



# A Matter of Trust: *Re Application of Country Road Services Pty Ltd (Re Browne Family Trust)* [2019] NSWSC 779

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## Decision

*Re Application of Country Road Services Pty Ltd (Re Browne Family Trust)* [2019] NSWSC 779 concerned an application made by the trustee of a family trust under s 81 of the *Trustees Act 1925* (NSW). The trustee as plaintiff (and sole party to the proceedings) sought orders conferring upon it the power to distribute the trust's capital and income otherwise than in accordance with the trust deed.<sup>1</sup>

Section 81(1) is in the following terms:

### “81 Advantageous Dealings

- (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.”

In a judgment that was both incisive and unsparing (the proposed orders were referred to as a “tax minimisation scheme”<sup>2</sup>) Parker J concluded that the application would not be a dealing in “the management and administration” of the trust property and thus fell outside the scope of s 81.<sup>3</sup> The application was dismissed.

### Role of trustee

Having found against the plaintiff, His Honour went on to query whether the proceedings had been appropriately constituted from the outset. The question was posed: is it the trustee’s role to seek additional powers so that it might administer the trust in a different way?<sup>4</sup>

Parker J noted that the trustee’s task is to administer the trust in accordance with the trust instrument.<sup>5</sup> His Honour cited the explanation of the trustee’s role given by the NSW Court of Appeal in *Re Dion Investments Pty Ltd* [2014] NSWCA 367; (2014) 87 NSWLR 75 [94], Barrett JA (Beazley P and Gleeson JA agreeing):

*Variation of the terms of a trust (including by way of conferral of some new power on the trustee) is not something within the ordinary and natural province of a trustee. It is not something that it is “expedient” that a trustee should do; nor, fundamentally, is it something that is done “in the management or administration of” trust property. A trustee’s function is to take the trusts as it finds them and to administer them as they stand. The trustee is not concerned to question the terms of the trust or seek to improve them. I venture to say 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.* (Emphasis added).

His Honour considered that where an application under s 81 is to be made, it should be brought not by the trustee, but by those who are propounding the change (usually, the beneficiaries).<sup>6</sup> The benefits of this approach are twofold:

- First, it ensures that the costs of unsuccessful proceedings are borne appropriately. His Honour noted that where an application is unsuccessful the trustee will not be entitled to costs out of the trust fund. He found



it to have been presumptuous of the trustee as plaintiff to have incurred expenditure in anticipation of a successful outcome.<sup>7</sup> His Honour went on to say that “[t]hose who are promoting the change, who would usually be beneficiaries of the trust or other interested persons, should, at least at the outset, bear the financial cost of propounding the application. The trustee should be joined as a defendant but would usually adopt a position of neutrality”.<sup>8</sup>

- Second, in cases where the trustee adopts a position of neutrality, it enables the trustee to act as contradictor or otherwise arrange for the presence of one.<sup>9</sup> His Honour said that “in any case where there is room for debate, the Court may be assisted by the presentation of argument on an adversarial basis ... If the trustee is in any doubt, in a particular case, about whether to act as a contradictor, or to join someone else to do so, the Court’s advice can be sought on that question”.<sup>10</sup>

### Takeaways:

- The case serves to remind us that the trustee’s role is to administer the trust in accordance with the terms of the trust instrument. Section 81 is concerned with the management and administration of trust property. The Western Australian equivalent is found at s 89 of the *Trustees Act 1962* (WA). These sections are

not concerned with the beneficial interests of the beneficiaries and it is not appropriate to attempt to vary beneficiaries’ interests under them.<sup>11</sup>

- More broadly, the case also suggests that the usual role of a trustee should be one of neutrality. In considering applications that are brought outside the scope of the trustee’s function, the application should be brought by those propounding the change. The trustee’s position of neutrality will serve to:
  - o ensure that application costs are borne appropriately; and
  - o assist the Court by enabling the trustee to act in the role of contradictor or arrange for the presence of one. When in doubt, the trustee can seek the Court’s advice on the question.

### Endnotes

- \* STEP (The Society of Trust and State Practitioners) is a worldwide professional association for lawyers, accountants and other advisors who help families plan their assets across generations. STEP promotes high professional standards by educating professionals, connecting advisors and families globally, informing public policy and acting in the public interest.
- 1 *Re Application of Country Road Services Pty Ltd (Re Browne Family Trust)* [2019] NSWSC 779 [1], [99].
- 2 *Ibid* [107].
- 3 *Ibid* [85].
- 4 *Ibid* [103].
- 5 *Ibid* [103].
- 6 *Ibid* [105].
- 7 *Ibid* [104].
- 8 *Ibid* [105].
- 9 *Ibid* [106] - [107].
- 10 *Ibid*.
- 11 *The Law of Trusts*, 2014, Annotated Legislation [41.8140] (NSW) and [81.8940] (WA).