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No trust variation power? No worries*

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Arguably the starkest example of the need for trust advisers to embrace the foundational heuristic (ie read the deed) is where a trust instrument contains no - or an inadequate - power to vary.

The issues in this regard are particularly stark given the trustee of a discretionary trust cannot amend or vary a trust deed unless the terms of the deed (or legislation) expressly permits it (see *Lowther Park Pty Ltd as trustee for the Lowther Park Family Trust v Simon Della Marta* [2023] NSWSC 1555 and *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753).

Helpfully, there have been numerous cases in recent years confirming the framework for what is often the only potential remedy - that is a court application.

Unhelpfully, not only does the solution require court approval (with all the second order consequences including costs, time investment and publicity - name check the 2024 case instigated by Rupert Murdoch), there is also the threshold holistic estate planning heuristic that the answer to whether any application will be successful is 'it depends'.

Or in other words, no trust aviation power; no worries – as long as making a court application is acceptable.

The decision in *Re EM McPherson Settlement* [2024] VSC 744 provides further lessons in all of the key areas.

In relation to a trust deed from 1972, the application involved four key requests, as set out below - including a brief summary of the approach adopted by the court:

1. Extension of vesting date: The court approved the extension of the vesting date to 80 years from the date of the original deed. This decision was based on the benefits of allowing more time for potential beneficiaries to be born and benefit from the trust, as well as deferring capital gains tax liabilities.

2. Broadening the range of potential beneficiaries: The court approved the amendment to include companies and trusts in which beneficiaries had an interest, subject to certain qualifications.

3. Managing various other tax issues: In addition to flagging the deferral of capital gains tax by granting an extension to the perpetuity period, the court endorsed changes that would allow distributions to entities with tax losses, the creation of sub-trusts (designed to avoid adverse tax consequences under Division 7A, which can deem unpaid distributions to corporate beneficiaries to be dividends), general income streaming powers and creating the ability for the trustee to choose the method for determining the ‘net income’ and the ‘income’ of the trust (ie to address the impact following the decision in *Federal Commissioner of Taxation v Bamford* (201) 240 CLR 481).

4. A general power of amendment: The court rejected the request for introducing a general power of amendment, primarily as it was unable to be satisfied that all future amendments would in fact benefit minor and unborn beneficiaries (a key mischief the court needs to be satisfied about before granting any variation, and thus in turn effectively mandating that any future desired changes to the trust deed here will require further court applications).

In a comprehensive decision that numbers over 215 paragraphs, a summary of some of the other noteworthy elements advisers should be aware of include the following:

(a) the trust, with assets at the date of the hearing in excess of $20M (which included shares owned in a family investment company, which at the date of the application was not in fact a beneficiary of the trust), would have vested by 30 June 2030, but for the successful application;

(b) given the revenue driven nature of a number of the proposed changes, notice of the court application was issued to both the Federal Commissioner of Taxation and the Commissioner of State Revenue, with a request that they advise whether they sought to be joined - both Commissioners declined;

(c) before granting an extension to the vesting date of a trust, the court must be confident that it is appropriate, having regard to whether it is for the benefit of the beneficiaries, and fair and proper; and what form the amendment providing for the extension should take - the issues in addressing these two factors can be complex, and certainly were in this case (occupying some 60 paragraphs of the judgment);

(d) the fact that extending a vesting date has a purpose of obtaining a tax advantage should not see the court decline to exercise its power, if it is otherwise appropriate to do so (see *Re Plator Nominees Pty Ltd* [2012] VSC 284);

(e) broadening the class of potential beneficiaries can be justified by reasons such as using a corporate beneficiary (or 'bucket company') to cap tax at the company tax rate, distributing to related trusts with carry forward income tax losses and minimising the accumulation of assets in personal names which would be available for division amongst creditors, in the event of bankruptcy;

(f) before extending the class of potential beneficiaries the court needs to consider the intention of the settlor (see *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98) and whether the adding of beneficiaries destroys the substratum of the trust or would constitute a resettlement (see Re *McGowan & Valentini Trusts* (2021) 63 VR 449);

(g) it is likely that a court can approve arrangements which have no identified purpose other than for tax related objectives, assuming it is satisfied that the arrangement is for the benefit of all beneficiaries, including those who cannot consent (see *Re Arthur Brady Family Trust* (2015) 2 Qd R 172, *Ridgewell v Ridgewell* [2007] EWHC 2666 and *Re The Pickering Family Trusts* [2024] VSC 5) - that is, 'the court is not a watch-dog for the Inland Revenue' (see *Re Weston's Settlement* [1969] 1 Ch 223) - particularly where the revenue authorities are informed of the application and choose not to intervene (as was the case here);

(h) the financial advantage to certain beneficiaries from more tax effective allocation of trust income, was held to also flow to some degree to the broader family, at least indirectly. While the extent to which that would occur was uncertain, it was still appropriately regarded as a 'benefit' to all relevant beneficiaries, although this conclusion was subject to altering of the initially proposed definition of 'Beneficiaries' to require a closer relationship between the family member beneficiaries and the corporate beneficiaries;

(i) that is, instead of a definition of 'any company in which any beneficiary has any interest', an alternative definition of 'beneficiary' was appropriate, relevantly 'private companies in which a beneficiary has a controlling interest';

(j) at least in Victoria (and jurisdictions with similarly drafted enabling legislation, where the court must be satisfied that granting a general power of variation will for evermore be for the benefit of the beneficiaries who are unable to consent for themselves) it is very difficult to reach that state of satisfaction 'when the court does not have the detail of all the variations that the trustee will make, once given the general power of variation' (see *Re Alan Synman Family Trust* [2013] VSC 264 and *Re The Pickering Family Trusts* [2024] VSC 5).