The Variation of Trust Provisions

Division 3A of Part 3 of the *Trustee Act 1925* (NSW)

STEP NSW Branch

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1. Overview

A vexed issue for trusts in New South Wales has been the limited ability for the Courts to vary trusts and enlarge powers. Until the New South Wales Court of Appeal decisions in *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753 and in *Ciseara v Cisera Holdings Pty Ltd* (2018) 98 NSWLR 747, section 81 of the Trustee Act 1925 (NSW) was used to vary terms of trusts in New South Wales, including in the context of extending vesting periods.

Given the limitations imposed on section 81 of the Trustee Act 1925 (NSW), the legislature has intervened.

The *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020 No 24* (NSW) was passed by Parliament on Wednesday 23 September 2020, and assented to on Monday, 28 September 2020. The Act amended the *Trustee Act* to insert a new Division 3A in Part 3 of the *Trustee Act 1925* (NSW).

The provisions replicate variation of trust provisions which have been a common feature of other State and the United Kingdom's trustee legislation for some time now. Indeed, the provisions seek to bring New South Wales into line with those other jurisdictions.

2. Variation of trusts – general principles

2.1 Generally speaking, once a trust is established, the Court does not have the power to vary the terms of a trust (except in limited emergency circumstances) (see Young AJ in *Re Dion Investments Pty Ltd* [2013] NSWSC 1941 at [49] to [51]).

2.2 In *Re Crawshay* (1888) 60 LT 357 at 359 North J said:

> *I should not be administering the trusts created by the testator if I consented to this scheme. I should be altering his trusts and substituting something quite outside the will. On the assumption that the scheme would be beneficial to the estate, I cannot decide that I have jurisdiction to authorise it.*

2.3 In *Re Walker* [1901] 1 Ch 879 at 885 Farwell J said:

> *I decline to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible*

2.4 In *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753 (**"Re Dion"**) at [45] to [48], Barrett JA outlined the manner in which the terms of a trust may be varied, being (and see **[5] below**):

(a) pursuant to a power reserved in the trust instrument ([45] in Re Dion);

(b) pursuant to the consent principle contained in *Saunders v Vautier* [1841] EngR 629; (1841) 4 Beav 115; 49 ER 282 (affd [1841] EngR 765; (1841) Cr & Ph 240; 41 ER 482) (**"Saunders v Vautier"**) ([46] in Re Dion);

(c) legislation such as the UK Act, which is said to build on the consent principle ([46] in Re Dion); and

(d) a "*… very limited power of the court (of uncertain provenance) to sanction departure from the terms of the trust where some circumstance of emergency in the course of administration needs to be resolved in the interests of preserving the trust property: Re Jackson (1882) 21 Ch D 786; Re New [1901] 2 Ch 534; Re Tollemache [1903] 1 Ch 457 …*" ([47] in Re Dion).

3. The Court of Appeal's Decision in *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753 – the concept of creating a trust relationship and then variation

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Effect of creating an express trust

3.1 Before considering the concept of a variation to the terms of a trust (including via statutory mechanisms), regard needs to be given to the effect of creating a trust estate pursuant to an instrument (i.e. an express trust).

3.2 Barrett JA in *Re Dion* at [39] to [43] discussed the effects of creating an express trust. As observed by Barrett JA at [40], the facts in Re Dion was one in which a settlor chose to define in writing the trusts and powers in a trust deed (notwithstanding that the settled

property was money). Further, the original trustee executed the trust deed to signify the acceptance of that position, and the powers, duties and responsibilities.

3.3 The crux of Barrett JA's analysis was that the "*… terms of the trust have, in the eyes of equity, an existence that is independent of the provisions of the deed that define them …* " ([42]).

3.4 Upon the execution of a trust deed, equity recognises the rights and interests of beneficiaries, and the duties, obligations and powers of trustees. The duties, obligations and powers are engrafted onto the trust property – and relate to the rights and interests of the beneficiaries. It is equity (and not the law) which recognises the interests of the beneficiaries and the duties / powers of trustees.

3.5 Barrett JA at [41] observed that upon the establishment of a trust pursuant to a deed made between a settlor and a trustee the "*… rights of the beneficiaries arise immediately the deed takes effect…*". The rights of beneficiaries – who are not parties to a deed of settlement - were described by Barrett JA at [41] as follows:

> *…. the beneficiaries are not parties to the deed and, to the extent that it embodies covenants given by its parties to one another, the beneficiaries are strangers to those covenants and cannot sue at law for breach of them. The beneficiaries' rights are equitable rights arising from the circumstances that the trustee has accepted the office of trustee and, therefore, the duties with respect to the trust property (and otherwise) that the office carries with it.*

3.6 That is, notwithstanding that a beneficiary may not be a party to a deed declaring an express trust, it is equity that affects the consciousness of a trustee – being a volunteer that accepts the obligations imposed in the eyes of equity.

3.7 Upon the execution of the deed of settlement equity recognises both:

(a) the rights and interests of the beneficiaries; and

(b) the duties, obligations and powers of the trustee.

