests. In doing so, Young AJ relied on the authority of *In re Downshire Settled Estates* [1953] Ch 218 (“*In re Downshire*”) and *Chapman v Chapman* [1954] AC 429 (“*Chapman*”) (see for example [52] of the Original Decision).
- 4.2 Whilst the alteration of beneficial interest issue was raised by Young AJ, his Honour did not explain how the proposed powers did in fact affect beneficial interests.

In re Downshire Settled Estates [1953] Ch 218

- 4.3 *In re Downshire* comprised of three appeals with respect to applications made pursuant to the Court’s inherent jurisdiction, section 57 of the *UK Act* and / or section 64 of the *UK Act*.

The matters all related to approvals of schemes of arrangement with respect to the three scenario's contemplated.

4.4 Two of the three appeals were reversed on appeal, with the effect that it was only the In re Chapman's Trust matter (which was one of the schemes considered *In re Downshire*) which was further appealed to the House of Lords (in *Chapman*).

4.4 Central in Young AJ's reasoning was the decision *In re Downshire*. The materials facts relevant for current purposes (being the In re Chapman's Trust matter), an application was made pursuant to section 57 of the *UK Act* to vary as follows:

4.4.1 Pursuant to a settlement in 1944, a trust fund was settled for the benefit of the settlor's grandchildren.

4.4.2 Clause 3 of the settlement provided that until either:

- (a) the settlor's grandchildren attained the age of 25 years; or
- (b) the expiration of 21 years from the death of the survivor of the settlors,

the trust income would be applied at the discretion of the trustees as a common fund for the maintenance of the grandchildren, with the balance accumulated, with ultimate trustee for the grandchildren.

4.5 As a result of clause 3 of the settlements, a charge for estate duty would accrue upon the death of the settlors. An application was therefore made, pursuant to section 57 of the *UK Act* to transfer the trust funds to a new settlement, with the same trusts of the original settlement, but absent clause 3.

4.6 Evershed M.R. and Romer L.J. disallowed the application (with Denning L.J. in dissent).

Reduction of tax liability not an objection

4.7 Evershed M.R. and Romer L.J. at 232-3 discussed the "principal objects" of the relevant schemes, being "... a limitation of future liability of the corpus of the trust property to serious diminution from estate duty." It was then observed that:

The high rates of taxation, in the form of both income tax and death duties, is a phenomenon of the present generation. It must be taken as notorious that many persons having families and free estates, so dispose of their estates so as to reduce, within the law, liability for income tax during their lives and for death duties upon their deaths ...

4.8 As a result, it was held that a sanction of the proposed schemes would not be unsuccessful on the basis that it had the effect of reducing taxation liabilities, where at 233 it was held that:

It follows, in our judgement, that it is not an objection to the sanction by the court of any proposed scheme in regard to trust property that its object or effect is or may be to redress liability for tax including death duties).

Non-application of section 57 of the UK Act – scheme was for the destruction of the trusts

4.9 Evershed M.R. and Romer L.J. considered that section 57 of the UK Act did not confer on the Court any power to vary beneficial interests. In particular, the term “... *the management or administration of any property ...*” is confined to the managerial supervision and control of trust property on behalf of beneficiaries. Their Honours considered that the term cannot be stretched to include the modification of equitable interests which have been created in the property.

4.10 At 247, it was held that the words “management” and “administration” as contained in the relevant provision:

... is confined to the managerial supervision and control of trust property on behalf of beneficiaries. Such is the natural scope of both expressions, and to attribute to them, or either of them, an additional association with the beneficial interests themselves, would be to superimpose upon their ordinary significance an interpretation that is both unnatural and unwarranted.

4.11 Evershed M.R. and Romer L.J. gave five reasons why section 57 of the UK Act was limited, and did not contain a power to vary beneficial interest. Those reasons are:

Reason 1	Given the inability of a Court to sanction a deviation from the trust, granting such a power was a novelty, and an expansion of the Court’s jurisdiction
Reason 2	If the section did allow for such deviations, then the legislature would have imposed limits, other than “expediency”

4.12 At 247-8, Evershed M.R. and Romer L.J. observed in relation to “Reason 1” and “Reason 2” that:

We have already pointed out that neither trustees nor the court itself at any time, before 1925, had any general power to depart from the precise directions (provided that they were within the law) that a settlor thought proper to declare. If Parliament, in enacting section 57, had intended to confer this power on the court it is, our view, inconceivable that it would not have done so in express terms, having regard not only to the novelty but also the width of the jurisdiction that it was creation; and it was equally incredible that it should have done so without imposing any kind of limit, other than expediency, upon the extent to which, or the manner in which, the court was able to exercise the power.

Reason 3	The legislation did not mention the term “beneficial interest”
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4.13 At 248 Evershed M.R. and Romer L.J. observed in relation to “Reason 3”:

... the legislature ... did not even mention beneficial interests from the beginning of the section to the end, or give the slightest indication that it was intending to give power to vary or interfere with such interests or intermeddle with them in any way – except to the extent that they might incidentally be affected by the exercise of powers which the section does in terms confer.

Reason 4	The “dealings” referred to in the section relate to management of property, which is the domain of trustees and not beneficiaries.
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4.14 At 248 it was observed that:

... the examples, which are given in the section of the kind of “transactions” which the legislature had in mind, are instances of management or property in the ordinary sense, for example, sales, leases, exchanges, etc. Again, the authorised transactions are those proper to be undertaken by the persons in whom the control of the property is vested, namely the trustees, and not the beneficiaries.

Reason 5	Given the legislation refers to a “trustee”, which includes an executor, allowing a departure from the terms of a trust would mean that an executor could depart from the terms of a will.
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4.15 At 248 it was observed that:

... finally, the word “trustees” in the section includes legal personal representatives as well, and one can scarcely suppose that Parliament was intending, by a side wind, as it were, to enable an executor, even with the authority of the court, to depart from the dispositions of his testator’s will.

4.16 The legislative purpose behind section 57 of the UK Act was described by Evershed M.R. and Romer L.J. at 248 as follows:

In our judgment, the object of section 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual “emergency” had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust, or to add such exceptions to that rule as had already found their way to the inherent jurisdiction.

4.17 The proposal was to have the trustees “... with the sanction of the court, advance their respective funds to the trustees of a new trust ...” (at 263), which was “... in truth ... the

destruction of trusts expressly declared ..." (at 266). Of the particular proposal, Evershed M.R. and Romer L.J. at 264 opined that:

... the alteration or remoulding as such of trusts declared by a settlement is not within the scope of section 57, which only empowers the court to make orders, if it thinks it expedient to do so, with reference to the management or administration by trustees of the trust property which is vested in them. The scheme which is proposed in the present case does not in any sense arise out of any administrative or managerial difficulty affecting the trust assets; its origin and aim are solely referable to the desire of the parties concerned to avoid a charge which will, or may, become leviable for death duties in consequence of the trusts as framed by eliminating from the ... settlements the particular provisions which it is feared may give rise to the claims for duty...

4.18 The section 57 of the UK argument was not considered in the appeal in *Chapman v Chapman*.

5. The Full Court of the Supreme Court in *Ku-ring-gai* and the High Court's decision in *Riddle's Case* – observations in relation to the difference between section 81 of the *Trustee Act* and section 57 of the UK Act

5.1 As observed at [3.17] above, central in Young AJ's reasoning was that section 81 of the *Trustee Act* could not be applied if the relief (more than incidentally) affects beneficial interests. In doing so, his Honour relied on *In re Downshire*, which in turn, itself relied on the 5 Reasons outlined in [4] above. In particular, the Court *In re Downshire* relied heavily on the fact that section 57 of the UK Act "... did not even mention beneficial interests from the beginning of the section to the end ..." (at 248).

5.2 However, both the Full Court of the New South Wales Supreme Court and the High Court have observed that the terms of section 81 of the *Trustee Act* differ from that of section 57 of the UK Act. In particular:

5.2.1 subsection 81(1) of the *Trustee Act* contemplates an "... adjustment of the respective rights of the beneficiaries ..."; and

5.2.2 subsection 81(2) of the *Trustee Act* contemplates an "... alteration whether by extension or otherwise of the trusts or powers...".

5.3 At [59] Young AJ of the Original Decision considered that the decision of Campbell J in *Stein's Case* was contrary to the decision of Myers AJ in *Ku-ring-gai Municipal Council v Attorney General* (1953) 19 LGR (NSW) 105, which his Honour indicated was affirmed on appeal: (1954) 55 SR (NSW) 65.

5.4 Whilst the Full Court of the Supreme Court of New South Wales in *Ku-ring-gai* (Roper CJ in Eq, Brereton and Maguire JJ) did affirm the decision of Myers AJ, the Full Court

at 74-5 (in obiter dictum) observed that the terms of section 81 went beyond section 57 of the *UK Act*, in particular by observing that:

Section 81, however, goes beyond s.57 in some respects. In particular the words contained in s81(1)(a) "including adjustment of the respective rights of the beneficiaries" are not to be found in the English section nor are the provisions of s.81(2).

