

# Changing trustees – can former trustees benefit?

By MICHAEL BENNETT

With the increasing popularity of trusts, especially self-managed superannuation funds, it is desirable that the confusion surrounding the transfer of dutiable property from a retiring trustee to a successor trustee be removed.

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**I**NCREASINGLY, THE NSW OFFICE of State Revenue (OSR) has been rejecting applications for nominal stamp duty on the transfer of dutiable property from a retiring trustee to a successor trustee, following a change of trustee, unless the trust deed irrevocably prohibits any person who is or has been a trustee of the trust from benefiting from the trust.

Revenue Ruling No SD 118 (SD118) and the decision of Gzell J in *Oates Properties Pty Ltd v Commissioner of State Revenue*<sup>1</sup> are being routinely cited by officers within the OSR in support of the Chief Com-

missioner's view.

**“Neither the 1920 Act nor the 1997 Act supports the breadth of the prohibition demanded by SD118 ...”**

In my opinion, there is a difference between the position espoused by SD118 and the relevant legislative provisions, which may lead to substantial overpayment of stamp duty on the transfer of dutiable property to a new trustee from a retiring trustee. This difference has not, as has been claimed, <sup>been</sup> sanctioned by Gzell's J decision in *Oates Properties Pty Ltd*.

#### The problem

Section 54(3) of the *Duties Act 1997* (NSW) (the 1997 Act) provides that a duty of \$10 is chargeable in respect of each transfer of dutiable property to a person other than a special trustee as a consequence of the retirement of a trustee or the appointment of a new trustee, if the

Chief Commissioner is satisfied that:

- none of the continuing trustees remaining after the retirement of a trustee is or can become a beneficiary under the trust; and
- none of the trustees of the trust after the appointment of a new trustee is or can become a beneficiary under the trust; and
- the transfer is not part of a scheme for conferring an interest, in relation to the trust property, on a new trustee or any other person, whether as a beneficiary or otherwise, to the detriment of the beneficial interest or potential beneficial interest of any person.

The statutory predecessor of this provision is s.73(2A) of the *Stamp Duties Act 1920* (NSW) (the 1920 Act) which similarly required the Chief Commissioner to be satisfied that “none of the persons who, after the appointment of a new or additional trustee by the decision of or the instrument upon the execution of which the conveyance is consequential, are the trustees for performing the trust is, or can be become, a beneficiary under the trust” or that “none of the continuing trustees remaining after the retirement of a trustee pursuant to the decision or the instrument upon the execution of which the conveyance is consequential is, or can become, a beneficiary under the trust”.

The symmetry of conditions of which the Chief Commissioner must be satisfied, in s.54(3) (a) and (b) of the 1997 Act on the one hand, and s.73(2A) of the 1920

Act on the other, is plain. It is this symmetry which has enabled SD118, which specifies the circumstances in which a transfer or conveyance of property to a new trustee will be liable to the fixed duty under s.73(2A), to apply to applications made in accordance with s.54(3) of the 1997 Act.

Neither the 1920 Act nor the 1997 Act supports the breadth of the prohibition demanded by SD118, the final paragraph of which states: "It is accepted by the Chief Commissioner that if;

"(a) an amendment is made to a deed of trust of a discretionary trust to the effect that any persons who are *or have been* the trustees of the trust are absolutely prohibited from being a beneficiary under the deed or otherwise directly or indirectly benefiting under the deed; and

"(b) that amendment is irrevocable, "a transfer to a new trustee of the trust, which is consequential upon the execution of an instrument of appointment or retirement referred to in section 73(1) (a) (i) to (iii), would be liable to the nominal duty of \$1 under section 73(2A)." (emphasis added)

The 1920 Act and the 1997 Act both require legal persons who are a trustee after the change of trustee, whether they are a continuing trustee or a new trustee, to be prohibited from benefiting under the trust. However, the legislation *does not* require a former trustee, whose retirement is the catalyst of the change of trustee, to be so prohibited. Yet the Chief Commissioner, relying on SD118 and *Oates Properties Pty Ltd*, will reject an application for nominal duty, and charge *ad valorem* rates of duty, if any former trustees of the trust can possibly benefit.

