

Article Information

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“Documents of the Trust”

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The recent case of *Hancock v Rinehart [2018] NSW SC 1684* provides some useful guidance in relation to disclosure and the trustee’s responsibilities and duties regarding what constitutes “documents of the Trust” that are liable to be delivered up to incoming trustees.

The first issue relates to what were “documents of the Trust”. The initial order required delivery up by the trustee of “all documents of the Trust in her possession, custody or power, including all those referred to in the claims for relief”. The incoming trustee submitted that the words “documents of the Trust” caught all documents in her possession, custody or power relating to the administration of the Trust whilst Mrs Rinehart took the view that certain papers were not documents of the Trust, namely:

- Documents disclosing deliberations in her trustee capacity, but which did not reflect or refer to a decision taken by her in that capacity;
- Documents recording communication of the trustee with some or all of the beneficiaries;
- Documents that were merely the subject of a trustee’s consideration in making a decision or administering the trust;
- Documents relating to advice obtained she obtained relating to allegations or threats of court proceedings; and
- Documents that were confidential in nature.

Mrs Rinehart took a narrow view of what constituted a document of the trust based on cases which consider the right of a beneficiary to inspect trust documents as being persuasive of what documents constituted trust documents.

The court recognised a distinction between a beneficiary’s right of inspection, and the duty of an outgoing trustee to deliver up trust documents to an incoming trustee, noting that the rights of a beneficiary to inspect trust documents and the obligations of a trustee to deliver up trust documents to a successor are not identical; with the obligations that an outgoing trustee owes to an incoming trustee being more extensive than those owed to a beneficiary seeking inspection.

It was further noted that although a document may be one that the trustee would be expected to pass on to any successor, it had a discretion to refuse to permit a beneficiary to inspect it.

The court highlighted the duty of an outgoing trustee to cooperate fully and actively in the transfer of the trusteeship by making all relevant documents and correspondence available to the incoming trustee, and also by providing any explanation to questions reasonably raised by the incoming trustee.

Mrs Rhinehart took the view that the obligation was, subject to the court’s discretion to mitigate it, to hand over to an incoming trustee all documents and information which relate to the administration of the trust so as to enable the incoming trustee to fulfil his or her duties. Essentially, the new trustee is entitled to be placed in just as good a position as the outgoing trustee in relation to all aspects of the administration of the trust. It was contended that documents relating to

trustee deliberations, as opposed to decisions, were not trust documents. The Court found that this view was misconceived and noted that, although trustees are not bound to permit beneficiaries access to documents recording the deliberations as distinct from their decisions, that does not mean that such documents are personal documents of the trustee rather than trust documents to be handed over to a replacement trustee.

The case details the documents of the trust which Mrs Rinehart was advised to deliver up and outlines the following classes of documents which had been the subject of contention:

- Trustee deliberations;
- Communications with beneficiaries;
- External consultant documents;
- Legal advice;
- Certain specific documents;
- Specific legal documents;
- Confidential documents;
- Documents used or considered in connection with the trust; and
- Redacted documents.

The court ordered Mrs Rhinehart to deliver up a number of additional documents and confirmed her obligations extended to providing the new trustee with all documents used in relation to the administration of the trust.

This included documents which disclosed the trustee's deliberations, documents which contained confidential information about the trust and other entities in the Rinehart Group, legal and accounting advice received by the trustee.

In conclusion, the judgement confirms that, whilst trust beneficiaries have a relatively narrow right to trust documents, a retiring trustee's obligation to provide documents and information to an incoming trustee is far more broad.