- 5.5 The Full Court in *Ku-ring-gai* refused to make an order pursuant to section 81 as the facts did not establish the requisite expediency in the management or administration of trust property – but that the “... expediency arises from the management or administration of other property held by the council and not subject to the trusts affecting the land in question ...”. In particular, the proposed “dealing” contemplated in *Ku-ring-gai* was for the advancement of the non-trust asset, and not the asset held subject to the relevant trust.
- 5.6 That is, the reason for the Full Court of the Supreme Court in *Ku-ring-gai* to not grant an order pursuant to s 81 was not because that Court followed *In re Downshire*, but rather, because the statutory requirement of “expediency” with respect to the management or administration of trust property was not present in the proposed relief.
- 5.7 Williams J in *Riddle’s Case* at 222 that section 57 of the *UK Act* “... does not contain a sub-section similar to s 81(2) ...”. However, there was no need for the High Court to explore the implications of the difference between the *Trustee Act* and the *UK Act*.
- 5.8 Given the above, and in particular the different wording of paragraph 81(1)(a) and subsection 82 of the *Trustee Act* (of which there are no equivalents in the *UK Act*), the decisions of *In re Downshire* and *Chapman* have little utility in considering the limitations of the *Trustee Act*.
- 5.9 Given that the relief sought in *Re Dion* did not affect any beneficial interests, this aspect was not analysed by the Court of Appeal.

6. The Court of Appeal’s Decision – *Re Dion*

Effect of creating an express trust

- 6.1 Before analysing the powers, and effect of an order pursuant to section 81 of the *Trustee Act*, and also for the purposes of discussing the scope of the term “transaction” as contained in subsection 81(1) of the *Trustee Act*, regard needs to be given to the effect of creating a trust estate pursuant to an instrument (i.e. an express trust).
- 6.2 Barrett JA at [39] to [43] discussed the effects of creating an express trust. As observed by Barrett JA at [40], the facts in *Re Dion* was one in which a settlor chose to define in writing

the trusts and powers in a trust deed (notwithstanding that the settled property was money). Further, the original trustee executed the trust deed to signify the acceptance of that position, and the powers, duties and responsibilities.

6.3 The crux of Barrett JA's analysis was that the "... *terms of the trust have, in the eyes of equity, an existence that is independent of the provisions of the deed that define them ...*" ([42]).

6.4 Upon the execution of a trust deed, equity recognises the rights and interests of beneficiaries, and the duties, obligations and powers of trustees. The duties, obligations and powers are grafted onto the trust property – and relate to the rights and interests of the beneficiaries. It is equity (and not the law) which recognises the interests of the beneficiaries and the duties / powers of trustees.

6.5 Barrett JA at [41] observed that upon the establishment of a trust pursuant to a deed made between a settlor and a trustee the "... *rights of the beneficiaries arise immediately the deed takes effect*". The rights of beneficiaries – who are not parties to a deed of settlement - were described by Barrett JA at [41] as follows:

.... the beneficiaries are not parties to the deed and, to the extent that it embodies covenants given by its parties to one another, the beneficiaries are strangers to those covenants and cannot sue at law for breach of them. The beneficiaries' rights are equitable rights arising from the circumstances that the trustee has accepted the office of trustee and, therefore, the duties with respect to the trust property (and otherwise) that the office carries with it.

6.6 That is, notwithstanding that a beneficiary may not be a party to a deed declaring an express trust, it is equity that affects the consciousness of a trustee – being a volunteer that accepts the obligations imposed in the eyes of equity.

6.7 Upon the execution of the deed of settlement equity recognises both:

6.7.1 the rights and interests of the beneficiaries; and

6.7.2 the duties, obligations and powers of the trustee.

6.8 Barrett JA at [42] discussed the implications of a settlor and trustee who attempt to vary the provisions of a deed after execution. Importantly, Barrett JA observes that equity considers that the terms of a trust are independent to the provisions of the deed that established the trust:

Any subsequent action of the settlor and the original trustee to vary the provisions of the deed made by them will not be effective to affect either the rights and interests of the beneficiaries or the duties, obligations and powers of the trustee. Those two parties have no ability to deprive the beneficiaries of those rights and interests or to vary either the terms of the trust that the trustee is bound to execute and uphold or the powers that are available to the trustee in order to do so. The terms of the trust

have, in the eyes of equity, an existence that is independent of the provisions of the deed that define them.

- 6.9 That is, once the trusts are established, unless there is an express power to vary (alter or revoke) those trusts, then any attempt to deal with / destroy the trusts will be ineffective. Barrett JA at [43] observed that:

*Let it be assumed that on Monday the settlor and the trustee execute and deliver the trust deed (at which point the settled sum changes hands) and that on Tuesday they execute a deed revoking the original deed and stating that their rights and obligations are as if it had never existed. Unless some power of revocation of the trusts has been reserved, **the subsequent action does not change the fact that the trustee holds the settled sum for the beneficiaries named in the original deed and upon the trusts stated in that deed.** The covenants of a deed may be discharged or varied by another deed between the same parties ... but **the equitable rights and interests of a beneficiary cannot be taken away or varied by anyone unless the terms of the trust itself (or statute) so allow.** [emphasis added]*

- 6.10 Because the rights of beneficiaries arise as at the execution of a trust deed, and those rights are recognised in equity, once those rights are created (unless there is a reserve power or statute allows) the rights and interests of a beneficiary cannot be affected by the parties of the deed.
- 6.11 The deed creates (in equity) interests and rights in strangers to the deed (i.e. the beneficiaries), which cannot be easily taken away.

7. The concept of amending the terms of a trust

- 7.1 After discussing the effect of settling a trust, Barrett JA at [44] to [48] in *Re Dion* explored the concept of whether an amendment of a trust deed is a “transaction” for the purposes of subsection 81(1) of the *Trustee Act*.
- 7.2 At [44] Barrett JA observed that it is “... 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”.
- 7.3 Barrett JA considered that the amendment of the trust instrument itself, which adds specific powers for advantageous dealings is “... merely a procedural step ...” ([95]). At [48] Barrett JA considered that whatever route is taken, there is never an amendment to a trust deed but instead: “... 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.”
- 7.4 That is, Barrett JA differentiated between:
- 7.4.1 a variation of a trust instrument; with

7.4.2 a variation of the terms of a trust.

7.5 Barrett JA at [44] observes that it is “... *commonplace to speak of the variation of a trust instrument ...*”, when in truth, there is actually a “... *variation of the terms upon which trust property is held under the trusts created or evidenced by the instrument ...*”.

8. Varying or supplementing the terms of a trust outside any statutory powers

8.1 At [45] to [48], and putting aside any statutory powers, Barrett JA discussed the methods of varying or supplementing the terms of a trust, being:

8.1.1 a power reserved in a trust instrument;

8.1.2 where the “consent” principle as contained in *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282 (affd Cr & Ph 240; 41 ER 482) (“**Saunders v Vautier**”) is used; or

8.1.3 where the court sanctions a departure of the terms of the trust where some circumstances of emergency needs to be resolved in the interests of preserving the trust property.

The nature of a reserve power of amendment contained in a trust instrument

8.2 At [44] to [45] Barrett JA discussed the effect of the use of a reserve powers of amendment contained in a trust instrument. Barrett JA considered that the use of such a power did not, strictly speaking, vary the terms of the instrument, but instead varied the terms of a trust. At [44] Barrett JA observed that:

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 in 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.

8.3 Because the trusts (or the equitable rights and interests of the beneficiaries) arise in equity, a “variation” of those trusts are exactly that – not a variation of the (physical document being the) deed.

8.4 At [45] Barrett JA considered that the power of variation contained in an instrument may be traced to the settlor’s initial intention:

Where the trust instrument contains a provision allowing variation by a particular process, the situation is one in which the settlor, in declaring the trust and defining its terms, has specified that those terms are not immutable and that the original terms will be superseded by varied terms if the specified process of variation (entailing, in concept, a power of appointment or a power of revocation or both) is

undertaken. The varied terms are in that way traceable to the settlor's intention as communicated to the original trustee.

- 8.5 Interestingly, Barrett JA at [45] considered that a reserve power of amendment is (conceptually speaking) a power of appointment, a power of revocation – or both.
- 8.6 However, Barrett JA at [45] observes that a variation of a trust pursuant to a reserve power contained in a trust instrument is traceable to the settlors intention, as communicated to the original trustee (via the trust instrument).
- 8.7 Whilst Barrett JA considered that the power of amendment is (in concept) a power of appointment or a power of revocation, or both, regard needs to be given to [16.03] to [16.06] of Thomas, G, *Thomas on Powers* (2nd edition), Oxford University Press, 2012 ("*Thomas on Powers*") in which it was observed that whilst a power to amend resembles a power to appoint or a power to revoke, they are different powers.

The "consent principle" – *Saunders v Vautier*

- 8.8 As an alternative to a reserve power, Barrett JA at [46] discusses the use of the "consent" principle which may be used to amend the terms of a trust. Barrett JA at [46] discussed the "consent" principle which derives from the principle contained in *Saunders v Vautier*. It was observed at [46] that:

*Where the trust instrument contains no such variation provision, principles of equity may countenance variation of the terms of the trust with the unanimous consent of the beneficiaries if all are in being, sui juris and absolutely entitled. Under the principle in *Saunders v Vautier* ... beneficiaries in that position are entitled to put an end to the trust and require that the trust property be transferred to them.*

- 8.9 The High Court in *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at [43] ("*CPT Custodian*") observed of the principle in *Saunders v Vautier* that:

*Saunders v Vautier is a case which has given its name to a "rule" not explicitly formulated in the case itself, either by Lord Langdale MR (at first instance) or by Lord Cottenham LC (on appeal). In Anglo-Australian law the **rule has been seen to embody a "consent principle"** recently identified by Mummery LJ in *Goulding v James* as follows:*

"The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument." [emphasis added]

- 8.10 As an extension of the ability to terminate a trust, the consent principle may allow a trustee to hold trust property pursuant to varied trusts.
- 8.11 Barrett JA at [46] opined that the capacity of beneficiaries – who are *sui juris* and absolutely entitled – “... enables them to require ... that the property be held by the trustee upon varied trusts; but, if they do so require, the situation may in truth be one of resettlement upon new trusts rather than variation of the pre-existing trusts ...”.

