CHANGING THE UNCHANGEABLE – VARIATION OF TRUSTS

Introduction

1. The focus of this paper is on the circumstances in which trusts may be varied where there is no express power of variation.

2. It has been held that where there is no express power to amend, the trust deed cannot be amended.\(^1\) While this is strictly correct, there are ways to get around the absence of an express power.

3. The lack of a power may be total, in that there is no term in the trust deed that allows any change to its terms, or partial, in that some changes are permitted, but the power does not cover the particular change that the trustees seek to make.

4. There are two main ways in which a trust deed may be varied when there is no express power. The first is by obtaining the consent of all of the beneficiaries to the trust, the second is by application to the Court. The latter may be an application under the inherent jurisdiction of the Court to supervise trusts, under the Trustee Act 1956, or if the trust wrongly failed to record the settlor’s wishes, in equity for rectification. Other alternatives to a variation include resettlement or revocation.

Consent of the beneficiaries

5. Obtaining the consent of the beneficiaries to a variation that would otherwise be a breach of trust does not make the variation lawful, but it prevents any beneficiary from suing, so in practice has the same effect. This option is only available if all of the beneficiaries are sui juris. Another way of achieving the same result would be for all the beneficiaries to call for the trust property to be handed over to a new trust that contains the power of variation that is sought.

Inherent jurisdiction of the Court

6. Under its inherent jurisdiction, the Court can authorise changes to trusts affecting beneficiaries that are not sui juris, provided that the change is plainly for their benefit and all those who are sui juris consent to the change.

7. The Court does not have unlimited jurisdiction to authorise a variation of trust in favour of beneficiaries who are not sui juris.

8. Examples of classes of cases in which the court has authorised variations include:
   (a) Authorising a change in the nature of an infant’s property, such as by substituting an investment in personal property for an investment in real estate;
   (b) Allowing trustees to enter into a business transaction in respect of trust property that is not authorised in the trust deed;
   (c) Allowing the trustees to pay maintenance out of income where the settlor required it to be accumulated;

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\(^1\) Smith v Hurst (1852) 10 Hare 30 at 47
(d) Approving a compromise on behalf of infants and potential unborn beneficiaries.

Changes in the nature of trust property

9. In type (a) cases, there is no change to the beneficial interests, the Court merely allows the trustees to invest in property that they could not otherwise invest in without the approval of the Court.

Unauthorised transactions

10. An example of type (b) was a case where the court approved the trustees’ participation in a shareholders’ scheme for a company in which the trustees held shares. The Court found that the scheme was in the best interests of all the beneficiaries and potential unborn beneficiaries. The Court will only act in this type of case where the settlor could not have foreseen the circumstance that has arisen, the trustees need to deal with effectively an emergency situation, and they cannot obtain the consent of the beneficiaries because they are not all sui juris. The jurisdiction cannot be used to adjust the beneficial interests under the trust deed.

Maintenance

11. A type (c) case can arise where a trust deed provides for accumulation of income while an infant is a minor, but there is no provision for maintenance of the infant. In such cases, the courts have been prepared not to enforce the strict letter of the deed, and have authorised the maintenance of the minor until they are able to take the benefit intended for them.

Compromise

12. As to the compromise cases, the Court can only approve settlement of a genuine dispute, and can only approve a compromise on behalf of beneficiaries who are not sui juris, or not yet in existence, if the compromise is for the benefit of those beneficiaries.

13. In the above examples, it is the beneficiaries themselves who vary the terms of the trust. The Court is simply empowering some of them to do so.

S64A Trustee Act 1956

14. Under s64A of the Trustee Act 1956, the Court has a discretionary power to approve an arrangement varying a trust on behalf of those who are unable to provide a lawful assent, because, for example, they are a minor, or incapacitated.

15. This has been regarded as a statutory extension to the principle embodied in the rule in Saunders v Vautier to the effect that beneficiaries absolutely entitled to the trust fund can defeat the intentions of a settlor if they all assent. The statutory extension enables those who cannot lawfully assent to have the benefit of an arrangement, as the Court can assent on their behalf.
16. The Court cannot bind beneficiaries who are sui juris but unwilling to consent to the arrangement.2

17. In most cases the Court can only approve a change that is not to the detriment of the person for whom the Court is approving the arrangement, and may take into account all benefits that accrue to the person, directly or indirectly. The Court is not bound to assent even if the arrangement is for the benefit of the beneficiary.