An example will illustrate the point. Assume both a husband and wife are default beneficiaries and objects of a discretionary trust of which the husband alone acts as trustee. For asset-protection purposes, the husband decides to incorporate a company, of which husband and wife will be shareholders and directors, to act as corporate trustee of the trust. A deed of change of trustee is executed by the husband as retiring trustee and by the company as the incoming trustee.

Provided the company is irrevocably prohibited from becoming a beneficiary under the trust, neither s.73(2A) of the 1920 Act nor s.54(3) of the 1997 Act will have anything to say in opposition to an application for nominal stamp duty. However, in this situation the Chief Commissioner, and the OSR, will refuse the application because the husband was formerly a trustee of the trust and remains a beneficiary under the trust.

### Oates Properties

Justice Gzell's decision in *Oates Properties Pty Ltd* has been cited by the OSR in support of the interpretation of s.54(3) of the 1997 Act proposed by SD118. I argue

that a close consideration of the decision shows it does support the interpretation SD118 proposes.

The case concerned the transfer of dutiable property pursuant to a change of trustee where the parties to the deed of change of trustee intended, and sought legal advice to ensure, the transfers would qualify for the nominal stamp duty exemption. To this end, the incoming trustee covenanted that it shall not receive a benefit from the trust fund. The Chief Commissioner "expressed the view that an effective amendment required reference to the trustee not becoming a beneficiary to be irrevocable".<sup>2</sup> Justice Gzell was required to determine whether the deed of change of trustee could be rectified, by making such a prohibition irrevocable, to give effect to the parties' intentions.

There are three reasons why this case does not support the interpretation of s.54(3) of the 1997 Act proposed by SD118. First, the focus of the case was on the law of rectification of trust deeds, not the requirements of the section. Second, both parties approached the case on the basis that former trustees were not required to be prohibited from benefiting under the trust.<sup>3</sup> Finally, in discussing s.54(3),<sup>4</sup> Gzell J limited his view to the "present or future" trustees, though this statement itself is *obiter dictum*.

The erroneous interpretation of Gzell's J decision may be explained by the circumstances of the plaintiff in that case. The proposed rectification of the deed of change of trustee prohibited any person who has been, currently is, or will be a trustee of the trust. However, the happenstance that the plaintiff's circumstances were consistent with the interpretation proposed by SD118 does not prop up an otherwise unsupported view of the legislation. The plain language of s.54(3) of the 1997 Act makes clear that it is only trustees so acting after the change of trustee who must not benefit under the trust.

### Conclusion

The unsupported reach of SD118 was pointed out in this publication in 1995:<sup>5</sup> "It may be noted that SD118 is unjustifiably wide. It indicates the Chief Commissioner will impose *ad valorem* duty if former trustees (as well as new or continuing trustees) can become beneficiaries. The prohibition against former trustees is not in s.73(2A)."

Despite this criticism, the plain meaning of the legislative provisions and the succinctness of Gzell's J decision, SD118 remains. The confusion caused for practitioners, who seek to apply the legislation in the face of SD118's administrative extension, is evidenced in the facts leading to the *Oates Properties Pty Ltd* litigation. With the increasing popularity of trusts, especially self-managed superannuation funds, it is desirable that this con-

fusion be removed. □

### ENDNOTES

1. (2003) 53 ATR 308; [2003] NSWSC 596.
2. *Oates Properties Pty Ltd & Ors v Commissioner of State Revenue* (2003) 53 ATR 308 at 311; [2003] NSWSC 596 at [12].
3. At para 8 Gzell J made clear the plaintiffs were concerned "the new trustee and any other trustee appointed after that could never benefit from the trust" and at para 12 that the Chief Commissioner limited his objection to requiring the prohibition be irrevocable.
4. *Oates Properties Pty Ltd & Ors v Commissioner of State Revenue* (2003) 53 ATR 308 at 311; [2003] NSWSC 596 at [15].
5. Main J, "Changing Trustees – Be Careful" October 1995 *Law Society Journal* 41 at 41. □