



LECTURE 29 - WHEN A FETTERING OF DISCRETION IS IGNORED

Arguably the leading case explaining when the probation on fettering of discretion will essentially be ignored is *Dagenmont Pty Ltd v Lugton* [2007] QSC 272. If you would like a copy of the decision please contact me.

The background in this case was as follows -

1. an agreement was entered into by the original appointor of a discretionary trust and other family members in control of the corporate trustee, whereby the appointor would resign from various roles in the trust, in return for guaranteed distributions from the trust;
2. the distributions were set at an amount of \$150,000 each year, indexed for inflation;
3. the agreement by the trustee to make these future distributions was effectively a fetter on its future discretion;
4. each party received independent legal advice at the time of the agreement, however some years later the trustee attempted to cease the distributions due to the, argued, invalid fettering of its discretion.

The court specifically acknowledged the general prohibition on a trustee fettering its discretion, confirming -

‘trustees cannot fetter the future exercise of powers vested in trustees ... any fetter is of no effect. Trustees need to be properly informed of all relevant matters at the time they come to exercise their relevant power.’

In rejecting however the trustee’s attempt to avoid the agreement the court confirmed -

- (a) a provision in a document authorising a trustee to release powers which they would otherwise have a duty to exercise is valid;
- (b) here the document confirming the agreement between the parties was in essence a release by the trustee of the power conferred on to exercise an unfettered discretion to distribute amongst all potential beneficiaries;
- (c) alternatively, the agreement effectively amounted to a variation of the terms of the original trust deed;
- (d) this meant that what would otherwise have been an unfettered trustee discretion became reduced in scope, simultaneously with an obligation being imposed on the trustee (created by the agreement with the original appointor) to distribute the annual amount of \$150,000 (indexed);
- (e) arguably particularly where parties receive independent advice at the time, the court should uphold bargains where it can, rather than destroy them.