

THOMSON REUTERS WEEKLY TAX BULLETIN

Issue 44, 17 OCTOBER 2014

[1445] Extensions to vesting dates - some lessons from *Re Arthur Brady Family Trust; Re Trekmore Trading Trust*

by Patrick Ellwood and Matthew Burgess, Directors, View Legal

Often a key reason for seeking to extend the vesting day of a trust will be to defer the likely tax and stamp duty implications that would arise where the trust vests and assets are distributed to the beneficiaries.

The recent Queensland case of *Re Arthur Brady Family Trust; Re Trekmore Trading Trust* [2014] QSC 244 (see 2014 WTB 42 [1416]), provides a useful illustration of the way in which the Courts respond to applications where deferring revenue costs are arguably the primary driver for the application.

The case follows previous decisions such as *Stein v Sybmore Holdings Pty Ltd* [2006] NSWSC 1004 in NSW and *Re Plator Nominees Pty Ltd* [2012] VSC 284 in Victoria, each of which are discussed below.

Legislation

In each State, the Court has statutory power to vary trust instruments in particular circumstances.

In the Northern Territory, this power can be exercised where the Court "thinks fit". In Western Australia and Queensland, the power can be exercised where the Court considers the variation "expedient" or where the transaction is in "the best interests of the beneficiaries".

In all other jurisdictions, the "expedient" test applies.

In circumstances where a trust has been established with a vesting period of less than 80 years, the trustee may vary the trust deed, in accordance with an express power of variation in the trust instrument, to extend the vesting day.

The decision of *FCT v Clark* [2011] FCAFC 5 provides comfort that in many circumstances, such a variation will not trigger a resettlement of the trust for tax purposes.

However where the trust instrument does not provide the trustee with adequate powers to extend the vesting day, an application to the Court may be necessary.

The Court would therefore need to consider whether the trustee's reasons for wanting to extend the vesting day are "expedient" or "in the best interests of the beneficiaries", depending on the jurisdiction.

Cases

Stein v Sybmore Holdings Pty Ltd involved an application under s 81 of the *Trustee Act 1925* (NSW) to extend the vesting day of a trust established in 1978, which was to vest in 2007.

The trustee sought an order authorising it to extend the vesting date of the trust, notwithstanding that the variation power in the trust instrument was insufficient to allow such an amendment.

The trustee's reasons for seeking the authorisation included:

1. the trust had been established for the intended benefit of the applicant's children and grandchildren, however his adult children were unmarried and without children and unless the application was granted, the trust would vest before his grandchildren

- could benefit; and
2. the trustee anticipated that capital gains tax of \$690,000 and stamp duty of \$620,000 would be payable on vesting of the trust, diluting an asset pool valued at approximately \$13m.

The Court granted the order requested as it considered the amendment to be "expedient". The judgment focused primarily on the first reason for the application outlined above, however the dilution to the value of the trust that would have been caused by the capital gains tax and stamp duty costs outlined above were a relevant factor.

A similar sentiment can be found in the Victorian case of *Plator Nominees Pty Ltd*. The case involved a trust established in 1972 which had a 40 year vesting period. Consequently the trust was due to vest in 2012.

The trustee brought an application under s 63A of the *Trustee Act 1958 (Vic)* that the vesting day be extended to the date 21 years after the death of the last living relative of one of the primary beneficiaries.

The trustee's application included the following justifications for the extension:

1. the trust was established as a property investment vehicle intended to survive the primary beneficiaries for the benefit of their children, but if it vested in 2012 it would not achieve that purpose;
2. all of the beneficiaries had consented to the extension;
3. no specific reason could be identified as to why 2012 had been nominated as the vesting day; and
4. if the trust vested in 2012 a "significant capital gain" would be realised.

The Court granted the extension and noted that, consistent with previous judicial authority, the fact that deferral of taxation costs was one of the drivers for requesting the extension did not preclude it from granting the extension.

Re Arthur Brady Family Trust; Re Trekmore Trading Trust arguably further clarifies the position set out in the previous cases.

In that case, the first trust was established in 1977 with a vesting date of 2017. The second trust was established in 2008 with near identical terms to the first trust (presumably as part of a trust "cloning" arrangement), including the 2017 vesting date.

The applicants sought an order for an extension to the vesting date under the *Trusts Act 1973 (Qld)*.

The sole reason for the application outlined in the judgment was the applicant's desire to defer capital gains tax and stamp duty costs which would substantially dilute the overall pool of assets to the detriment of the beneficiaries.

The total tax and stamp duty costs across both trusts were anticipated to exceed \$1.8m out of an asset pool of \$15m.

The applicant submitted that, in order to maintain the property portfolios, the beneficiaries would need to borrow funds to meet the transaction costs. Each of the contingent beneficiaries supported the application.

After a detailed analysis, the Court granted the requested extensions as it was satisfied the "very substantial impact of taxes and duties upon the trust funds" and the unanimous approval of the beneficiaries supported the exercise of its discretion.

Lessons

A few key lessons can be taken from the cases above.

First, many trust deeds from all eras, and particularly those established in the 1970s and 1980s include vesting periods significantly shorter than 80 years.

Practitioners should be alert to this issue and ensure they methodically check the vesting day of every trust as part of any trust dealing.

Secondly, *Re Arthur Brady Family Trust; Re Trekmore Trading Trust* provides authority that the Court may grant an order for the extension of a vesting day even where the sole purpose of the extension is to defer the capital gains tax costs and stamp duty costs that would otherwise arise as a result of the vesting, provided it can be shown that those costs would have a material adverse impact on the beneficiaries.

Finally, although any application to Court carries a degree of risk, recent cases indicate the Court will generally react positively to applications for the extension of vesting dates, where there are compelling commercial or family reasons to order the extension.