SUPREME COURT OF QUEENSLAND

CITATION:	*Re Arthur Brady Family Trust; Re Trekmore Trading Trust* [2014] QSC 244
PARTIES:	**In BS 4106 of 2014** **In the matter of the Arthur Brady Family Trust ex parte Arthur Brady Pty Ltd** **In BS 4182 of 2014** **In the matter of the Trekmore Trading Trust ex parte Trekmore Trading Pty Ltd** ACN 19 527 273 914
FILE NO/S:	BS 4106 of 2014 BS 4182 of 2014
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2014
JUDGE:	Philip McMurdo J
ORDER:	**BS 4106 of 2014:**

1. **On the application by Arthur Brady Pty Ltd as Trustee for the Arthur Brady Family Trust, it is ordered that pursuant to s 94 of the *Trusts Act* 1973 (Qld) the applicant is empowered and authorised to amend the vesting date of the trust, as set out in cl 1(d) of the trust deed dated 16 February 1977, to the date which is 80 years from the settlement date of that trust deed.**

BS 4182 of 2014:

2. **On the application by Trekmore Trading Pty Ltd as Trustee of the Trekmore Trading Trust, it is ordered that pursuant to s 94 of the *Trusts Act* 1973 (Qld) the applicant is empowered and authorised to amend the trust deed for that trust, dated 30 June 2008, by deleting cl 1(e) of the trust deed and substituting it with the following:**

"(e) the Vesting Day means the day on which

shall expire the period of eight (80) years after 16 February 1977 provided that the Trustee may (subject to the same being within the applicable period under the rule known as the rule against perpetuities) (as modified by statute) appoint an earlier or later date as the Vesting Day"

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – DISCRETIONARY TRUSTS – OBJECTS AND DURATION – where the applicant, in each case, is the trustee of a discretionary trust – where each trust has a vesting date of 16 February 2017 – where there would be substantial tax consequences if the vesting date remained and the trust property was distributed – where the applicant seeks an order amending the vesting date – where all the primary and contingent beneficiaries consent to the amendment – whether an amendment to the vesting date is a 'transaction' within the meaning of s 94 of the *Trusts Act* 1973 (Qld) - whether the vesting date can be amended under s 94 of the *Trusts Act* 1973 (Qld) .

Trustee Act 1925 (NSW), s 81
Trustee Act 1925 (UK) c.19, s 57
Trustees Act 1962 (WA), s 89
Trusts Act 1973 (Qld), s 94, s 95

Barry v Borlas Pty Ltd [2012] NSWSC 831, cited
Chapman v Chapman [1954] AC 429, cited
James N Kirby Foundation v AG (NSW) (2004) 213 ALR 366, cited
Perpetual Trustees WA Ltd v AG (WA) (1992) 8 WAR 441, applied
Re Bowmil Nominees Pty Ltd (as trustee of the Williamson Superannuation Fund) [2004] NSWSC 161, cited
Re Dion Investments Pty Ltd [2013] NSWSC 1941, distinguished
Re Downshire Settled Estates [1953] 1 Ch 218, distinguished
Re Philips New Zealand Ltd [1997] 1 NZLR 93, cited
Riddle v Riddle (1952) 85 CLR 202, cited
Stein v Sybmore Holdings [2006] NSWSC 1004, applied
Westfield Queensland No 1 Pty Ltd v Lend Lease Real Estate Investments Ltd [2008] NSWSC 516, cited

COUNSEL: R Bain QC for the applicant in both proceedings

SOLICITORS: Barron & Allen Lawyers for the applicant in BS 4106/14

McKays Solicitors for the applicant in BS 4182/14

[1] These two Originating Applications were heard together and involve identical questions. In each case, the applicant is the trustee of a discretionary trust with a vesting date of (no later than) 16 February 2017. Each application seeks an order,

pursuant to s 94 of the *Trusts Act* 1973 (Qld), to the end of amending the vesting date to 16 February 2057.

[2] Each of the persons or companies to which the income of the trust funds could now be paid, or who could share in the capital upon the vesting date, supports the applications. There was no separate appearance for any of them. The only submissions were by the applicants' counsel.

