

## Everybody has plans until they get hit – even controllers of discretionary trusts

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

- 1 Matthew Burgess, director of View Legal, said *Deemhire Pty Limited as trustee of the Vartuli Family Trust v No Defendant* [2026] NSWSC 318 shows what can happen directly from inadequately drafted trust deeds.
- 2 Burgess said the presiding judge specifically observed how vital it is to ensure estate planning is detailed and precise in terms of future events.
- 3 “In positioning the difficulties caused by the trust deed in this case, the judge specifically observed firstly that ‘plans’ are schemes of action or proposals by person(s) for doing or achieving something now that will impact events or things in the short or long term future,” Burgess said.
- 4 “The judge also observed that ‘succession planning’ particularly focuses upon a future event when some key person will no longer be available to carry out or assist a plan or to do certain things by dint of that person passing away, retiring, becoming incapable, or in the realm of business, leaving the business.”
- 5 Additionally, it was noted in the judgement that frequently, such plans are designed and/or purposefully underpinned by some rationality, however, some plans or schemes in life are said to be “harebrained” (see *Estate of the late John Currie Docherty Hamilton* [2025] NSWSC 932).
- 6 “Furthermore, the judge observed that some plans may be entirely transparent and borne out of exquisitely beautiful and pure motives. Other plans may be borne out of tragic experiences embittering a person, clothed as one thing but having a manipulative or Machiavellian purpose. For example, in Charles Dickens’ *Great Expectations*, Miss Havisham’s plans affecting Pip – and ultimately self-destructive to herself – were forged from such an event,” Burgess said.
- 7 “And the success of such plans may depend on minimal or conversely many factors of varying importance. The mettle of plans may be tested by putting the plan theory into practice ... as Mike Tyson famously said ‘Everybody has plans until they get hit for the first time’.”
- 8 The case involved a discretionary trust with a number of provisions which over time had proved problematic, including a failure to anticipate the succession of an appointor role on the death of the appointor; and the prohibition on any appointor from receiving distributions from the trust; even if otherwise being a potential beneficiary.
- 9 Burgess said other issues were that the range of beneficiaries narrowing automatically on the death of the appointor (a nuance that if not fully appreciated by the trustee would have certainly triggered numerous invalid purported trust distributions).
- 10 “There was also the inability to amend the trust deed – and take a range of other steps likely to be needed – following the death of the appointor (in this regard, the relevant variation clause stated ‘at any time during the life of the appointor and prior to the termination of the trusts hereinafter declared’,” he said.

- 11 “The court confirmed that while this clause might have permitted variations after the death of the appointor but prior to the termination of the trusts, the integrity of this approach was counted against by the fact that the clause went on to provide for notice to be given to the appointor. There was also a purported variation that was assumed by the court as likely invalid.”
- 12 Burgess continued that the court approved some of the changes requested to the trust deed, including the appointment of new appointors which in theory would allow the trustee to then make, with appointor consent, other changes.
- 13 “The decision is comprehensive, particularly in considering the inherent and statutory rights of the court to amend trust instruments,” he noted.
- 14 The judgement also makes comments in relation to the interpretation of the trust deed, all of which are likely relevant for trust advisers, Burgess said.
- 15 Firstly, it appears that the principles applicable to the removal of a guardian and appointor holding a fiduciary role are akin to those applicable to removing a trustee and the guiding principle is the welfare of the beneficiaries and due administration of the trust in their favour (see *Dryandra Investments Pty Ltd (ACN [tel:627%20096%20146](#)) as trustee of the Dryandra Trust v Hardie* by her guardian ad litem Ian Torrington Blatchford [2024] WASC 248 and *Panizza v Clathington Pty Ltd as former trustee for the P. and D. Panizza Family* [2025] WASC 246).
- 16 “Secondly, court implemented trust deed variation provisions are beneficiary initiated (rather than settlor or trustee) and the role of a court is not itself, amending or varying the trusts, but rather acting on behalf of or representing beneficiaries who are not in a position to give their own consent and approval (see *Inland Revenue Commissioners v Holmden* [1968] AC 685 and *Application by Perenna Nominees Pty Ltd* [2022] VSC 193),” Burgess added.
- 17 Moreover, he said, as confirmed in *WFT Capital Pty Ltd v Windt* [2025] NSWSC 819, in Australia, the question of whether a variation of a trust amounts to a resettlement is not answered by reference to whether the variations are “essential or inessential, fundamental or immaterial” (see *Commissioner of Taxation v Commercial Nominees of Australia Ltd* [2001] HCA 33; (2001) 75 ALJR 1172).
- 18 “Rather, the question is answered by reference to whether there is continuity across three indicia, being the regime of trust obligations, that is, its so-called constitution; the trust property; and membership of the trust (see *Federal Commissioner of Taxation v Clark* (2011) 190 FCR 206),” Burgess added.
- 19 “Where there is continuity of these matters, there will be no resettlement no matter how fundamental or essential the changes might otherwise be seen to be.”
- 20 Another point of which advisers should take note is whether an appointor’s powers are fiduciary depend on the terms of the trust deed (see *El Sayed v El Hawach* [2015] NSWCA 26, *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 and *Hitchcock v Pratt Group Holdings Pty Ltd as trustee for the Pratt Family Holdings Trust* [2024] NSWSC 1292).
- 21 “The terms of the trust deed here were such that while the trust could have operated without an appointor, the power of the appointor to appoint or remove trustees was ‘facilitative to the due and proper execution of the trust’ and thus the court could use its inherent power to at least appoint a replacement appointor (but not otherwise make alterations in this regard) to secure the due execution of the trust,” Burgess said.

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- 22 “When changes to the range of beneficiaries are proposed, a court can legitimately consider familial benefits – that is, the fact that the changes may help with the dynamics of intra-family relationships is a relevant factor (see Application by Perenna Nominees Pty Ltd [2022] VSC 193).”