18. The benefit does not need to be certain. In deciding whether to assent, the court should be prepared to take the sort of risk that an adult would be prepared to take,3 and to take a broad view.4

19. The term “benefit” is not limited to financial benefit, and extends to a moral or social benefit. So that a beneficiary was held to benefit from the application at his request, of part of a trust fund to a family charitable foundation.5 The Court will not approve the giving away of an interest however, unless there is compensation to the beneficiary.

20. The Court should make a practical and business-like assessment of the arrangement as a whole, including the advantages to each of the parties and their relative bargaining strengths.6

21. It is the arrangement that varies the terms of the trust and not the Court’s order.

22. Under this section, the Court can approve the variation or revocation of trusts, and can enlarge the powers of the trustees.

23. The term “arrangement” covers any proposal, and is not limited to a contract or deed.

24. The term “varying” has been interpreted very widely, to include a revocation of trust coupled with a new declaration of trust, but only where the original trust is in essence preserved.7 Provided an arrangement effectuates the purpose of the original trust, it may do so by different means and in a completely different form.8 An arrangement that has the effect of a complete resettlement will not, however, amount to a variation.9

25. In this context it has been suggested that a variation that changes the whole “substratum” of the trust might not be a variation. This may be no more than saying that a variation should not exceed the limits intended by the settlor, to the extent that they can be ascertained. To do so would, in effect, constitute a fraud on a

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2 Knock v Youle [1986] 2 All ER 914
3 Re Holt’s settlement, Wilson v Holt [1968] 1 All ER 470
4 Re Robinson’s Settlement Trusts, Heard v Heard [1976] 3 All ER 61, 64f
5 Re Clore’s Settlement Trusts [1966] 2 All ER 272
6 Re Towler’s Settlement Trusts [1964] Ch 158
7 Re Holt’s Settlement, Wilson v Holt [1968] 1 All ER 470, and Re Ball’s Settlement Trusts Ball v Ball [1968] 2 All ER 438
8 Dyer v Trustees Executors & Agency Company Ltd [1935] VLR 273
9 Re Towler’s Settlement Trusts [1964] Ch 158 at 162
power.\textsuperscript{10} If the power to amend is very broad, it can be difficult to ascertain what the settlor intended the “substratum” to be.

26. It has been held that orders under s64A are prospective and cannot have any retrospective effect.\textsuperscript{11} The fact that the section includes a provision with the words “and thereafter the trusts as so arranged shall take effect accordingly”\textsuperscript{12} tends to support this conclusion.

27. Anyone can propose the variation, including the settlor, the trustees or a beneficiary.

**Scope of powers of variation**

28. It has been held that what is “in power and lawful” is a matter of construction of the relevant instrument.\textsuperscript{13}

29. Any power of amendment must be exercised in good faith.\textsuperscript{14}

30. One of the problems that arises is that powers to vary trusts can be too inflexible to allow a change that has become necessary or desirable due to changed circumstances. Theses powers need to be drafted with precision to ensure that trustees are not hidebound.

31. However, if a power of variation is completely unrestricted, it may be that a trust can be revoked in its entirety.\textsuperscript{15} This could have unintended implications for the settlor, such as adverse tax consequences. It could also result in a Court finding that the “trust” is in fact a “sham” as the property is not actually put beyond the reach of the settlor.

32. In crafting provisions in a trust allowing amendments, the goal is to allow for sensible changes to be made, but to ensure that the fundamental purpose and effect of the trust is preserved.

33. The authors of one of the major English trust law texts, *Lewin on Trusts* consider that where there is a wide power of revocation in a trust this implies a comprehensive power of amendment where the power is vested in the settlor.\textsuperscript{16} They reason that since the settlor can completely revoke the trust and settle a new one with different terms, what can be done in two steps can be done in one. This may not be possible however, if the power to revoke is restricted.\textsuperscript{17}

34. If a power to add beneficiaries is vested in the trustees then it must be designed as a discretionary power. The reason for this is that if they are obliged to exercise