[3] In the course of the hearing, I questioned whether s 94 permitted the court to authorise the amendment of the vesting date and asked whether consideration had been given to s 95 of the *Trusts Act* 1973 (Qld). Ultimately, counsel submitted that s 95 could be used, without developing an argument as to how the facts of these cases might engage that provision. In substance, the applications seek to engage s 94.

The trusts

[4] The Arthur Brady Family Trust was settled on 16 February 1977. The original trustees were Robert Arthur Brady and his wife, Beryl Joan Brady. Each is now deceased, Mrs Brady dying only last year. In 1979, Arthur Brady Pty Ltd became its trustee and remains so. Pursuant to cl 1(d) of the trust deed for this trust (which I will call the AB Trust), the vesting day is 40 years from the execution of the deed or such earlier day as the trustee determines.

[5] The trust deed provides for the payment or accumulation of the income as follows:

> "2. The Trustee shall hold the Trust Property upon and subject to the trust herein declared and shall until the Vesting Day pay or apply the whole of the income of the Trust Property as it arises to or for the benefit of the Contingent Beneficiaries in such shares and proportions as the trustees shall determine provided that the said trustee for the time being shall have the power to vary from time to time the proportion in which any contingent beneficiary is to share in the income of the Trust Property and may exclude any one or more of the Contingent Beneficiaries from participating in such distributions of Trust income … PROVIDED FURTHER that the trustee shall be empowered whether there be contingent beneficiaries or not to declare that the whole or any portion of the income of the trust property as it arises be accumulated in any way and be dealt with as an accretion to the capital PROVIDED HOWEVER that if at any time during the continuance of the Trust there be no contingent beneficiary the income of the trust property as it arises shall be accumulated and dealt with as an accretion to the capital of the Trust."

[6] The distribution of the capital on the Vesting Day is governed by cl 4 of the trust deed which provides in part as follows:

> "4.(a) the trustees shall on the Vesting Day stand possessed of the trust property in trust to pay the whole of the sum to or for any one or more of the contingent beneficiaries (whether to the exclusion of some of them or not) in such proportions as the

trustees shall in their absolute discretion think fit and appoint and in default of such appointment upon trust to pay the same to such of the primary beneficiaries as are then living and if more than one absolutely as tenants in common in equal shares …"

[7] Clause 4(b)(i) provides:

> "4.(b) (i) in this deed 'contingent beneficiaries' shall mean initially ROBERT ARTHUR BRADY, BERYL JOAN BRADY, COLIN ARTHUR BRADY and IAN CHRISTOPHER BRADY (who are in this deed referred to as the primary beneficiaries) together with such other contingent beneficiaries as shall be added by the trustees pursuant to this deed."

[8] Of the four named contingent beneficiaries, I have mentioned the late Mr and Mrs Brady. The others are their sons.

[9] There are further provisions for the inclusion or exclusion of "contingent beneficiaries" as follows:

> "4.(b) (ii) the trustees shall in addition to whatever other rights be conferred under this clause have the right to include as contingent beneficiaries, the parent, child or grandchild, brother, sister, brother-in-law, sister-in-law, nephew and niece of the said ROBERT ARTHUR BRADY, BERYL JOAN BRADY, COLIN ARTHUR BRADY and IAN CHRISTOPHER BRADY.
>
> (c) The trustee shall have the right at any time to exclude any of the contingent beneficiaries as defined in the preceding sub-clause and from the date of their exclusion (if such exclusion occurs) the contingent beneficiary so excluded shall have no further right to income or any part of the capital (on the vesting day) whatsoever PROVIDED THAT any person so excluded can be included again under the provisions of clause 4(d).
>
> (d) Subject to the other provisions of this deed the trustees shall have the power at any time or times and from time to time in their absolute discretion with or without consideration to pay, transfer, apply, set aside or accumulate the whole or any part of the Trust Fund and/or the Income to any such persons, incorporated companies, trusts, charities, bodies or associations whether incorporated or unincorporated having a separate legal identity in the country or place according to the laws of which they have been created as the Principal by notice in writing before the vesting date appoint to be the contingent beneficiary for the purpose of this deed …"

[10] Clause 4 further provides:

> "(e) If on the Vesting Day there is no contingent beneficiary the Trust Property shall vest in the next of kin of the last surviving contingent beneficiary such next of kin being determined as being those persons who would benefit under the law governing intestate estates on the said last surviving contingent beneficiary dying intestate (called and referred to in this Deed as 'Other Beneficiaries') and if more than one in equal shares absolutely."