Saunders v Vautier – consent principle and there being a “resettlement”

- 8.12 Unlike the reserve power contained in an instrument, which Barrett JA considered were a species of the powers of appointment / revocation (or both) (see [8.4] above), Barrett JA considered that the use of the consent principle may be “in truth” a “resettlement upon new trusts” rather than a variation of pre-existing trusts.
- 8.13 Regard needs to be given to the implications of a “resettlement” if the consent principle contained in *Saunders v Vautier* is used to give a trustee powers (see [18] below). Such a situation would typically (and most often) arise in the context of a trust that have vested. In particular, the consent principle would apply upon the vesting date happening (with – for example – the trust property going to the takers in default).
- 8.14 As an example, considering the trusts in *re Dion*, Barrett JA at [12] observed that there were trusts declared in two separate clauses of the trust deed, with:
- 8.14.1 one of the trusts applying during “the period of restriction” (i.e. during the period before the vesting date of the first trust); and
- 8.14.2 the other trust, being at the end of the “period of restriction.”
- 8.15 Barrett JA at [13] observed that the trusts during the “period of restriction” were discretionary, whereas the trusts at the end of the restricted period also (to an extent) discretionary – as the trustee had the power to appoint the income / capital, but there were takers in default of appointment.
- 8.16 It is the beneficiaries who obtain the capital after the period of restriction, or those beneficiaries who were appointed capital / income during the period of restriction, who would be considered absolutely entitled to such income and / or capital. As a result, upon the vesting date arriving (and assuming that there has not been an appointment of capital that defeats their interests), it is those beneficiaries who could use the consent principle.
- 8.17 However, the point is this – there were at least two trusts in *Re Dion*. One which was largely discretionary in nature (i.e. prior to the vesting date), and another which beneficiaries would (necessarily) have absolute entitled beneficiaries. To the extent that the beneficiaries of the “second” trust exercise the “consent” principle to confer powers onto the trustee, then there seems to be a resettlement, which may give rise to CGT event E1 (section 104-55 of the 1997 Act (refer [18] below)).

Trustee not compelled to perform new trusts declared pursuant to the consent principle

- 8.18 Whilst the consent principle may allow the *sui juris* and absolutely entitled beneficiaries to vary terms of trusts, trustees are not necessarily compelled to accept or perform those trusts. In support of this proposition, Barrett JA referred to *CPT Custodians* at [44], where (in terms of Hohfeld’s analysis of rights), the consent principle entails a Hohfeldian “power” (on the part of beneficiaries) which correlates to a “liability” for trustees (rather than a “right” on the part of a beneficiary and therefore a “duty” on the part of the trustee).
- 8.19 The High Court at [44] in *CPT Custodians* observed that:

*A different view was taken long ago by the United States Supreme Court. In *Shelton v King*, the Court repeated what had been said by Miller J in 1875 when speaking for the Supreme Court in *Nichols v Eaton*. He saw no reason in the principles of public policy concerning frauds upon creditors, restraints upon alienation, the prevention of perpetuities and of excessive accumulations, or in the necessary incidents of equitable estates, which supported a rule of the width engrafted upon the law (then comparatively recently) by the English Court of Chancery as a limitation upon effecting the intent of testators and settlors. However that may be, **there is force for Anglo-Australian law in the statement that the rule in *Saunders v Vautier* gives the beneficiaries a Hohfeldian "power" which correlates to a "liability" on the part of the trustees, rather than a "right" correlative to a "duty"**. This is because, in the words of Professor J W Harris:*

*"[b]y breaking up the trust, **the beneficiaries do not compel the trustees to carry out any part of their office as active trustees; on the contrary, they bring that office to an end**". [emphasis added]*

- 8.20 That is, on the basis that the *sui juris* and absolutely entitled beneficiaries have the power to allow trust property to be held subject to varied trusts, there is a corresponding liability for the trustee. As a result, a trustee may choose not to accept the liability to perform those (new) trusts.

Inherent jurisdiction – Court authorising a departure from the terms of the trust

- 8.21 Barrett JA at [47] observed of the limited power of the Court, which his Honour observed was of “uncertain provenance” to “... *sanction departure from the terms of the trust where some circumstance of emergency in the course of administration needs to be resolved in the interests of preserving the trust property ...*”.
- 8.22 Thomas, G and Hudson, A in *The Law of Trusts* (2nd edition) Oxford University Press, 2010 at [24.05] to [24.12] (“**Thomas and Hudson**”) discuss the inherent jurisdiction of the Court to vary trusts. At [24.05], Thomas and Hudson observe that:

Apart from statute, there are, at most, four cases in which the court has inherent jurisdiction to modify or vary trusts affecting persons who are not sui juris subject to the preconditions that all persons who are sui juris consent and the modification and variation is clearly for the benefit of all persons who are not sui juris.

8.23 The four cases outlined by Thomas and Hudson at [24.05] are:

- 8.23.1 cases in which the Court has effected changes in the nature of an infant's property, for example by directing investment of his personalty in the purchase of freeholds;
- 8.23.2 cases in which the court has allowed the trustees of settled property to enter into some business transaction not authorised by the settlement;
- 8.23.3 cases in which the Court has allowed maintenance out of income which the settlor or testator directed to be accumulated; and
- 8.23.4 cases in which the Court has approved a compromise on behalf of infants and possible after-born infants.

8.24 Thomas and Hudson at [24.07] observes of another three cases, being:

- 8.24.1 'salvage' cases. Tucker, L, Le Poidevin, N and Brightwell, J in *Lewin on Trusts* (19th edition) Sweet & Maxwell, 2015 ("**Lewin on Trusts**") describes these cases at [45-005] as follows:

The court has inherent jurisdiction to authorise otherwise unauthorised acts of management or administration of the trust property where an emergency arises connected with the trust property. But this can only be done in a case where the emergency may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, the trustees are embarrassed by the emergency, the consent of the beneficiaries cannot be obtained to the course proposed, and the emergency must be dealt with at once.

- 8.24.2 'emergency' cases. *Lewin on Trusts* describes these cases at [45-005] as follows:

Connected with ... [salvage cases] ... are those in which the court in its inherent jurisdiction has authorised, as a matter of salvage, the expenditure of capital in keeping up the trust property, for instance by raising money on mortgage and spending it on repairs of the property to save it from ruin which would otherwise ensue, which will be done only in a case of actual salvage, or to pay the premiums of a settled policy which would otherwise lapse. A settled policy has also been ordered to be surrendered where it is impossible to pay the premiums.

- 8.24.3 'maintenance' of minors cases – *Lewin on Trusts* describes these cases at [45-009] as follows:

It is the practice to authorise the maintenance of minor beneficiaries out of income directed to be accumulated and even out of capital ... where this

course is contrary to the strict terms of the trust instrument and the statutory power of maintenance ... is excluded or otherwise not applicable.

8.24.4 'compromise' cases – Lewin on Trusts describes these cases at [45-010] as follows:

The court has inherent jurisdiction to approve on behalf of minor, unborn and unascertained persons compromise of genuine disputes over the destination of trust property, but there must be a real, substantial question which the court would otherwise have to try; it will not dress up an agreed variation of a trust instrument as a compromise of a dispute.

9. The elements of subsection 81(1) of the *Trustee Act*

- 9.1 Of subsection 81(1) of the *Trustee Act*, Barrett JA at [87] noted that in *Riddle's Case*:
- 9.1.1 Dixon J at 214 considered that the provision is "... *not intended to be restricted by implications ...*"; and
- 9.1.2 Williams J at 220 considered that the provision is "... *couched in the widest possible terms ...*".
- 9.2 At [88], Barrett JA said of subsection 81(1) of the *Trustee Act* that a court may:
- 9.2.1 "... *confer upon the trustees, either generally or in any particular instance, the necessary power for ...*" the purpose;
- 9.2.2 the purpose effecting "... *any sale, lease, mortgage, surrender, release or disposition of any purchase, investment, acquisition, expenditure or transaction...*";
- 9.2.3 which 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*".
- 9.3 Barrett JA at [89] to [90] discussed the "two classes" of "dealings" contemplated by subsection 81(1) of the *Trustee Act*, being:
- 9.3.1 **the first class**, being "... *any sale, lease, mortgage, surrender, release, or disposition...*". *The first class describes dispositive acts, by which property (or some interest) passes or accrues to others. They are dealings which relate to those which owners of property would usually have; and*
- 9.3.2 **the second class**, being "... *any purchase, investment, acquisition, expenditure, or transaction...*". *Putting aside the term "transaction", the second class deals with the way resources are deployed.*
- 9.4 Further, the "dealing" conferred upon the Court may be supplied by the Court if ([92]):
- 9.4.1 in the management or administration of any property vested in the trustee;
- 9.4.2 the particular "dealing" is expedient.
- 9.5 In relation to expediency, referring to *Riddle's Case*:

- 9.5.1 Dixon J at 214 considered that the expediency must be “... *in the interests of the beneficiaries...*”; and
- 9.5.2 Williams J at 222 considered that expediency is “advantageous”, “desirable” or “... *suitable to the circumstances of the case ...*”, but that in every case, the expediency must be tied to management or administration of trust property.