\textsuperscript{10} This was the approach taken by the Court in *Mercanti v Mercanti* [2016] WASCA 206
\textsuperscript{11} *Ash v Singh* [2017] NZHC 2909
\textsuperscript{12} S 64A(2), this subsection was referred to by Associate Judge Bell in *Ash v Singh* [2017] NZHC 2909
\textsuperscript{13} *Graham Australia Pty Ltd v Perpetual Trustees Ltd* [1992] PLR 193 at 206
\textsuperscript{14} *Citco Banking Corp NV v Pusser’s Ltd* [2007] UKPC 13
\textsuperscript{15} *Matter of Woodward* (1954) 284 App Div 459, 132 NYS (2d) 266
\textsuperscript{16} *Lewin on Trusts* 19th Ed. 30-102
\textsuperscript{17} *Re Dion Investments Ltd* [2013] NSWSC 1941
the power, the trust may fail due to lack of certainty of objects. 18 There may also be adverse tax consequences if the settlor or spouse can become an object, so care needs to be taken to restrict the potential class.

35. The power to add to the provisions of a trust does not necessarily include the power to make exclusions or to revoke provisions, unless this would be the natural result of the exercise of the power of addition.

36. It has been common to include a power for the trustees to add to or vary only the administrative or managerial powers and provisions of a trust. This type of power does not permit the trustees to change their powers of disposition, or alter the interests of the beneficiaries in the trust property. 19

37. Powers of amendment are not to be interpreted in a narrow or unreal way. 20 They should be interpreted liberally, but consistently with the purpose of the trust. A wide general power is likely to be interpreted as such, without qualification. 21 Where a power has been drafted widely it is likely that the whole purpose of it is to provide flexibility.

38. If the power to amend is subject to express restrictions, these must be strictly complied with and cannot be removed by exercise of the power. 22

39. There may also be implied restrictions, so that a power to amend may not be used so as to undermine the purpose of the trust, or inconsistently with obligations to act in good faith. 23

40. As a general rule, restrictions in a power of amendment cannot be removed, particularly if the restriction is entrenched, 24 because this would defeat the purpose of the restrictions.

41. It has been suggested that there is an implied but rebuttable presumption that a power of amendment cannot be used to extend its own scope or amend its own terms. 25 This limitation can be removed by express words permitting amendment or extension of scope, or by extrinsic evidence showing that the settlor intended the trustees to have such a power.

42. However, there are cases in which an apparently entrenched provision has been altered where the amendment was found to be consistent with the overall purpose of the trust.

43. An example was a case where the trustees had power under the regulations pertaining to a pension fund to augment benefits, but only with the consent of a

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18 Re Manisty’s Settlement [1974] Ch 17; Re Hay’s Settlement Trusts [1982] 1 WLR 202
19 Hemming v Chambers (High Court Auckland CP351-SD97, 7 December 2000, Rodney Hansen J)
20 Kearns v Hill [1991] PLR 161 (Australia)
21 MNPOT Trustees Ltd v FT Everard & Sons Ltd [2005] EWHC 446 (Ch)
22 British Coal Corp v British Coal Staff Superannuation Scheme Trustees Ltd [1994] OPLR 51
23 Imperial Group Pension Trust Ltd v Imperial Tobacco [1991] 1 WLR 589
24 Re Brunner’s Declaration of Trust [1941] 2 All ER 745
named company. The trustees altered the regulations to remove the requirement to obtain consent from that company to proposed changes in benefits, and to prohibit employees from being admitted as members of the scheme from a specified date. These were, in effect, alterations to a power of alteration. The Court held that the alterations were valid, as the trustees had a general power of alteration, the exercise of it was reasonable in the circumstances and it was not necessary to limit the power of alteration to give it business efficacy.26

44. The context of the case is important. The company that was required to consent to augmentation of benefits had been taken over by another company, which had proposed to the trustees of the pension fund that the fund be amalgamated with its own fund. The trustees feared that the members of the fund they administered would be disadvantaged by the dissipation of assets that this amalgamation would cause. Their actions were entirely consistent with the purpose of the trust.

45. It was considered to be of some significance that while the trust was established in 1937, they had made the relevant regulations in 1981. The Court held that the trustees addition of a conditional power to augment benefits could not cut down the wide power of alteration conferred on the trustees by the trust deed.

46. Narrowing powers of amendment is more easily justified than broadening them, provided that the narrowing effect is consistent with the objects of the trust.