[11] By cl 15, the trustee is given the power to amend, delete or add to any of the provisions of the deed, but with certain exceptions including the amendment of cll 1, 2 and 4. Therefore, a power in the trustee to amend the trust deed by altering the description of the vesting date is expressly excluded.

[12] The Trekmore Trading Trust was established to enable the corpus of the AB Trust to be split between Colin's family and Ian's family. The trust deed for the Trekmore Trust was executed on 30 June 2008. Colin Brady is the director of the trustee of the AB Trust. Ian Brady and his wife Linda Brady, are the directors of the trustee of the Trekmore Trust.

[13] The terms of the Trekmore Trust are relevantly identical to those of the AB Trust. By cl 1(e) of its trust deed, the vesting day is 16 February 2017 or such earlier day as the trustee may determine. Clauses 2, 3 and 4 replicate the terms of the AB Trust which I have set out above.

The present parties

[14] Over the years there have been exclusions from and inclusions in the class of contingent beneficiaries of each of the trusts.

[15] The contingent beneficiaries under the AB Trust are Colin Brady, his wife Christina Mary Brady, their four children (each of whom is an adult) and two companies of which Colin Brady is a director and the apparent controller.

[16] The present contingent beneficiaries of the Trekmore Trust are Ian Brady, his wife Linda Brady, Colin and Christina Brady, their four children and a company of which Ian Brady is the sole director and Ian and Linda Brady are the shareholders.

Reasons for the applications

[17] Each of the trusts holds valuable real estate. The AB Trust has a portfolio of industrial and commercial real estate comprising 7 properties with a total value of more than $7 million. The Trekmore Trust holds another seven properties of a total value of more than $8 million. If the vesting date remains as 16 February 2017, there will be considerable amounts of capital gains tax and stamp duty to be paid on the distribution of the real property assets.

[18] In the case of the AB Trust, there will be an estimated capital gains tax liability of more than $500,000 and an estimated amount of stamp duty of $370,000. In the case of the Trekmore Trust, there is an estimated capital gains tax liability of more than $600,000 and a stamp duty liability of more than $400,000. In each trust, there are amounts owing to beneficiaries for amounts of income which the trustee has apportioned in their favour (under cl 2) but which have not been paid. In the AB

Trust, these amount to nearly $2 million. In the Trekmore Trust, at least as at 30 June 2012, they amounted to nearly $3 million. The accountant for the Trekmore Trust estimates that the total unpaid entitlements would now be somewhat higher than the 2012 figure. These unpaid entitlements would have to be paid on the vesting date.

[19] In order to maintain the same property portfolios within these two branches of the family, monies would have to be borrowed to meet the tax and duty components, resulting in a further expense for the cost of that borrowing. The result would be a substantial burden, in each case, if the portfolio is to be preserved or alternatively, a diminution in the portfolio.

[20] Each of the contingent beneficiaries under these trusts supports the present applications. They wish to avoid what the trustees' submissions describe as the very substantial imposts and other financial detriment which will result if the current vesting date stands. It is submitted "that the manifest common intention of all concerned was and remains that the trusts be the commercial vehicle for substantial investment in continuing substantial income stream to those concerned" and that should be "retained for as long as possible". The objective is to extend the vesting date of each trust to the maximum perpetuity period which is permitted by law for the AB Trust, which is 80 years from 16 February 1977.[1] The application for the Trekmore Trust seeks an amendment by which the vesting day would be 80 years from 16 February 1977 with a proviso that the trustee might, subject to the relevant law of perpetuities, appoint an earlier or later date as the vesting day.

