

Court decisions on variation of trusts contain valuable lessons for advisers: lawyer

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

Lessons from cases involving discretionary trusts can be instructive for all advisers, including those in the SMSF space, says a top legal specialist.

Matthew Burgess, director of View Legal, said the extent to which a trustee has power to amend a trust deed is predicated on the terms of the deed.

“It is important to note that if a trust deed does not have any, or any adequate, power of variation a trustee may apply to the court to implement changes,” he said.

In most states, courts have a relatively wide power to assist trust deeds amendments that don't have robust provisions, except for NSW where the rules are more restrictive.

Mr Burgess said an example of this is the decision in *Application of Country Road Services Pty Ltd (In the matter of the Browne Family Trust) [2019] NSWSC 779*, in which the court rejected an amendment to a trust deed that sought to appoint a related trust (that had losses) to allow distributions. It was rejected on the basis that it was not “expedient” - a requirement of NSW law.

In this instance, the court affirmed that altering the terms of a trust is not within the “ordinary and natural province” of a trustee's authority, unless the trust deed explicitly bestows such a power.

“The court also said it is not something that is ‘expedient’ that a trustee should do nor, fundamentally, something that is done ‘in management or administration of’ trust property,” Mr Burgess said.

“Rather, a trustee's function is to take the trust as it finds it and to administer it as it stands and not question the terms of the trust or seek to improve them.”

Even when the trust instrument grants the trustee the authority to make variations, the exercise of this power doesn't pertain to the day-to-day management or administration of trust property. Instead, it is specifically undertaken to reshape the fiduciary administration of the property.

“Ultimately, the court's power to amend a trust deed in NSW cannot be used to subvert the beneficial disposition in the trust instrument,” Mr Burgess said.

Another case, *Cisera v Cisera Holdings Pty Ltd [2018] NSWCA 286*, also saw the court deny the request to amend a trust deed to extend the perpetuity period even though the trust was due to vest in around seven years and would likely trigger significant capital gains tax costs at that point.

“Interestingly in this decision, the court highlighted the fact that in NSW the variation of trust legislation was arguably inadequate, at least compared to other jurisdictions,” Mr Burgess said.

“Subsequently, the NSW regime was amended to significantly expand the powers of the court to approve any arrangement to vary or revoke all or any of the trust, or to enlarge the powers of the trustees for the purpose of managing or administering any of the property subject to the purpose of the trust.”

Latest decision

However, the extension of the powers does not guarantee a favourable outcome from the court, as highlighted in another decision related to the same trust, *Cisera v Cisera* [2023] NSWSC 1507.

The follow up decision related to a further court application shortly before the original vesting date of the trust, and although it is unclear in the ruling, it appears the key driver for the application was the perceived prospective liability for capital gains tax (CGT) on the properties held via the trust on vesting.

“In again rejecting an application to extend the vesting date of the trust, the court confirmed if the changes in question amount to more than a 'variation' of the trust then the court lacks power to approve the arrangement, no matter what its merits might be,” Mr Burgess said;

He said a key question the court has to consider is whether the requested changes are so extensive that the trust no longer answers the description of a “variation” of the existing trust, and that the focus of any changes must be on how they benefit the persons involved and the nature of those benefits.

In the *Cisera* case the application for a change involved a rededication of the trust property away from the beneficiaries who would become entitled on vesting, in the hope of avoiding the (assumed) adverse taxation consequences of such a vesting.

“The court was not satisfied that the changes could be properly described as a 'variation' of the existing trust,” Mr Burgess said

“It also confirmed its view that the real motivation for the application was to avoid the CGT which they believed would otherwise accrue on vesting, however, the court observed that there would be no utility in approving the proposed deed of arrangement if entry into it generated an equivalent tax liability to that triggered by allowing the trust to vest.”

Mr Burgess said despite the arguments of the parties and the comments of the court in relation to the CGT consequences, the CGT conclusions in this case contradict the position of the ATO, and most specialist advisers.

“In Taxation Ruling 2018/6, the vesting of a trust does not ordinarily cause a trust to come to an end and its property to settle on the terms of a new trust,” Mr Burgess said.

“Furthermore, the extension of the perpetuity period of a trust to defer its vesting is unlikely to cause a CGT event, as confirmed by TD 2012/21.”