47. A broad power to vary, add to, and revoke the trust terms and conditions has been considered sufficiently wide to allow the removal of the appointor and the appointment of a new appointor.27 The opposite result was achieved in a case where the person defined as the Principal (who was also the settlor) held the power of appointment and had arranged for his replacement on his death. It was held that the settlor did not intend that he could be replaced as Principal by the trustees without his consent, which is what the variation purported to do.28

48. A power to vary “including any beneficial interest” was held to allow the addition of a beneficiary.29 A power to remove discretionary beneficiaries has been held not to include a power to remove final beneficiaries.30

49. Even if there is an express power to make a variation, the Court may refuse to uphold the variation if it is not exercised appropriately. So in a case where an appointor removed his parents as beneficiaries of a trust to which they had transferred assets, it was held that the particular power to remove beneficiaries was in that case a fiduciary power, and the removal of the parents was a breach of fiduciary duty. This was because the effect of the use of the power in this way appropriated to the son the whole of the trust assets.31

26 Aitken v Christy Hunt plc [1991] PLR 1
27 Mercanti v Mercanti [2016] WASCA 206
28 Jenkins v Ellett [2007] QSC 154
29 Re Highcroft Trustees Ltd (2008) 2 NZTR 18
30 Clayton v Clayton [2016] NZSC 29 at [46] and [98(b)]
31 McLaren v McLaren [2017] NZHC 161
50. The above case is an illustration of the principle that a power must not be exercised in a manner that is beyond the reasonable contemplation of the parties and must be exercised consistently with the purpose for which it was conferred.

51. The Court did, however, uphold the son’s appointment of two new trustees, even though that power was held to be fiduciary, because he was not constrained by the terms of the trust deed from doing so.

52. In contrast, in a case where a beneficiary was removed because she was no longer in the affections of the settlor who had contributed the assets to a trust, the Court upheld the removal. The trust deed gave wide scope for removal, and should not be read down.

53. Where a power of amendment is vested in trustees, they are obliged to consider from time to time whether to exercise the power.

54. It is generally considered that powers of amendment cannot have retrospective effect. There are, however, decisions in which it has been held that mere retrospectivity is not necessarily wrong.

55. There are cases in which amendments that have retrospective effect, so as to defeat vested or accrued rights have been upheld. For example, in a case where the manager of a fund was obliged to repurchase units at a date 7 days before the request, it was held that the terms of the trust could be amended to require repurchase at current value.

56. It is not permissible to deem an amendment to have occurred earlier than it did to validate an amendment that would otherwise be outside the scope of the power of amendment.

57. If a Court finds that some of the steps taken in an instrument to vary a deed are lawful and some unlawful, it may declare that the instrument is to be read as if the unlawful provisions are omitted. This may not be possible if, for example, the provisions of a deed of variation are all part of a scheme, and removing one aspect would skew the impact of the other changes that are held to be within the power of the trustees.

Rectification

58. If the written terms of a trust deed do not reflect the instructions or intentions of the settlor, then equitable rectification could be sought.

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32 Lord Napier and Ettrick v RF Kershaw Ltd (No 2) [1999] 1 WLR 756 at 766
33 Re Courage Group’s Pension Schemes [1987] 1 WLR 495
34 Penson v Forbes [2014] NZHC 2160 at [27] and [39]
35 Wilson v Metro Goldwyn Meyer (1980) 18 NSWLR 730, at 735-6
36 R v Brabook (1893) 69 LT 718 at 719
37 Graham Australia Pty Ltd v Perpetual Trustees Ltd [1992] PLR 193
38 Bank of New Zealand v Board of Management of the Bank of New Zealand Officers’ Provident Association [2003] UKPC 58
39 Price v Williams-Wynn [2006] EWHC 788 (Ch)
59. It has been held that the court has power to rectify a trust notwithstanding that it is a voluntary settlement and not the result of a bargain.40

60. A settlor may seek rectification by proving that the settlement does not express his or her true intention,41 or the true intention of the settlor and anyone with whom the settlor has bargained. The court has a discretion as to whether to rectify a deed, and may decide not to do so if a trustee opposes rectification.42

61. The standard of proof is the balance of probabilities, but there is a high evidential standard to establish that the document written and executed by or for the settlor does not reflect his or her intentions.43 There may be real difficulties when the settlor’s evidence is not supported by contemporary documents,44 and these are likely to be even greater where the settlor is no longer available to give evidence.