Section 94

[21] Section 94 of the *Trusts Act* 1973 (Qld) provides as follows:

> "94 Court's jurisdiction to make other orders
>
> (1) Where in the opinion of the court any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, retention, expenditure or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the court, or it or they can not be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the court may by order confer upon the trustee, 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 paid or borne,

[1] s 209(1) of the *Property Law Act* 1974 (Qld).

> and as to the incidence thereof between capital and income.
>
> (2) The court may from time to time rescind or vary any order made under this section, or may make any new or further order; but such a rescission or variation of any order shall not affect any act or thing done in reliance on the order before the person doing the act or thing became aware of the application to the court to rescind or vary the 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."

[22] Counsel for the applicants submitted that the proposed retention of the property of the trusts, consequent upon the extension of their vesting date, is a "retention" within s 94(1). But his principal submission was that the extension of the vesting date itself would constitute a "transaction" within this provision. It was said that the extension of the vesting date and the consequent retention of the property of the trusts would be expedient in the management or administration of the property vested in the trustees or that it would be "in the best interests of the persons … beneficially interested under the trust".

[23] The terms of s 94 derive from s 57 of the *Trustee Act* 1925 (UK). All Australian jurisdictions have enacted a similar provision but there are some differences between the various Australian provisions. That which has received the most judicial consideration is s 81 of the *Trustee Act* 1925 (NSW) which relevantly provides as follows:

> "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. …"

[24] There are relevantly two differences between the New South Wales and Queensland sections. The first, which might be thought to enlarge the jurisdiction granted by the NSW section, is the inclusion of the words "including adjustment of the

respective rights of the beneficiaries" in s 81(1)(a). In a New South Wales decision upon which the applicants heavily rely, *Stein v Sybmore Holdings*,[2] Campbell J (as he then was) noted that those words are not found in the English section and that they have the effect of making the New South Wales section wider than it (and similarly, wider than the Queensland section).[3]

[25] The second difference, which makes the Queensland section wider than the New South Wales and English sections, is that the Queensland section is not confined to a case where the proposed transaction is "expedient in the management or administration of any property vested in a trustee". The court's jurisdiction will also exist where a transaction "would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust …". The *Trusts Act* 1973 (Qld) followed the recommendations of the Queensland Law Reform Commission in its report in 1971 entitled "The Law Relating to Trusts, Trustees, Settled Land and Charities".[4] At p 64 of that report, the Commission described the power in the English, New South Wales and Victorian sections as limited, in that it could only be used "for reasons of management or administration" and therefore could not be used "to effect any changes in the substantive dispositive provisions of the trust, however advantageous such changes might be". The Commission there cited *Chapman v Chapman*[5] for that limitation to which I will return. The result was the enactment of s 94 which follows the terms of s 89 of the *Trustees Act* 1962 (WA).

[26] The applicant's argument was advanced upon each of these alternatives within s 94(1). As to the first of them, namely expediency in the management or administration of the property, it was emphasised that, as Dixon J said in *Riddle v Riddle*,[6] the criterion of the expediency is "of the widest and most flexible kind"[7] and that the powers given by the (New South Wales) section were not to be restricted by any implication.[8]

[27] Nevertheless, it is necessary to observe the restrictions which come from the words of s 94. Most importantly for the present case, the jurisdiction exists only where the court's assistance is necessary or desirable in order to facilitate some transaction with trust property. It exists where there is a proposed "sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, retention, expenditure *or other transaction* …".

[28] In the present case, there is no proposed transaction in the sense of a dealing with another person. The very purpose of these applications is to avoid the need to deal with the trust property upon the vesting date. At one point it was argued for the applicants that their proposals were for the "retention" of the trust property and were thereby within the section. But any retention of property in this context must be the subject of a "transaction".

---

2 [2006] NSWSC 1004.
3 Ibid at [34].
4 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971).
5 [1954] AC 429.
6 (1952) 85 CLR 202.
7 Ibid at 214.
8 Ibid.