The term “transaction” as contained in subsection 81(1) of the Trustee Act

- 9.6 Barrett JA considered that the term “transaction” contained in subsection 81(1) of the *Trustee Act* does not necessarily imply an outlay of money. Whilst a transaction that involves an outlay of money falls within that term, Barrett JA considered that the term “transaction” includes something that does not involve the outlay of money.
- 9.7 Unfortunately, Barrett JA did not provide any guidance as to “transactions” which do not involve the outlay of money.
- 9.8 Barrett JA at [91] did not agree with Young AJ that the term “transaction” should be considered *ejusdem generis* with the preceding words, being “... *purchase, investment, acquisition, expenditure...*”.

10. The scope of subsection 81(1) of the Trustee Act

- 10.1 Barrett JA considered that subsection 81(1) of the *Trustee Act*:
- 10.1.1 cannot allow a trustee to vary the terms of a trust instrument;
 - 10.1.2 cannot allow the trustee to amend the terms of a trust;
 - 10.1.3 only allows the granting of specific powers which related to the management and administration of trust property. Such powers which are conferred co-exist with (and if inconsistent, override) the powers conferred by the trust instrument or by law.
- 10.2 Barrett JA considered that an order pursuant to subsection 81(1) of the *Trustee Act* requires the identification of a power which is absent. The insertion of such a power pursuant to subsection 81(1) of the *Trustee Act* is not an amendment to the trust deed, but a substantive conferral of new powers to conduct advantageous dealings.
- 10.3 At [94] Barrett JA observed that the termination of the terms of a trust is not something that is within the ordinary providence of a trustee. Barrett JA considered that:
- 10.3.1 a trustee’s function is to take the trusts as it finds them;
 - 10.3.2 a trustee’s function is to administer the trusts as the trusts stand;
 - 10.3.3 the trustee is not concerned to question the terms of a trust; and
 - 10.3.4 the trustee is not to seek to improve the trusts.
- 10.4 Further, the amendment of the terms of a trust is:
- 10.4.1 not something that is “expedient” that the trustee should do;

10.4.2 not something that is done “in the management or administration of” trust property.

10.5 Indeed, in the context of a trust instrument that contains a reserve power of amendment, Barrett JA at [94] considered that:

... even where the trust instrument itself gives the trustee a power of variation, exercise of that power is not something that occurs “in the management or administration of” trust property. It occurs in order that the scheme of fiduciary administration of the property may somehow be reshaped.

10.6 In relation to past decisions, which ostensibly amended the trust instrument pursuant to subsection 81(1) of the *Trustee Act*, Barrett JA at [95] considered that if those orders “... have any force and efficacy at all, it can only be as orders conferring substantive new powers.” Indeed, if the Court has concluded that “... it is expedient that powers to effect dealings ... should be made available to the trustee ...”, then what has happened is that the Court has (directly seeking) allowed the trustee to exercise those powers. To say that there is an amendment of the trustee to ad powers to allow for specific, advantageous dealings, is only a procedural step in the conferral of those powers.

11. The effect of an order pursuant to subsection 81(1) of the *Trustee Act*

11.1 Barrett JA at [96] considered that previous orders of the Court which were couched in terms of a variation of a trust instrument was a “superfluous and meaningless step”, when was in fact occurring was an order which allowed a specific power if advantageous dealings by the trustee.

11.2 Whilst the effect of an order pursuant to subsection 81(1) of the *Trustee Act* is that it is taken that the Court had conferred the power as though the power was inserted into the trust instrument, the substantive power is given pursuant to the Court’s order, and that the power “... does not have its source in the terms of the trust. There is no addition to the content of the trust instrument.” (at [96])

11.3 Rather, the content of the trust instrument is “... supplemented and overridden ‘as though’ some addition had been made to it. The terms of the trust are reshaped accordingly” ([96]). Barrett JA at [97] observed that:

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.

- 11.4 At [100], Barrett JA agreed with Young AJ’s decision that a variation of a trust is not (of itself) a “transaction” as that term is found in subsection 81(1) of the *Trustee Act*. Barrett JA considered that:

The court is not empowered by the section to grant power to the trustee 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.

12. The ultimate relief given by the Court of Appeal’s decision in *Re Dion*

- 12.1 Of the five (5) powers which were proposed to be included, being (at [107] and [26] in *Re Dion*) (see [3.15] above) at [110] to [114], Barrett JA applied the elements of subsection 81(1) of the *Trustee Act* (see [9] above) to confer the powers sought in (1) to (4) (but not 5).

Whether there was a “dealing”

- 12.2 Barrett JA at [27] considered that:

In substance, the desire is twofold: first, to cause the specific provisions concerning matters of accounting, allocation and “streaming” to be included in the trust instrument; and second, to cause the instrument also to contain a provision allowing comprehensive alteration of the terms of the settlement trusts by unilateral action of the trustee.

- 12.3 In relation to items (1) to (4), Young AJ did not order that the trustee be permitted to amend the trust deed by incorporating the proposed terms pursuant to subsection 81(1) of the *Trustee Act*. Barrett JA agreed with Young AJ’s view (at [109]). However, Barrett JA at [109] considered that items (1) to (4) above could “... be achieved by orders under s 81(1) that directly confer powers which supplement, and, as necessary, override the provisions of the trust instrument”.

- 12.4 At [110] Barrett JA observed of the requested powers at (1) to (4) that:

The Court could make an order to the effect that the trustee had power, in managing and administering the trust property in accordance with clause 4(a) of the trust deed to deal separately with the income of each and every year ending 30 June, to distinguish income from corpus on the footing that receipts or gains of such a nature as to be within assessable income for the purposes of the taxation legislation are of an income nature regardless of their character at general law, to maintain in respect of each beneficiary such account or accounts as the trustee thinks fit and to credit to each such account (and thereby allocate to the particular beneficiary) the whole or part of an amount paid or applied under clause 4(a) in respect of that beneficiary ...

- 12.5 At [111], Barrett JA explained how items (1) to (4) were “transactions” pursuant to subsection 81(1) of the *Trustee Act*:

*Clause 4(a) is a provision under which the trustee has a discretion to “pay or apply” any part of the settled property. It applies indiscriminately to income and corpus, as understood according to the law of trusts. The verb “pay” is applicable only to money. **In the ordinary course, therefore, exercise of the postulated new power in managing and administering the trust property in accordance with clause 4(a) would involve the payment of money or the application of financial resources, both of which are within the s 81(1) concept of “expenditure”. Things done in exercise of the new power would also be within the “transaction” concept.** In *Southgate v Sutton* (above) which involved subdivision into sub-trusts and, in effect, administration of the trust property in two separate accounts instead of as an undivided whole, there was a reference to “the proposed transaction for appropriation and partition” ...**In the present case, it would be accurate to refer to the proposed “transaction” (or “transactions”) of segregating income from corpus according to a particular defined meaning of “income” and of apportioning or allocating elements of such “income” in specified ways,** including those envisaged by the “specifically entitled” concept in the taxation legislation ... [emphasis added]*

- 12.6 That is, items (1) to (4), given that they relate to the power of appointment of income (and capital) involves both “expenditure” and “transactions” for the purposes of subsection 81(1) of the *Trustee Act*.

The dealing being a part of the management or administration of trust property

- 12.7 Barrett JA at [113] cited with approval the comment made by the Victorian Court of Appeal in *Royal Melbourne Hospital v Equity Trustees Ltd* [2007] 18 VR 469 at [150] that the term “management or administration” of trust property is said to “... pick up everything that a trustee may need to do in practical or legal terms in respect of trust property ...”. As a result, Barrett JA considered that the effectuation of the power of appointment was “... probably the most significant aspect of the trustee’s function of administering the trust property”.
- 12.8 As a result “[m]ore efficient and economical performance of ... [the power to appoint] ... with the aid of the new power would be part of the management and administration of trust property ...” ([113]).

Expediency in the management and administration of trust property

- 12.9 At [21] to [25], Barrett JA considered the advice of an accounting firm (KPMG), and an amendment to the 1997 Act made by the *Tax Laws Amendment (2010 Measures No 5) Act 2001* (Cth), which provided for a streaming regime of capital gains and franked distributions derived by trustees (sections 115-228 and 207-58 of the 1997 Act).

- 12.10 The amendments to the revenue regime requires a beneficiary to be “specifically entitled” to an amount of capital gains (for the purposes of the CGT discount) and franked distributions in order for those taxation advantages to be availed of by beneficiaries (as opposed to possibly being subject to tax in the hands of the trustee at a higher rate than applicable to beneficiaries).
- 12.11 The question of whether a beneficiary is ‘specifically entitled’ depends upon a beneficiaries actual or expected receipts “... *in accordance with the terms of the trust ...*”. The terms of a trust include those which apply as a result of legislation, the common law or rules of equity, or the trust instrument.
- 12.12 As a result, there was a desire to cause specific provisions concerning matters of accounting, allocation and “streaming” to be allowable pursuant to the terms of the trust. Barrett JA at [114] considered that the “streaming” proposals (given the KPMG advice) “... *establishes that it is expedient in the management and administration of the trust property by way of efficient and economical effectuation of ... [the power of appointment] ... that the powers should be given ...*” to the trustee pursuant to subsection 81(1) of the *Trustee Act*.

Absence of power

- 12.13 There was an absence of power in the trust deed.

