

Deviation from trust authorised by court

By BERNADETTE CAREY

Trustees may depart from the terms of the trust deed – but only with the authorisation of the court.

A trustee may engage in “advantageous dealings” if empowered by the court to do so, the NSW Supreme Court has found in *Barry v Borlas Pty Limited & Ors* [2012] NSWSC 831. The decision highlights the effectiveness of s.81 of the *Trustee Act 1925* (NSW) as a tool to ensure that a trust is administered for the advantage of the beneficiaries – even if the trust deed might prohibit the trustee from deviating from its terms.

In practice, the use of the section will usually be limited to the exercise of an otherwise prohibited power in a particular instance, rather than to alter the substantive nature of the trust. More importantly, s.81

does not authorise professional trustees to disregard the terms of the trust deed and go off on a folly of their own.

Those that do depart from the strict terms of the trust without first satisfying the court that the deviation is necessary or beneficial do so at their peril.

The case is a helpful resource for solicitors advising trustees who may feel that their hands are unreasonably tied by the terms of the trust deed. The possibility of an application to court under s.81 should be identified as a real option for trustees so hindered. Provided it is supported by carefully drafted evidence showing the expediency of the proposed course of action and the benefit

it will ultimately confer on the beneficiaries, the application is likely to be a cost-effective and efficient alternative to maintaining the frustrating status quo otherwise enforced by the trust deed.

Obligations of trustees

Performing the role of a professional trustee of a discretionary or family trust can feel like a daunting and unrewarding task at times. Not only do professional trustees have imposed on them stringent obligations to protect and nurture the assets of the trust, they also risk being sued for breach of trust if they contravene the often extremely restricted terms of the trust deed.



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Often, an action or transaction which is obviously advantageous to the beneficiaries may be prohibited by the terms of the trust deed, leaving a professional trustee feeling firmly wedged between the proverbial rock and hard place.

Trustee Act

Justice White's decision in *Barry v Borlas* highlights the benefits offered by s.81 of the *Trustee Act 1925* (NSW) to professional trustees faced with such a dilemma. The section recognises that, in certain circumstances, it may be to the benefit of the beneficiaries of the trust if the trustee ventures from the strict terms of the trust.

Section 81 of the Act concerns “advantageous dealings”. It provides that, if in the course of administering or managing the trust property, the trustee considers it expedient to, for example, sell or lease any trust property, or to purchase, invest or enter into a transaction on behalf of the trust, it may obtain the approval of the court to do so even if the trust deed does not confer a power of that nature on the trustee.

However, before empowering the trustee to so act, the court must be satisfied that it is expedient to do so in the circumstances in which the trustee finds itself.

Acts not contemplated by the trust deed

Interestingly, the trustee does not need to show that the circumstances involve an emergency or that the action contemplated by the trustee is needed to prevent injury to the trust property or the interests of a beneficiary. The court will really only be concerned with expediency and it will not be swayed by any contrary intention contained in the trust deed.

In the past, the courts have made orders in reliance on s.81 to approve a wide variety of transactions. The term “transaction” has been interpreted to include alterations to the terms of the trust deed. By way of example, sales of trust property have been approved even though there was no such power of sale in the trust deed and investment in shares of companies has been permitted notwithstanding the trustee having no express power of investment.

Facts

In *Barry v Borlas*, the trust in question was established by a deed made back in June 1977 by Mr Barry. The trust was created for the benefit of his wife, children and grandchildren, who were named as the primary beneficiaries. Borlas Pty Limited is the present trustee of the trust.

Clause 6 of the trust deed provided that on the vesting day, which was specified as 31 December 2026, the trustee was to stand possessed of the capital of the trust fund upon

trust for such of the primary beneficiaries as the trustee might determine and in such shares as the trustee might declare. If the trustee has not made such a declaration on the vesting day, the capital will be held for certain “residuary beneficiaries”.

After the settlement of the trust, Mr Barry had divorced his former wife, who was named as one of the primary and residuary beneficiaries of the trust. He had remarried, and his present wife and his children became the primary and residuary beneficiaries. Over the subsequent years, Mr Barry had built up the trust's interests in primary production and he was eager for his children and grandchildren to foster those interests and to have a continued association with rural Australia.

Decision to confer power on trustee to advance the objectives of the trust

Mr Barry and the primary beneficiaries had grown concerned that the vesting of the trust, due to occur in just over

14 years' time, would have adverse tax implications for the beneficiaries and might require the sale of assets held in the trust, including farming property. The trust deed did not allow for the extension of the vesting day.

Accordingly, Mr Barry applied to the court in reliance on s.81 of the *Trustee Act* for an order to permit the trustee to extend the vesting day to ensure that the trust continue beyond his death and for the benefit of his current wife, children and grandchildren.

The court was satisfied that the proposed amendment to the trust was expedient in the circumstances of the case and for the purposes of s.81. This is because it was consistent with, and would advance, the objectives of the trust, including providing for Mr Barry's children and grandchildren well into the future.

The fact that the beneficiaries supported the proposal was also considered a sound reason to exercise the court's discretion and orders were made accordingly. □