[29] The applicants' principal argument was that the amendment of each of the trust deeds by the alteration of the vesting date, would itself constitute a transaction in this sense. That submission is directly supported by *Stein* and several judgments which it followed and others which have followed it.

[30] In *Stein*, as in the present cases, a trustee of a discretionary trust wished to acquire the power to extend the vesting date in order to avoid the tax and stamp duty consequences of dealing with real property, which constituted the trust fund, upon the vesting day. As in the present cases, the trust deed permitted the trustee to amend the trust deed but with an express exclusion as to an amendment of the vesting date. Campbell J considered whether the various elements for the New South Wales section were made out, the first being whether there was any proposed "transaction". As to this element, Campbell J said:

> "45. Of the types of dealing listed in section 81(1), in the phrase beginning "*any sale, lease* …", the only noun capable of applying to the present situation is "*transaction*". "*Transaction*", in section 81, extends to amendment of the Trust Deed: *Re Philips New Zealand Ltd* [1997] 1 NZLR 93; *Re Bowmil Nominees Pty Ltd (as trustee of the Williamson Superannuation Fund*) [2004] NSWSC 161 at [16] per Hamilton J; *James N Kirby Foundation v Attorney General (NSW)* (2004) 213 ALR 366 at 370, [16] per White J.
>
> 46. Thus the type of power that Mr Stein seeks to have conferred on the Trustee is within the scope of section 81."

The order made by Campbell J was that the trustee be "empowered and authorised, notwithstanding the exception to the power of amendment contained in … the trust deed, to amend the vesting day specified in … the trust deed to a date not later than 31 March 2058". The relevant "transaction" was said to be the trustee's amendment of the trust deed in its specification of the vesting date. Plainly, if that was an event permissible by an order under s 81, it was one which would affect the trust property. But the question was whether it was a *transaction* which would do so.

[31] In the first of the cases cited by Campbell J, *Re Philips New Zealand Ltd*,[9] the trustees of a retirement plan sought orders under the equivalent section of the *Trustee Act* 1956 (NZ), enabling them to amend a trust deed to apportion a sum in the trust's reserve account between the settlor/employer and members of the plan. It was held that this "'transaction' by way of amendment of the deed" was "expedient in the management of that trust".[10] The apparent effect of the order was that the respective interests in that part of the fund would be immediately altered by the amendment of the trust deed.

[32] In *Bowmil Nominees Pty Ltd*,[11] Hamilton J followed *Re Philips New Zealand Ltd*, observing that the word "transaction" is one of "wide import"[12] and that in the Macquarie Dictionary (rev 3rd, 2001), the word was defined as "that which is

---

9 [1997] 1 NZLR 93

10 Ibid at 101

11 [2004] NSWSC 161.

12 Ibid at [16]

transacted; an affair; a piece of business".[13] In his Honour's view, an amendment of a trust deed readily fell within that definition.[14]

[33] In the third of the cases cited in *Stein*, *James N Kirby Foundation v Attorney General (NSW)*,[15] White J saw no reason not to follow the two other authorities.[16] The amendments which were authorised in that case were required to ensure that a fund remained an income tax exempt charity so that it would continue to attract donations which would be expedient in the administration of the existing trust property.

[34] However, the contrary view has been more recently expressed in the Supreme Court of New South Wales in *Re Dion Investments Pty Ltd*,[17] a judgment of Young AJ. Referring to *Stein*, his Honour said:[18]

> "I disagree with great respect that 'transaction' in section 81 extends to amendment of the trust deed. It seems to me that this is quite inconsistent with the bulk of authorities particularly *Downshire* and that here the difference in the English and NSW Acts does not cause a different result."

His Honour was there referring to *Re Downshire Settled Estates*,[19] a landmark decision under the English section, where Sir Francis Evershed MR and Romer LJ said:[20]

> "It is clear, in our judgment, that the subject-matter both of 'management' and of 'administration' in section 57 is trust property which is vested in trustees; and in our opinion 'trust property' cannot, by any legitimate stretch of the language, include equitable interests which a settlor has created in that property. … [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 the powers which the section does in terms confer. Further, the examples, which are given in the section of the kind of 'transaction' which the legislature had in mind, are all instances of management of property in the ordinary sense, for example, sales, leases, exchanges, etc. … 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 authorize 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

---

13 Ibid.
14 Ibid.
15 (2004) 213 ALR 366.
16 Ibid at 370 [16].
17 [2013] NSWSC 1941.
18 Ibid at [56].
19 [1953] 1 Ch 218
20 Ibid at 247-248.