Wholesale power of amendment

- 12.14 There were also proposals which allowed for a broader scope of investment, and dealing with the drawing of bills of exchange and like matters. Curiously, notwithstanding that Young AJ considered that there was no power to amend, Young AJ did grant these investment / borrowing powers.
- 12.15 Barrett JA considered that a power which can be conferred pursuant to subsection 81(1) of the *Trustee Act* must be in relation to a power in relation to a particular dealing, or dealings of a particular kind. Any “... *wide discretionary power to alter the terms of the trust as the trustee thinks fit ...*” is not within the scope of subsection 81(1) of the *Trustee Act* ([98]).
- 12.16 Any discretionary, wide power to amend the terms of the trust to allow an unrestrained amendment provision does not contemplate a proposed “transaction” which is specifically related to the management and administration of trust property. Further, such a power would allow the departure of the terms of the trust which the settlor had declared, which would be both:
- 12.16.1 an impermissible action of the Court; and
 - 12.16.2 sanction a departure from the terms of a trust by a trustee.
- 12.17 As a result, Barrett JA at [108] concluded that:

.... (the comprehensive amendment power) is not a power which s 81(1) allows the court to confer on a trustee. The primary judge correctly declined to countenance creation by the court of a comprehensive discretionary power enabling the trustee to vary the terms of the trust

12.18 As a result, Barrett JA declined to allow for a wholesale power of amendment. Any further insertions of powers would require further applications to the Supreme Court pursuant to section 81 of the *Trustee Act*.

13. Review of the “post-1997” cases – orders permitting amendments to trust deeds

13.1 Barrett JA at [100] concluded that his Honour shared the opinion of Young AJ that “... the post-1997 decisions that have proceeded on the basis of the terms of a trust is, of itself, a “transaction” within the contemplation of s 81(1) rests on an unsound foundation”.

13.2 The reference to the “post-1997 decisions” refers to those decisions since that of Baragwanath J in *Re Philips* ([49] to [54]), in which (according to Young AJ) Baragwanath J made a “mere throwaway line” (in obiter dictum) that the term “transaction” as contained in subsection 64(1) of the *Trustee Act 1956* (NZ) includes an “amendment of the deed”.

13.3 Barrett JA at [55] to [74] discussed the development of Baragwanath J’s comments in a series of New South Wales decisions.

13.4 The first New South Wales decision where the term “transaction” was accepted to include the amendment of a trust deed for the purposes of subsection 81(1) of the *Trustee Act* was the decision of Hamilton J in *Re Bowmil Nominees Pty Ltd* [2004] NSWSC 161. Whilst Hamilton J ultimately provided relief pursuant to the “consent principle”, in obiter dictum Hamilton observed that the word “transaction” has wide import, and that “[i]n my view the amendment of a trust deed readily falls within that definition and the Court has power under the section to empower the amendment of a trust deed”.

13.5 White J in *James N Kirby Foundation Ltd v Attorney General* (NSW) [2004] NSWSC 1153; 62 NSWLR 276 considered an application pursuant to subsection 81(1) of the *Trustee Act* to alter the terms of a charitable trust to:

13.5.1 incorporate features required in the tax legislation to permit those that make donations to obtain taxation deductions; and

13.5.2 alter provisions of the deed which required the constituent documents of the corporate trustee to have a board of directors of particular categories of people (again, to comply with the relevant tax legislation).

13.6 White J was satisfied that the expediency test was satisfied, as the amendment would ensure continuing donations. The requirement of certain categories of persons to be on the board of the corporate trustee would ensure the prudent management of the trust property.

- 13.7 Whilst there was no identifiable “dealing”, nor were the proposed amendments concerned with any activity that fell within the “dealings” provided for in subsection 81(1) of the *Trustee Act*, the objective was “... *efficiency or advantageous operation in the administration of the trust estate as a whole...*” (Barrett JA at [62]).
- 13.8 As there was no identified “dealing” Barrett JA at [63] observed that White J “... *sound it necessary to concentrate on the proposal to alter the trust deed (or, more precisely, the terms of the trust)...*” and that that “transactions” was occurring in the “... *management and administration of...*” trust property.
- 13.9 The next decision, which it is submitted has been the most influential decision post-1997 which solidified the notion that the term “transaction” as contained in subsection 81(1) of the *Trustee Act* encompasses an amendment to a trust deed is that of Campbell J in *Stein’s Case*.
- 13.10 The relevant trust deed in *Stein’s Case* contained a power of amendment, which did not allow an extension of the vesting date. The vesting date was approaching, and there was evidence that the vesting date would impose a significant capital gains tax and stamp duty liability.
- 13.11 Campbell J concluded that it was expedient to extend the vesting date.
- 13.12 At [45]-[46] in *Stein’s Case*, Campbell J relied on the decisions of Baragwanath J in *Re Philips New Zealand Ltd*, Hamilton J in *Bowmil Nominees Pty Ltd*, and White J in *James N Kirby Foundation v Attorney General (NSW)* to conclude that the term “transaction” in subsection 81(1) of the *Trustee Act* extends to amendment of a trust deed.
- 13.13 White J came to the same conclusion as Campbell J in *Stein’s case* in *Barry v Borlas Pty Ltd* [2012] NSWSC 831 (“**Barry v Borlas**”), which raised issues indistinguishable to those in *Stein’s Case*.
- 13.14 Slattery J in *Re Grant* [2013] NSWSC 1603 conferred various powers on a trustee, including a wholesale power to amend the relevant trust deed. At [40], Slattery J concluded that section 81 of the *Trustee Act* allowed “... *the making of orders to give the trustee power to amend the trust instrument to facilitate a range of future commercial transactions ...*”.
- 13.15 The same conclusion, and relying on the *Re Philips / Stein’s case* reasoning has been reached in other jurisdictions, including in:
- 13.15.1 *Colonial Foundation Ltd v Attorney-General (Vic)* [2007] VSC 344 (in relation to subsection 63(1) of the *Trustee Act 1958 (Vic)*);
 - 13.15.2 *Hutchinson v Attorney-General* [2009] VSC 551;
 - 13.15.3 *Ballard v Attorney-General* [2010] VSC 525; and
 - 13.15.4 *Re Arthur Brady Family Trust; Re Tuchmores Trading Trust* [2014] QSC 244.

14. Recent cases which were approved by the Court of Appeal in *Re Dion*

- 14.1 In [101] to [106], Barrett JA referred, with approval to three cases where section 81 (or an equivalent) was used to effect “dealings” with trust property.

Cameron v Jeffress

- 14.2 The decision of Hammerschlag J in *Cameron v Jeffress* [2014] NSWSC 702 was one of the decisions cited with approval by Barrett JA as a proper exercise of subsection 81(1) of the *Trustee Act*. His Honour (for the purposes of avoiding adverse taxation implications) allowed for a power to accumulate income (which his Honour considered as an “acquisition” for the purposes of subsection 81(1) of the *Trustee Act*), and a power to pay the accumulated income (which his Honour considered was expenditure” for the purposes of subsection 81(1) of the *Trustee Act*).
- 14.3 Hammerschlag J decided to take a “direct” approach instead of the indirect method of a transaction being a variation of the relevant will. This approach was approved by Barrett JA.

Re Z Trust

- 14.4 *Re Z Trust* [2009] CLR 593 was an application under the equivalent of subsection 81(1) of the *Trustee Act* to give the trustee the power to partition a trust fund (into three), with powers to administer each of the three trusts in different ways.
- 14.5 The Court found that there was no alteration of beneficial interests or entitlements by creating the sub-trusts. The Court granted the power, on the basis that the arrangement (which was part of a “peace agreement” as between family members) was “... *only for the more efficacious management and administration of the trust ...*”.

Southgate v Sutton

- 14.6 *Southgate v Sutton* [2011] EWCA Cv 637; [2012] 1 WLR 326 concerned an application to partition a trust, so that one part of the trust was held for United States residence (and held by a US trustee), and the other part for United Kingdom resident beneficiaries (with a UK trustee).
- 14.7 The partition was to “avoid UK tax and reduce US tax”.
- 14.8 The trial judge was satisfied that the transaction was expedient, but considered that the transaction would affect beneficial interests and therefore was outside of section 57 of the UK Act.
- 14.9 The Court had the power pursuant to section 57 of the UK Act to partition the trust fund. This was because a partition related to the ... *administration of any property vested in the trustee ...*”.

- 14.10 The Court also held that the appropriation and partition was a transaction, and that it only incidentally effected beneficial interests in the trust fund. Further, the Court held that *Re Freeston's Charity* (1978) 1 WLR 741 is not authority for an unqualified proposition that the partition of a trust fund was always a variation or re-arrangement of beneficial interests, or that a partition always had a more than incidental impact on any beneficial interests.

15. What Re Dion does not stand as authority for

- 15.1 Barrett JA (and the Court of Appeal) in *Re Dion* did not consider:
- 15.1.1 whether an order pursuant to subsection 81(1) of the *Trustee Act* could affect beneficial interests (and indeed, more than incidentally). Although it was a reason given by Young AJ to not provide the relief sought in the Original Decision, Barrett JA accepted that because there were no life interest / remainder element of the relevant trust estate, the orders did not affect any beneficial interests (see **[16] below**).
 - 15.1.2 whether an order could be made pursuant to subsection 81(1) of the *Trustee Act* which has the effect of extending the vesting date of a trust (see discussion at **[17] below**); and
 - 15.1.3 the extension effect of terms contained in subsections 81(1) and 81(2) of the *Trustee Act*, or indeed, terms such as “... *adjustment of respective rights of the beneficiaries ...*” (being terms not included in section 57 of the *UK Act*).