62. Examples of cases where rectification has been granted are:

   (a) Rectification of two deeds of appointment where it could clearly be inferred from the evidence that an executrix intended the deeds of appointment to be revocable, but the draftsman had not included a provision to this effect;45

   (b) An employee benefit trust was amended to include the right to interest free loans, which had been promised by the founder of the trust, but mistakenly omitted from the trust document. The evidence of the founder’s intention was said to be “irrefragable and indisputable”;46

   (c) A trust deed was rectified where, by mistake, it failed to include a power to override the settlor’s life interest or to transfer assets to discretionary beneficiaries.47

**Self-variation**

63. There is a possibility that a settlor may be able to correct drafting errors after the trust deed is executed. Whether this can be done may depend on whether any property has been disposed of in accordance with the wrongly recorded terms. If the ink is barely dry, or no steps have been taken that are inconsistent with the changes that are made, written changes to correct clear mistakes may be permissible.

64. Generally speaking, however, the safer course would be to bring a claim for rectification as soon as an error is discovered.

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40 Wright v Goff (1856) 22 Beav 207, Bonhote v Henderson [1895] 1 Ch 742 (Ch D)
41 Wright v Goff (1856) 22 Beav 207
43 Van der Linde v Van der Linde [1947] Ch 306 at 311; Stephenson v Stephenson [2004] EWHC 3474
44 Bonhote v Henderson [1895] 1 Ch 742 (Ch D) at 748-9
45 Summers v Kitson [2006] EWHC 3655 (Ch)
46 Re A Trust Co Ltd (2007/84) [2008] WTLR 377
Resettlement

65. If there is no power of variation, or the power is too narrow to achieve a desired purpose, the possibility of resettlement should be considered. Powers of advancement are also considered to be powers to resettle, so can be used to achieve the same result as a variation.

Ash v Singh

66. In the recent High Court case of Ash & Singh a purported variation was found to be void. There was no express power to vary, but only a power to resettle the trust for the same discretionary beneficiaries. A deed of variation executed 3 years after the original deed of trust purported (among other changes) to add a wife as a beneficiary, when there was no power to add beneficiaries.

67. To get around this, the wife argued that the power of resettlement was sufficiently wide to permit the variation and that the variation should be seen as a resettlement.

68. The problem with this argument was that the power of resettlement apparently did not allow for the addition of new discretionary beneficiaries. The party who was held to be the settlor had recently separated when he set up the trust, and it appeared that he had deliberately omitted to include any mother of his children in the bounty of the trust.

69. The Court also noted that the change had not been described as a resettlement but as a variation, and that no property had been removed from the trust or resettled. These factors should not necessarily be a bar to arguing that a purported variation is in fact a resettlement. The better ground for the decision is that the resettlement clause was simply not wide enough to cover what had been done.

70. Rectification was also sought, as something of an afterthought. The Court was not persuaded that the settlor intended to include a mother of his children, and found the rectification claim implausible.

71. It was held that the deed of variation was invalid in its entirety.

72. The case is interesting from a procedural perspective as well as for its substantive findings. The plaintiff brought part of his claim as an application for summary judgment for a declaration that the deed of variation was invalid, and this application was granted.

73. The case was appealed to the Court of Appeal. The only argument run on the appeal was in relation to rectification. The appeal was upheld, the Court finding that the existence of the deed of variation was consistent with the settlor having made a mistake, and may provide evidence of his true intention. The central finding in the judgment focussed on this aspect:

48 In re Pilkington's Trusts, Pilkington v IRC [1962] 3 All ER 622
49 Ash v Singh [2017] NZHC 2909
The key aspect is the settlor’s actions in 1996 when he initiated the variation to the Trust deed. Unless Shean Singh [the deemed settlor] did this knowing there was no such power, and furthermore thereafter conducted his affairs for nearly 20 years on this basis, the inference is available that he wrongly believed the Trust deed had such a power. Further, the independent trustee who was involved from the outset has sworn that Shean Singh and all those involved believed at the time the Trust was set up that there was a power to vary.

74. The effect of this decision is that the summary judgment application was dismissed, and the issues will now need to go to trial.

75. The case illustrates that it is well worth considering rectification where the need for a variation arises because the trust deed does not record the settlor’s intentions.

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