> 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 to such exceptions to that rule as had already found their way into the inherent jurisdiction."

[35] The correctness of this reasoning was not questioned on appeal, sub nom *Chapman v Chapman*,[21] to which, as noted above, the Queensland Law Reform Commission referred.

[36] As Young AJ noted in *Dion Investments*, a number of cases in New South Wales have applied *Downshire*.[22] In *Westfield Queensland No 1 Pty Ltd v Lend Lease Real Estate Investments Ltd*,[23] Einstein J cited *Downshire* and said that:[24]

> "The aim of the jurisdiction is not to permit the substantive alteration of the trust or its termination, but to give the trustees power to administer the trust in a more satisfactory and effective way"

for which his Honour also cited in *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society*[25] and *Re McNaughton*.[26]

[37] But there are other decisions of the Supreme Court of New South Wales which support the view in *Stein* that an amendment to the trust deed can constitute a "transaction" in this context: *Re Application of NSFT Pty Ltd*;[27] *Grant (as Trustee of the Grant Family Testamentary Trust)*[28] and *Barry v Borlas*.[29]

[38] In England, the consequence of *Downshire* was the enactment in 1958 of a provision which is replicated in s 95 of the *Trusts Act* 1973 (Qld) and in most other Australian jurisdictions. (However, there is no equivalent provision in New South Wales.)

[39] In *Downshire*, the limitation of the court's jurisdiction under s 57, namely the facilitation of the management or administration of trust property affected the meaning of the word "transaction". The court could confer upon a trustee a power to effect a transaction only of a managerial or administrative kind. With respect, there is much force in Young AJ's view that the reasoning in *Stein*, that the amendment of the trust deed to extend the vesting date was a transaction of a relevant kind, was inconsistent with *Downshire*. Whilst Campbell J in *Stein* did refer to several authorities, it would appear that, as in the present cases, *Downshire* was not cited to the court.

[40] But *Downshire* must be considered with the particular terms of the Queensland section in mind. As already noted, the Queensland section is wider than the English

---

21 [1954] AC 429.

22 *Ku-ring-gai Municipal Council v Attorney-General* (1953) 19 LGR (NSW) 105 affirmed on appeal (1954) 55 SR (NSW) 65.

23 [2008] NSWSC 516.

24 Ibid at 52

25 [1959] Ch 220 at 228.

26 Supreme Court of NSW, Young J, 8 December 1994, unreported.

27 [2010] NSWSC 380 at [17].

28 [2013] NSWSC 1603 at [39].

29 [2012] NSWSC 831.

section, because it is not limited to orders which are expedient in the management or administration of trust property.

[41] The term "transaction" is obviously a wide one. Although it usually refers to a dealing between at least two parties, it is not so limited in every case.[30] The amendment of the trust deed to change the vesting date could be fairly characterised as a transaction, in my view, which is fortified by the numerous cases such as *Stein* in which it has found favour. The limitation as established by *Downshire* does not apply here.

[42] The proposed transaction would, in the view of all who are amongst the class of potential beneficiaries, be in their best interests. The alternative would be a substantial depletion of the assets held by each trustee.