16. Re Dion – the orders did not effect on any beneficial interests No change in beneficial interests

- 16.1 Young AJ considered that the powers requested could not be given pursuant to subsection 81(1) of the *Trustee Act*, as there would have had implications for beneficial interest(s) in the trust. However, the proposed dealings did not affect any beneficial interests. In particular, and unlike the position in *Stein's Case*, the default beneficiaries were the same that were entitled to the appointment of income and / or capital.
- 16.2 Whilst an object in a discretionary trust only have a right to due administration and a right to be considered, default beneficiaries (or takers-in-default of appointment) do have an interest in income or trust property.
- 16.3 Being a potential object of a power of appointment is not enough to confer any rights of property in the assets which can be appointed (Campbell J at [27] in *Stein's Case*). Campbell J in *Stein's Case* at [25] to [27] discussed the present rights in the trust property with respect to the particular trust in question, and from [28] to [36] discussed how the extension of a vesting day affected those rights.
- 16.4 Campbell J at [25] in *Stein's Case* observed that “*Where there is a power to appoint property amongst members of a class, and a gift over in default of appointment, the takers*

in default have a vested, but defeasible, interest in the property". In relation to clause 6 of the trust deed considered in *Stein's Case* – which were the trusts of capital – Campbell J at [26] observed that:

In similar fashion, Clause 6 of the Trust deed gives Tanya and Ian as Residuary Beneficiaries a vested but defeasible interest in the capital of the Trust. The interest of, say, Tanya in the capital is a contingent interest, because it is contingent on her surviving until the Vesting Date. It is defeasible because if the Trustee appoints the property to someone else, under the power of appointment contained in Clause 6 or 7, it will no longer flow to her as a taker in default of appointment. Even so, such a defeasible contingent interest in the capital is a right of property, which is vested in interest but not in possession.

- 16.5 Pursuant to the trust deed considered in *Re Dion*:
- 16.5.1 the trustee had the power to appoint the "settled property" (which included both income and capital) to any "beneficiary";
 - 16.5.2 any income not appointed was to be accumulated; and
 - 16.5.3 at the vesting date, the trustee has the power to appoint the "settled property" to one or more of the "beneficiaries" (to the exclusion of others), and if default of appointment, then the settled property and income would vest in the "beneficiaries" as tenants in common.
- 16.6 At [15], Barrett JA observed that the trust deed in *Re Dion* "... does not, in any explicit way, deal separately with corpus and income". In particular, there were no "... trusts as to income of particular periods and distinct trusts as to corpus from which the income was derived".
- 16.7 That is, the "Beneficiaries" could have had income and / or capital appointed to them, and they were also the takers in default of appointment. There was no separate income default beneficiaries, nor capital default beneficiaries. As a result, the ability to (for example) re-characterise income to capital, and vice versa, did not change any interest that any beneficiary would have.
- 16.8 The trust deed did provide that income could be paid or applied for the maintenance, support, education, advancement in life for selected beneficiaries. Any income not so paid or applied was to be accumulated ([15] in *Re Dion*).
- 16.9 There was a clause which allowed the trustee to determine whether any amounts were capital or income, and to determine whether expenses, outgoings or losses were to be borne out of income or capital ([16] in *Re Dion*). However, Barrett JA at [17] queried the need of such a clause as:
- 16.9.1 The trust is "... not one of successive interests for life and in remainder making it vital to distinguish income to which the life tenant is entitled from an accretion to corpus that accrues to the remainderman".

6.9.2 “Nor, as has been seen, are there, in any explicit sense, trusts as to income and trusts as to corpus...”, although there was a clause that provided that surplus income not dealt with is to be accumulated.

16.10 An issue that was not determined in *Re Dion* is whether an order pursuant to section 81 of the *Trustee Act* can change beneficial interests in a more than incidental manner. Barrett JA at [112] observed that:

*Because the processes contemplated by the postulated new power would not, of themselves, involve discrimination among beneficiaries (the potential for discrimination being inherent already in the discretion in clause 4(a) entails), **creation of the power would not involve any change of beneficial interests or adjustment of the respective rights of beneficiaries.** [emphasis added].*

16.11 As a result, it remains to be seen how far an order pursuant to section 81 of the *Trustee Act* can affect beneficial interests.

17. Extending the vesting date – where to from here?

17.1 *Re Dion* did not consider whether section 81 of the *Trustee Act* could be used to extend the vesting date of a trust.

17.2 An issue that often comes up is the extension of a vesting date of a trust. Both *Stein’s Case* and *Barry v Borlas* are examples of pre-*Re Dion* cases in which an extension was sought. There has been no case since *Re Dion* which has sought to extend the vesting date of a trust pursuant to section 81 of the *Trustee Act* (see [19] below where the issue has been discussed in obiter dictum post *Re-Dion*).

17.3 The ability to (in effect) extend the vesting day of a trust post-*Re Dion* will need to be considered.

17.4 In particular, whilst the Court of Appeal disapproved of the notion that the term “transaction” as contained in subsection 81(1) of the *Trustee Act* encompasses an amendment of a trust instrument, and whilst Barrett JA did analyse *Stein’s Case* and *Barry v Borlas*, his Honour did not say that those cases were wrongly decided. Rather, it was observed at [95] that “*If those orders have any force and efficacy at all, it can only be as orders conferring substantive new rights.*”

17.5 It begs the question, what “direct” power (being the “conferring of substantive new rights”) could be given pursuant to subsection 81(1) of the *Trustee Act* that would have the effect of extending the vesting date of a trust estate?

17.5 A submission that was put to the Court of Appeal, in the context of whether a variation of a trust deed was a “transaction”, was that the execution of a declaration of trust was itself a “transaction”. This is because of the effect of the declaration in relation to the trust property which is affected by the declaration. As an example, subsection 8(2) of the *Duties*

Act 1997 (NSW) deems a declaration of trust over dutiable property (paragraph 8(1)(b)(ii)) to be a “dutiable transaction”. Similarly, a declaration of trust itself would be a “transaction”.

- 17.6 Whilst that submission was not analysed nor discussed by the Court of Appeal (either at hearing or in the decision), the analysis (albeit the “direct” implications of such an execution) may be used in considering an application to extend vesting dates of trust estates.
- 17.7 A declaration of trust, or a settlement of property into a trust, would themselves be “dealings” pursuant to the two “classes of transactions” provided for in subsection 81(1) of the *Trustee Act*. Putting aside the term “transaction” contained in subsection 81(1) of the *Trustee Act*, by reference to the notion that the creation of a trust the “... *obligation attaches to the trustee in personam, but is also annexed to the property, so that the equitable interest resembles a right in rem ...*”¹ a declaration would be a “disposition” by the declarant, and a corresponding “acquisition” by the trustee. The holding of the trust assets by the trustee would also be an “investment” by the trustee.
- 17.8 A similar analysis must apply to a settlement of property into a trust.
- 17.9 Further, on the basis that the terms of a trust may contain powers, those powers would (typically) fall within the two classes of “dealings” provided for in subsection 81(1) of the *Trustee Act*. For example:
- 17.9.1 “administrative” powers are clearly those which fall within the “first class of dealing”, being “... *any sale, lease, mortgage, surrender, release, or disposition...*”. So too would the “second class of dealing” contemplate administrative powers, being “... *any purchase, investment, acquisition, expenditure, or transaction ...*”;
- 17.9.2 “dispositive” powers (such as the power to appoint income and / or capital) are also contemplated by the “first class of dealing” and the “second class of dealing”. It is submitted that a “disposition” would be contemplated by a power to appoint. Hammerschlag J in *Cameron v Jeffress* [2014] NSWSC 704 at [50] considered that the term “expenditure” as contained in subsection 81(1) of the *Trustee Act* included the payment of accumulated income to beneficiaries.
- 17.10 Barrett JA at [106] and [114] in *Re Dion* cited with approval the “direct” approach that Hammerschlag J took in *Cameron v Jeffress*.
- 17.11 That is, provided that the other statutory integers of subsection 81(1) of the *Trustee Act* are satisfied, an application pursuant to subsection 81(1) of the *Trustee Act* to extend the period in which the “dispositive” powers (i.e. the powers to appoint income and / or capital) and the “administrative” powers would fall within both the “first class of dealing” and the “second class of dealing” (see [9.3] above).

¹ Heydon and Leeming, *Jacobs’ Law of Trusts in Australia* (7th edition), LexisNexis Butterworths, 2006 at [110] and Hope JA in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 518-9.

- 17.12 Such an application would give the trustee the direct power to affect such “dealings”.
- 17.13 The analysis could also be viewed on a “horizontal” and “vertical” plane. For example, just as section 81(1) of the *Trustee Act* may apply to empower a trustee to conduct “dealings” which are otherwise outside those contemplated by law or in the trust deed (i.e. a “vertical” imposition during the vesting period), it is submitted that the Court could empower the Trustee to conduct “dealings” with respect to trust property after the vesting date (a “horizontal” imposition outside of the vesting period).
- 17.15 To say that a “horizontal” imposition is outside the terms of the trust is beside the point. Provided that the statutory integers contained in subsection 81(1) of the *Trustee Act* is satisfied, the purpose of the power is to permit a departure of the terms (whether those at law in as provided in the trust instrument – subsection 81(2) of the *Trustee Act*).
- 17.16 Further, whilst the “horizontal” imposition may affect beneficial interests:
- 17.16.1 provided the statutory integers of subsection 81(1) of the *Trustee Act* are satisfied, an order pursuant to the section permits (and contemplates) variations to beneficial interests; and
 - 17.16.2 a “vertical” imposition may also affect beneficial interest. For example, a power to re-characterise income and capital (into the other) would clearly affect the interest that takers-in-default have in that income / capital.
- 17.17 That is, provided that the Court is satisfied that the statutory integers of subsection 81(1) of the *Trustee Act* was satisfied, being that:
- 17.17.1 there is a “dealing” (which would be the extension of the dispositive and the administrative powers);
 - 17.17.2 the “dealing” is “expedient”; and
 - 17.17.3 the dealing is in the management or administration of trust property; and
 - 17.17.4 the dealing cannot be affected because of an absence of power,
- then an application that seeks to extend the period in which dispositive and administrative powers could be effected may be within the scope of subsection 81(1) of the *Trustee Act*.
- 17.18 It is submitted that the above analysis is a “direct” one, which is the effect of the orders made in *Stein’s Case* and *Barry v Borlas*. Indeed, on the basis that the income and capital default beneficiaries in both those cases consented to the extension of the vesting date, what they did (in fact) was consent to the powers being exercised by the trustee in relation to the trust property.
- 17.19 That is, in both *Stein’s Case* and *Barry v Borlas*, the direct effect of the orders were that the administrative and dispositive powers could be exercised past the vesting date provided for in the trust deed.

