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Trust deeds should include power of variation: lawyer

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

A comprehensive power of variation is one of the most important aspects of any trust deed, says a leading legal expert.

Matthew Burgess, director of View Legal, said there is an inherent power for a court to make variations to trust instruments, under the Trusts Act and similar legislation in most Australian states.

“This power can be extremely important where there is no, or a very narrow, power of variation in a trust instrument,” he said.

Burgess said one of the leading cases in this area is Re Dion Investments Pty Ltd [2013] NSWSC 1941, which involved a trust deed set up in 1973 that the trustee wanted to amend to be able to better manage the trust property.

In this case, the relevant legislative provision in NSW gave the court the power to amend a trust instrument so long as it was “expedient” for the management or administration of trust property.

“In rejecting a request to amend the deed by inserting a comprehensive variation power which in turn would have allowed the trustee to make such changes to the trust deed as it deemed appropriate from time to time, the court confirmed firstly that the legislative provisions did not allow the court to simply insert into the deed a comprehensive power of variation,” Burgess said.

“It also found that only specific powers – in contrast to wide discretionary powers – with respect to a particular dealing will be granted under the legislation.”

However, it was permissible for the court to confer particular and limited powers concerning certain issues such as how to account for income and capital gains and related tax-driven provisions.

“Despite not originally crafting its variation request along the lines that the court said was permissible, the trustee was permitted to make further submissions in accordance with the court’s recommendations for immediate approval,” he said.

Burgess added that in a subsequent decision of Re Dion Investments Pty Limited [2020] NSWSC 1661, the court authorised a further variation to ensure the “foreign person” land tax surcharge could be avoided.

“This was in light of the fact that the trust deed did not give the trustee the ability to exclude foreign persons as beneficiaries,” he said.

“In particular, the relevant power of variation was limited to 'trusts' granted to persons who had all died and therefore had lapsed, not the ‘powers’.”

The court confirmed in this decision that the requirements in the legislation were all met, including the need for “proposed dealing”, being a “sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction”.

It also said the dealing must be expedient and incapable of being affected because of an absence of power.

“Relevantly, the court confirmed that the existence of a tax advantage can form the basis of the ‘expediency’ in the management and administration of trust property requirement; here the land tax saving was over $100,000,” Burgess said.

“This conclusion was reached notwithstanding that the order would adjust or even destroy the rights of some (potential) beneficiaries to the extent that they met the definition of a 'foreign person'.”

He added that the same outcome was granted in the case of Cecil Investments Pty limited [2021] NSWSC 211, where the trust deed permitted only a variation to the “powers” not “trusts”.

“This case also confirmed that previous attempted variations to the trust deed were invalid as they breached the limitation set out in the power of variation against anything that purported to change beneficiaries who were takers-in-default of appointment,” Burgess added.

“It is important to keep in mind that the legislation is worded differently in each state, for example, the Queensland courts have a wider power than in NSW and reference should therefore always be had to the specific wording of the legislation in the relevant jurisdiction.”