[43] As in *Stein*, there is a tension between the order which is sought and apparent intention of the settlor that the trustees should not be able to affect the vesting date by an amendment to the trust deed. But as to that tension, I respectfully adopt what was said by Campbell J:[31]

> "53. However, there is a more general sense in which one can tell, from the terms of the trust deed and the sort of context of social institutions and laws within which it was made, whether the conferring of power to carry out a particular dealing or type of dealing will involve a departure from the spirit of the settlor's intention. It has some analogy to the way in which the court, in deciding whether to settle a cy près scheme, decides whether there was a general charitable intention. It involves trying to ascertain whether a departure from the strict letter of administering the trust is a departure in some respect that is an important part of the settlor's intention, or a departure in a matter of inessential detail. The type of trust that is involved could be relevant here. A simple trust, to invest and pay income to or for the benefit of a nominated person, could probably not be altered, by the making of an order under section 81, to the same extent as could a more complex trust, like a family discretionary trust, or a superannuation trust. In the latter type of trusts, it is within the spirit of the settlor's intention that there can be changes, within a certain ambit, in the beneficial interests in the trust property - whether by the exercise of a trustee's discretion, or by conferring discretions on someone other than a trustee, as happens with the opportunity for a member of a superannuation fund to nominate, from time to time, who will receive benefits. In the latter type of trusts, there is a well-understood context of law (often tax law) which the trusts are clearly intended to take advantage of- it is often not difficult to conclude that keeping advantages of that type is within the spirit of the settlor's intentions, or if that context of law were to change, it might be possible to

---

30 See eg *Greenberg v Inland Revenue Commissioners* [1972] AC 109 at 136-137 per Lord Reid.

31 [2006] NSWSC 1004 at [53].

> conclude that it was within the spirit of the settlor's intention the trust should accommodate itself to whatever the new law was."

[44] This provision can be used to minimise the taxation liability of or in relation to trust property: *Re A.S. Sykes (deceased)*;[32] *Re Trusts of Kean Memorial Trust Fund*;[33] *Stein*;[34] and Heydon and Leeming, *Jacobs' Law of Trusts in Australia*.[35]

[45] The financial burdens which would result from the vesting of the property of these trusts are understandably sought to be avoided by the trustees and by each and every person or entity in whose favour either of the trustees would pay any of the income or capital of the trust fund. Plainly, the proposed amendment of each trust deed could not be effected because of the absence of a power within the trust deed to effect such an amendment. There is an absence of a power in this sense where the trust deed contains an express prohibition against the exercise of a power: *Perpetual Trustees WA Ltd v AG (WA)*.[36]

[46] I am satisfied then that there is a discretion to make the order which is sought in each of these cases. I have mentioned already the factors that are relevant to the exercise of this discretion: the very substantial impact of taxes and duties upon the trust funds and the unanimous approval of all members of the classes of potential beneficiaries. I am persuaded to make an order substantially as is sought in each case. In the application made for the AB Trust, the order sought is that the trustee be empowered and authorised to amend the vesting date. In the application for the Trekmore Trust, the order sought is simply for an extension of the vesting date. The Trekmore application is not in terms which correspond with the jurisdiction under s 94(1) and the orders will be as sought in the application for the AB Trust.

Orders

[47] On the application by Arthur Brady Pty Ltd as Trustee for the Arthur Brady Family Trust, it will be ordered that pursuant to s 94 of the *Trusts Act* 1973 (Qld) the applicant is empowered and authorised to amend the vesting date of the trust, as set out in cl 1(d) of the trust deed dated 16 February 1977, to the date which is 80 years from the settlement date of that trust deed.

[48] On the application by Trekmore Trading Pty Ltd as Trustee of the Trekmore Trading Trust, it will be ordered that pursuant to s 94 of the *Trusts Act* 1973 (Qld) the applicant is empowered and authorised to amend the trust deed for that trust, dated 30 June 2008, by deleting cl 1(e) of the trust deed and substituting it with the following:

> "(e) the Vesting Day means the day on which shall expire the period of eight (80) years after 16 February 1977 provided that the Trustee may (subject to the same being within the applicable period under the rule known as the rule against

---

32 [1974] 1 NSWLR 597.

33 (2003) 86 SASR 449 at 460 [45].

34 [2006] NSWSC 1004 at [61].

35 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (Lexis Nexis Butterworths, 7th ed, 2006) [1706].

36 (1992) 8 WAR 441 cited in *Jacobs' Law of Trusts in Australia* at [1706]; cf *Palmer v McAllister* (1991) 4 WAR 206.

perpetuities) (as modified by statute) appoint an earlier or later date as the Vesting Day"