17.20 Of course, any extension of the period in which powers could be exercised with respect to trust property would need to fall within the permissible perpetuity period, measured from the date of the creation of the trust (see for example [69] in *Stein's Case*).

18. Extending a vesting day – trustee continues to hold trust property – is that permitted?

18.1 Regard should be given to the strategy of not distributing the trust property to the default beneficiaries (or any other beneficiary with a vested and indefeasible interest) upon the vesting date occurring and, in particular, doing this when there is more than one beneficiary who has such an interest. In particular, this strategy is said to overcome CGT event E5 happening upon the vesting date occurring (section 104-75 of the *1997 Act*).

18.2 The concern is subsection 104-75(1) of the *1997 Act* happening upon the vesting date occurring, which provides that:

CGT event E5 happens if a beneficiary becomes absolutely entitled to a CGT asset of a trust (except a unit trust or a trust to which Division 128 applies) as against the trustee (disregarding any legal disability the beneficiary is under).

18.3 The Commissioner of Taxation (“**the Commissioner**”) in Draft Taxation Ruling TR 2004/D25, entitled *Income Tax: Capital Gains: Meaning of the words ‘absolutely entitled to a CGT asset as against the trustee of a trust’ as used in Part 3-1 and 3-3 of the Income Tax Assessment Act 1997 (“the Entitlement Ruling”)*² outlines when the Commissioner considers when a beneficiary is considered “absolutely entitled as against a trustee. Broadly speaking, the Commissioner considers that the test is satisfied when the “rule” in *Saunders v Vautier* is satisfied.³ In particular, the Commissioner considers that the test of “absolute entitlement” is satisfied if a beneficiary, who has a vested and indefeasible interest in the whole of the trust fund is entitled to call for the asset to be transferred to them or transferred at their direction ([10 of the Entitlement Ruling).

18.4 Broadly speaking, the Commissioner considers that if there is more than one beneficiary with an interest in the trust assets, then it is usually not possible for the beneficiaries to call (or direct) the assets, with the result that they will not be absolutely entitled ([23] of the Entitlement Ruling). However, if the beneficiaries are each absolutely entitled to a specific number of assets, then they will be considered ‘absolutely entitled’, which may happen if:

18.4.1 the assets are fungible;

² It should be noted that the Entitlement Ruling has been in draft since 2004. Developments such as the High Court’s decision in *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 and the New South Wales Court of Appeal’s decision in *Beck v Henley* [2014] NSWCA 201, which discuss the principles in *Saunders v Vautier* post-date the Entitlement Ruling.

³ Importantly, the Commissioner in the Entitlement Ruling refers to the “rule” in *Saunders v Vautier*. The High Court in *CPT Custodian* analysed the principle in *Saunders v Vautier* as a “power” rather than a “rule” (see [8.18] to [8.20] above)

- 18.4.2 the beneficiary is entitled to the asset as against the trustee by having a distribution or allocation in the beneficiary's favour; and
- 18.4.3 there is an understanding that the beneficiary is entitled to the specific number of (fungible) assets as against the other beneficiaries.
- 18.5 Whether or not the Commissioner's views in the Entitlement Ruling is outside the scope of this paper. I do note however the decision of the New South Wales Court of Appeal in *Beck v Henley* [2014] NSWCA 201 (Beazley P, Leeming JA and Sackville AJA), and in particular at [2] where Leeming JA observed that:
- The principal question in this appeal reduces to this: in what circumstances is one of two adult beneficiaries, each of whom is **absolutely and indefeasibly entitled** to one half of trust property comprising shares in a private company empowered to direct the trustee to transfer half of a parcel of 50% of the shares in that company, over the opposition of the other. [emphasis added]*
- 18.6 In particular, I query whether the Commissioner is confusing the concept of "absolute entitlement" with the "power" contained in *Saunders v Vautier*. That is, is absolute entitlement a pre-condition that needs to be satisfied before the "power" in *Saunders v Vautier* can be exercised – with the result that they are two different concepts (i.e. one may be absolutely entitled without having the "power" to call upon the asset)?
- 18.7 In any event, if a trustee is to continue holding onto trust assets post-vesting date, then the following will need to be considered:
- 18.7.1 a discretionary trust with a gift over is (very broadly speaking) two trusts. There are trust powers (before the vesting date) (the first trust) and then (after the vesting date) the trust assets are held subject to new trust(s) – being for the takers-in-default of appointment;
- 18.7.2 upon the vesting of the trust, what are the "powers" that apply to the trustee? Outside the general rules in equity and any statutory powers provided (e.g. if the *Trustee Act*) – how can a trustee exercise active powers which may have been provided for in the relevant trust instrument (outside of the "consent" principle being invoked)?
- 18.7.3 any dealings with trust property held subject to the (second) trusts can be effected via the consent principle – which according to Barrett JA is "in truth" a resettlement.
- 18.7.4 if consent of the beneficiaries with a vested and indefeasible interest is not obtained, then what power does a trustee have to continue holding the assets?
- 18.8 That is, even if it is accepted that CGT event E5 does not happen merely by the vesting day occurring (with the effect that the trust fund is, say, held by the trustee for the takers in default of appointment), and the trustee does not distributing the trust assets to those

entitled (with the consent of the relevant default beneficiaries) then regard needs to be given to the implications of non-distribution.

Whether a trustee can continue to hold onto trust assets at the vesting date

- 18.9 The power of a trustee to continue holding onto trust assets post-vesting, without the consent of the beneficiaries who have a vested and indefeasible interest in the trust property, is also doubtful.
- 18.10 There are also questions as to the powers which attach to a trust in which beneficiaries are absolutely entitled.
- 18.11 The assertion that a trustee can continue to hold trust assets post-vesting date ignores the duty of a trustee to distribute. Darke J in *Paloto Pty Limited v Herro* [2015] NSWSC 445 at [23] observed that if “... **the vesting date arrives in June 2015, it will be the duty of the trustee to do whatever is required in order for that property to vest in accordance with the terms of the trust...**”. [emphasis added]
- 18.12 That is, it is doubtful whether a trustee, without more, has the power to continue holding assets to which beneficiaries are absolutely entitled post-vesting. Thomas and Hudson at [10.22] observe that: “... *it is well established that, as a general rule and in the absence of any discretion to the contrary in the trust instrument, the **trustees must make an immediate distribution** ...*”. [emphasis added]
- 18.13 That is, without a specific power to (for example) postpone distribution, it is difficult to see how a trustee can continue holding assets post-vesting date.
- 18.14 In *Lewin on Trusts* at [1-028] it is observed of a “bare” trust – where there is one beneficiary that is absolutely and indefeasibly entitled to trust property that:
- A distinction has traditionally been drawn between “bare” trusts, or “simple” or “naked” trusts, and “special” trusts. According to that distinction, a bare trustee holds property in trust for a single beneficiary absolutely and indefeasibly, and is a mere passive repository for the beneficial owner, **having no duties other than a duty to transfer property** to the beneficial owner or as he directs.* [emphasis added]
- 18.15 Further, in *Lewin on Trusts* at [1-037]:
- The trustee of a trust for a beneficiary absolutely entitled has a duty to transfer the property to or at the direction of the beneficiary, assuming that the beneficiary is of full age and capacity and so able to give a valid direction and receipt, that the property is capable of transfer by the trustee in the manner directed, and the trustee has no unsatisfied right of indemnity against trust property.*** [emphasis added]
- 18.16 Gummow J (as his Honour then was) in *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 281 confirmed the comments made in *Lewin on Trusts*, by observing that: “... *the usually accepted meaning of ‘bare’ trust is a trust under which the trustee or*

trustees hold property without any interest therein, other than that existing by reason of the office and the legal title as trustee, and without any duty or further duty to perform, except to convey it upon demand to the beneficiary or beneficiaries or as directed by them...”.

- 18.17 The Full Court of the High Court (French CJ, Heydon, Crennan, Kiefel and Bell JJ) observed of a bare trust in *CGU Insurance v One.Tel Ltd (in liq)* (2010) 242 CLR 174 at 182 ([36]):

*The trustee of a bare trust has no interest in the trust assets other than those by reason of the office of trustee and the holding of legal title. Further, the trustee of a bare trust has no active duties to perform other than those which exist by virtue of the office of the trustee, **with the result that the property awaits transfer to the beneficiaries** or awaits some other disposition at their direction. One obligation of a trustee which exists by virtue of the very office is the obligation to get the trust property in, protect it, and vindicate the rights attaching to it. [emphasis added]*

- 18.18 That is, without the consent of beneficiaries, a trustee would need to justify the continued holding of trust assets past the vesting date. A prudent trustee who wishes to continue to hold trust property past a vesting date may be well advised to seek judicial advice to ensure a degree of protection.

