

Mandated trust vesting; a 2025 reminder to read the deed

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In recent years cases there have been numerous key reported decisions centred around trust vesting.

Often the cases involve court applications to extend the perpetuity period of a trust, and in turn defer the trust ending.

It is also often the case that the key reason for seeking to extend the vesting day of a trust will be to defer the likely revenue consequences (that is, the tax and stamp duty implications) that would arise where the trust vests and assets are distributed to the beneficiaries.

Mandated early vesting

Perhaps counterintuitively however, a number of reported decisions also explore the early vesting of trusts; that is, forcing the wind up of a trust before the point in time originally mandated by the terms of the establishing trust deed.

The common theme in all cases arguably remains the same however; that is, the trust adviser's key mantra is to always read the deed - and the state based trust legislation.

For example, in *Campbell v Campbell* [2022] NSWSC 554, there was a successful request for the court to bring forward the vesting date of a trust to be immediately terminated, pursuant to the relevant power given to the court under the state based Trustee Act.

In granting the request the court (while also restraining the trustee from exercising a power under the trust deed to vest capital or income to any beneficiary prior to the vesting date) confirmed that one of the key reasons for its decision was to enable the parties to move past their costly and paralysing legal disputes, noting that further litigation was 'almost inevitable' (given the trustee was 2 separate companies, who were in dispute).

Recent decision

In a decision with the same outcome (that is, a trust being terminated before the date otherwise defined under the trust deed), the case of *Re Lingamaneni Momentum Melbourne Unit Trust* [2025] VSC 40 provides further useful guidance for advisers.

Broadly the factual matrix involved a unit trust (there was no exploration of whether the trust was a fixed trust for tax purposes; which for many advisers will be a critical aspect, particularly if any unitholders are self managed superannuation funds).

The unit trust had been created to acquire and hold a property that was to be redeveloped.

As part of a wider dispute, one of the unitholders purported to exercise rights given to each unitholder under the trust deed to issue a termination notice requiring the trust be vested (the relevant clauses from the trust deed are extracted at the end of this article); the ability of a single unitholder to unilaterally force the ending of the trust was disputed by the other unitholders.

In holding the termination notice was valid and effective to bring an end to the trust, the court confirmed

1. While the categories of fiduciary relationships remain open and not closed, the relationship of unitholders does not fall within one of the established categories.
2. To the extent that there might be a fiduciary relationship involving the unitholders in a unit trust, it is the relationship between the trustee and the unitholders as a whole that would be relevant; not as between the unitholders.
3. The trust deed set out the legal structure within which the commercial relationship would operate, the controlling minds of the unitholders each had extensive experience in financial matters, and in this context, equity is slow to impose fiduciary duties (see *Adventure Golf Systems Australia Pty Ltd v Belgravia Health & Leisure Group Pty Ltd* (2017) 54 VR 625).
4. In other words, commercial agreements which are negotiated at arm's length between sophisticated and self-interested parties on an equal footing and without pressure do not give rise to fiduciary duties. This is because the critical feature is missing, namely that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense (see *Hospital Products Limited v United States Surgical Corporation* [1984] HCA 64).
5. If the power granted by the trust deed here for a unitholder to vest the trust was to also be subject to a fiduciary obligation this would have restricted and have been inconsistent with the intended operation of the clause.
6. Relevantly, the terms of the trust deed were also more consistent with the absence of a fiduciary relationship between unitholders (see clause 3, again extracted at the end of this article, which was specifically included in the deed, and in the court's view needed to be given full effect).
7. The trust deed was also notable for what it did not include, for example there was no reference to unitholders owing a duty to other unitholders, nor any requirement for any unitholder to act for or on behalf of the interests of another unitholder when exercising any power or discretion which may affect the interests of the other unitholders.

8. Specifically in relation to the clause under the deed allowing a unitholder to force the vesting of the trust, the court confirmed it was crafted to allow it to be exercised for the benefit of a unitholder, without the requirement to have regard to the interests of the other unitholders - a right completely inconsistent with, and different from, a power or right to which a fiduciary obligation attaches.

9. Even if certain unitholder investors were somewhat vulnerable, equity will not impose a fiduciary relationship to protect against misplaced trust due to a wrong assessment of character or reliability, which may have been the case here (see *Coonwarra Pty Ltd v CornoNero Pty Ltd* [2023] VSC 781).

10. While the doctrine of fraud on the power was accepted as applying to both fiduciary and non-fiduciary relationships, it also did not apply on the factual matrix here, given:

(a) the trust deed clearly gave each of the unitholders the entitlement to terminate the trust in accordance with the empowering clause; and

(b) where the power is conferred on a beneficiary (as opposed on a trustee), the power is more likely to be conferred on that person for their personal benefit and not for the benefit of other beneficiaries too - a conclusion reinforced here given each of the unitholders had the same power (see *LGSS v Egan* [2002] NSWSC 1171).

11. It is difficult to discern a want of good faith in the exercise of a power by a donee where the power can serve only the interests of the party upon whom it is conferred; in other words, in these circumstances, the ostensible purpose of the exercise of a power will almost invariably be the true purpose.

Ultimately, the court confirmed its view that the exercise of the power to force the vesting of the trust was in accordance with its proper purpose. The plain words of the clause were clear and gave each unitholder the power to terminate the trust at any time before the vesting day on the giving of notice, without any further steps being required. The trust deed did not impose limitations regarding the reasons or motivations a unitholder might have had for exercising the power.

Extracted clauses from trust deed

Clause 3

THAT nothing in this deed shall constitute or shall be deemed to constitute or give rise to:-

(a) the relationship of principal and agent between the Trustees and the Unit Holders;

(b) the relationship of partners as between:-

(i) the Trustees and the Unit Holders;

(ii) the Unit Holders inter se;

(c) any association between the Unit Holders inter se.

Clause 74

THAT the Trust may be determined at such time before the Vesting Day as any Unitholder by not less than seven (7) days written notice to the Trustee directs and such determination shall take effect from the time as so directed unless the notice is withdrawn.

Clause 75

THAT upon the termination of the Trust as aforesaid or otherwise but subject to contrary agreement the Trustees shall proceed as follows:-

(a) Unless otherwise authorised by Special Resolution of the Unit Holders the Trustees shall sell by Public auction all property and investments constituting the Trust Fund and any Unit Holder may bid at such auction.

(b) Subject to any special rights or restrictions which apply to or in relation to Units of any class the Trustees shall from time to time and as soon as is practicable distribute the cash available in the Trust Fund to the Unit Holders proportionally to their holdings until the assets of the Trust Fund have been completely turned into cash and distributed to Unit Holders PROVIDED ALWAYS that the Trustees shall retain full provision for all costs and disbursements commissions brokerage fees expenses claims and advertising costs and demands incurred or expected by the Trustees in the liquidation of the Trust.

(c) Every distribution pursuant to sub-clause (b) hereof shall be made only against production of the relevant Unit Certificates accompanied by a request for payment in such form as the Trustees require.

(d) The Trustees shall endorse Unit Certificates with a notice of the payment made of any interim distribution and for the final distribution such Unit Certificates shall be surrendered to the Trustees.