Consent of beneficiaries – resettlement

- 18.19 In the event that continued holding of trust property past the vesting date is effected via the “consent principle” in *Saunders v Vautier*, regard needs to be given to the implications, given that it may be a resettlement (per Barrett JA in *Re Dion* at [46]).
- 18.19 In particular, “CGT event E1 happens if you create a trust over a CGT asset by declaration or settlement” (subsection 104-55 of the 1997 Act).

19. Extending the vesting day – applications post-*Re Dion*

- 19.1 Prior to *Re Dion*, section 81 of the *Trustee Act* was used to extend the vesting dates of trusts.
- 19.2 Since *Re Dion*, there have not been any applications (let alone successful applications) to extend the vesting date of a trust using subsection 81(1) of the *Trustee Act*. However, three applications seem to have been contemplated (but not pursued at hearing),
- 19.2.1 Darke J in *Paloto Pty Limited v Herro* [2015] NSWSC 445 (10 April 2015);
- 19.2.2 Rein J in *Philip James Bull v Boreas Pty Ltd* [2015] NSWSC 761 (12 June 2015); and
- 19.2.3 McDougall J in *Andtrust v Gioanni Andreatta* [2015] NSWSC 38 (6 February 2015).
- 19.3 Brereton J in *Hancock v Rinehart* [2015] NSWSC 646 considered *Re Dion* in the context of an order pursuant to the *Trustees Act 1962* (WA).

Paloto Pty Limited v Herro [2015] NSWSC 445

19.4 In *Paloto Pty Limited v Herro* [2015] NSWSC 445 (10 April 2015), Darke J dealt with a trust estate which had a vesting date of 8 June 2015, and where the plaintiff sought relief “... as will enable it as Trustee to vary the vesting date to any day not later than 7 June 2045.”

19.5 Darke J at [9] observed that:

The plaintiff accepts that the recent decision of the Court of Appeal in Re Dion Investments Pty Ltd [2014] NSWCA 367 is binding authority for the proposition that s 81(1) of the Trustee Act 1925 (NSW) does not permit the Court to confer upon a Trustee a discretionary power of amendment of the terms of the trust. In that case Barrett JA (with whom Beazley P and Gleeson JA agreed) upheld the decision of the primary judge (Young AJ) to the effect that the variation of the terms of the trust is not of itself a transaction within the meaning of s 81 and the section did not therefore empower the Court to confer upon a trustee a power to alter the terms of the trust as the trustee thinks fit (see at [98]-[100] and [108]). The plaintiff therefore seeks to invoke inherent jurisdiction of the Court to sanction deviations from the terms of the trust, which jurisdiction, it submits, has not been ousted by the enactment of s. 81. I am content to proceed on the assumption that the inherent jurisdiction remains available.

19.6 The application to extend the vesting date pursuant to section 81 of the *Trustee Act* was not pursued at hearing.

19.7 Rather, the Court was asked to sanction a variation to the terms of the trust to provide for a later vesting date. The primary basis for the relief sought was on the basis that there were circumstances which involved an emergency that has arisen in the course of administration of the trust estate, which needs to be resolved in the interests of preserving trust property. That is, the Court’s inherent jurisdiction was sought to be invoked.

19.8 Darke J considered that if there was an “emergency” (which was brought about by the introduction of capital gains tax, which post-dated the creation of the trust, and the nomination of the vesting date pursuant to a reserve power of amendment), the Settlor (in whom the reserve power of amendment) did not think it necessary prior to the Settlor death (in 1991 – after the introduction of capital gains tax) to use the reserve power to extend the vesting date ([22] in *Paloto*).

19.9 Further, given that the vesting date was arriving, it was said that there was a capital gains tax and stamp duty impost that would occur (which would be adverse to the beneficiaries (see for example [6] in *Paloto*). In finding that a tax impost on beneficiaries were not matters concerned with the “management or administration of trust property”, Darke J at [23] observed that:

The Trustee may well understand that upon such vesting of property there will be taxation consequences for the beneficiaries, and may consider that, in the interests of the beneficiaries, it would be desirable if the terms of the trust were altered so that it could effect a deferral of the vesting date.

- 19.10 On the basis that the capital gains tax impost would be that of the beneficiaries (and not the trustee), Darke J at [23] in *Paloto* considered that there was no emergency in relation to the trustee's duties with respect of the management and administration of trust property.
- 19.10 The particular CGT event (or the tax impost) that the trustee was concerned with in *Paloto* was not outlined in the reasons. However, on the basis Darke J's observations at [23] in *Paloto* that if "... the vesting date arrives ... it will be the duty of the trustee to do whatever is required in order for that property to vest in accordance with the terms of the trust ...", it is presumed that CGT event E5 (section 104-75 of the 1997 Act) was considered.
- 19.11 Whilst there is a possibility of a beneficiary being charged with capital gains tax pursuant to CGT event E5 (subsection 104-75(5) of the 1997 Act), there are also exceptions (subsection 104-75(6) of the 1997 Act). In particular, if (as is typical in a discretionary trust situation with takers-in-default) and capital gain or capital loss that a beneficiary makes as a result of CGT event E5 happening is disregarded if the beneficiary acquires the CGT asset for no expenditure (paragraph 104-75(6)(a) of the 1997 Act).
- 19.12 However, subsection 104-75(3) of the 1997 Act causes a capital gain or capital loss to arise for the trustee, with subsection 104-75(4) of the 1997 Act providing an exception for the trustee only if the relevant CGT asset was acquired before 20 September 1985.
- 19.13 A similar regime applies if a trustee appoints (disposes) of a CGT asset held subject to a trust in satisfaction of a beneficiary's interest in the capital of a trust (CGT event E7 contained in section 104-85 of the 1997 Act).
- 19.14 That is, provided that the relevant CGT assets were acquired after 20 September 1985 (causing the trust assets to be post-CGT assets), it seems that the taxation impost in *Paloto* would have been that of the trustee, and not the beneficiaries.
- 19.16 Further, arguably Division 6 of the *Income Tax Assessment Act 1936* (Cth) ("**the 1936 Act**") does not apply to pass any capital gain onto the beneficiaries, this is on the basis that:
- 19.16.1 CGT event E5 specifically provides that the "trustee" (subsection 107-75(3) of the 1997 Act) and the "beneficiary" (subsection 104-75(5) of the 1997 Act) makes the capital gain or capital loss;
- 19.16.2 unlike, for example CGT event A1 (section 104-10 of the 1997 Act), CGT event E5 does not use the term "you" (in relation to either the CGT event happening, or who makes the capital gain or capital loss). As a result, the "entity" that is the trust estate is not intended to have CGT event E5 apply to it. In this regard, refer

to the meaning of the term “you” in section 4-5 of the 1997 Act and “entity” in section 960-100 of the 1997 Act (which includes a trust relationship and not a trustee);

19.16.3 given [19.16.1] and [19.16.2] above, if CGT event E5 does happen, then it is the event of the “trustee” and the “beneficiary” and not of the “trust estate” as contemplated by the term “net income” in section 95 of the 1936 Act, with the result that the capital gain which may arise pursuant to CGT event E5 cannot be passed on pursuant to section 95 of the 1936 Act; and

19.16.4 the above analysis is supported by section 254 of the 1936 Act, which makes trustees liable for tax (or at least gives them the power to withhold amounts to pay tax on amounts derived by a trustee in that capacity).

Andtrust v Giovanni Andreatta [2015] NSWSC 38

19.17 The plaintiff in *Andtrust v Giovanni Andreatta* [2015] NSWSC 38 sought (as an alternative prayer of relief) an order pursuant to section 81 of the Trustee Act seeking to extend the vesting date of a trust. McDougall J at [8] held that, because of the Court of Appeals decision in *Re Dion* “.. I am constrained to hold that relief under s 81 is not available...”.

21.18 However, McDougall J considered that a reserve power contained in the trust deed (at [11]) was wide enough to allow for an extension of the vesting day (at [19] to [23]).

Philip James Bull v Boreas Pty Ltd [2015] NSWSC 761

19.19 In *Philip James Bull v Boreas Pty Ltd* [2015] NSWSC 761 (12 June 2015), Rein J dealt with three trust estates which vested in 2015 ([1]). At [4], Rein J observed that prayer 1 of the Amended Summons contained an application under section 81 of the *Trustee Act*, and at [5] Rein J observed that Senior Counsel for the applicant:

... accepted the Court of Appeal’s decision in Re Dion Investments Pty Limited [2014] NSWCA 367, presents an obstacle to the contention that a vesting date can be extended by virtue of s 81 [of] the Act. I am bound by that decision, in which in any event I respectfully agree, and Mr Pesman does not now press for relief in terms of prayer 1 of the Amended Summons.

19.20 That is, the application to extend the vesting date of the trust estates in *Philip James Bull v Boreas Pty Ltd* was not pursued.

19.21 Rather, Rein J held that a reserve power (at [7]) permitted the trustee to vary the trusts (at [15]).

20. Discretion to make the order – section 81 of the *Trustee Act*

20.1 Not only must there be an “absence of any power” for subsection 81(1) of the *Trustee Act* to have application, but the Court has a discretion to make the order requested. Campbell

J in *Stein's Case* at [65] considered that there was only one circumstance in which a Court would refuse relief, being if "... *there was some means other than the making of an order under section 81 by which the same practical objective could be achieved as would be achieved if power to enter the dealing were conferred*".

20.2 That is, not only must there be an absence of a power, but there must also not be any other relief available.

20.3 Campbell J at [66] in *Stein's Case* considered that rectification was one such way of achieving the same "practical objective". It was observed at [67] that rectification required:

20.3.1 evidence that the trust deed did not accord with the intentions of the person who declared the trust; and

20.3.2 cogent enough proof of what was intended.

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