3.8 Barrett JA at [42] discussed the implications of a settlor and trustee who attempt to vary the provisions of a deed after execution. Importantly, Barrett JA observes that equity considers that the terms of a trust are independent to the provisions of the deed that established the trust:

> *Any subsequent action of the settlor and the original trustee to vary the provisions of the deed made by them will not be effective to affect either the rights and interests of the beneficiaries or the duties, obligations and powers of the trustee. Those two parties have no ability to deprive the beneficiaries of those rights and interests or to vary either the terms of the trust that the trustee is bound to execute and uphold or the powers that are available to the trustee in order to do so. The terms of the trust have, in the eyes of equity, an existence that is independent of the provisions of the deed that define them.*

3.9 That is, once the trusts are established, unless there is an express power to vary (alter or revoke) those trusts, then any attempt to deal with / destroy the trusts will be ineffective. Barrett JA at [43] observed that:

> *Let it be assumed that on Monday the settlor and the trustee execute and deliver the trust deed (at which point the settled sum changes hands) and that on Tuesday they execute a deed revoking the original deed and stating that their rights and obligations are as if it had never existed. Unless some power of revocation of the trusts has been reserved,* ***the subsequent action does not change the fact that the trustee holds the settled sum for the beneficiaries named in the original deed and upon the trusts stated in that deed****. The covenants of a deed may be discharged or varied by another deed between the same parties … but* ***the equitable rights and interests of a beneficiary cannot be taken away or varied by anyone unless the terms of the trust itself (or statute) so allow****.* [emphasis added]

3.10 Because the rights of beneficiaries arise as at the execution of a trust deed, and those rights are recognised in equity, once those rights are created (unless there is a reserve

power or statute allows) the rights and interests of a beneficiary cannot be affected by the parties of the deed.

3.11 The deed creates (in equity) interests and rights in strangers to the deed (i.e. the beneficiaries), which cannot be easily taken away.

4. The concept of amending the terms of a trust

4.1 After discussing the effect of settling a trust, Barrett JA at [44] to [48] in *Re Dion* explored the concept of whether an amendment of a trust deed is a "transaction" for the purposes of subsection 81(1) of the *Trustee Act*.

4.2 At [44] Barrett JA observed that it is "*… commonplace to speak of the variation of a trust instrument as such when referring to what is, in truth, variation of the terms upon which trust property is held under the trusts created or evidenced by the instrument*".

4.3 Barrett JA considered that the amendment of the trust instrument itself, which adds specific powers for advantageous dealings is "*… merely a procedural step …*" ([95]). At [48] Barrett JA considered that whatever route is taken, there is never an amendment to a trust deed but instead: "*… there is a variation or supplementation of the terms of the trust derived from that instrument or the powers of the trustee conferred by that instrument. Shorthand references to amendment of a trust deed must be understood accordingly.*"

4.4 That is, Barrett JA differentiated between:

7.4.1 a variation of a trust instrument; with

7.4.2 a variation of the terms of a trust.

4.5 Barrett JA at [44] observes that it is "*… commonplace to speak of the variation of a trust instrument …*", when in truth, there is actually a "*… variation of the terms upon which trust property is held under the trusts created or evidenced by the instrument …*".

5. Varying or supplementing the terms of a trust outside any statutory powers

5.1 At [45] to [48], and putting aside any statutory powers, Barrett JA in *Re Dion* discussed the methods of varying or supplementing the terms of a trust, being:

(a) a power reserved in a trust instrument;

(b) where the "consent" principle as contained in *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282 (affd Cr & Ph 240; 41 ER 482) (***"Saunders v Vautier"***) is used; or

(c) where the court sanctions a departure of the terms of the trust where some circumstances of emergency needs to be resolved in the interests of preserving the trust property

The nature of a reserve power of amendment contained in a trust instrument

5.2 At [44] to [45] Barrett JA discussed the effect of the use of a reserve powers of amendment contained in a trust instrument. Barrett JA considered that the use of such a power did not, strictly speaking, vary the terms of the instrument, but instead varied the terms of a trust. At [44] Barrett JA observed that:

> *A provision of a trust instrument that lays down procedures by which it may be varied is, of its nature, concerned with variation of the terms of the trust, not variation of the content of the instrument, although in fact that it is the instrument that sets out the terms of the trust does, in an imprecise way, make it sensible to speak of amendment of the instrument when the reference is in truth to amendment of the terms of the trust.*

5.3 Because the trusts (or the equitable rights and interests of the beneficiaries) arise in equity, a "variation" of those trusts are exactly that – not a variation of the (physical document being the) deed.

5.4 At [45] Barrett JA considered that the power of variation contained in an instrument may be traced to the settlor's initial intention:

> *Where the trust instrument contains a provision allowing variation by a particular process, the situation is one in which the settlor, in declaring the trust and defining its terms, has specified that those terms are not immutable and that the original terms will be superseded by varied terms if the specified process of variation (entailing, in concept, a power of appointment or a power of revocation or both) is undertaken. The varied terms are in that way traceable to the settlor's intention as communicated to the original trustee.*

5.5 Interestingly, Barrett JA at [45] considered that a reserve power of amendment is (conceptually speaking) a power of appointment, a power of revocation – or both.

5.6 However, Barrett JA at [45] observes that a variation of a trust pursuant to a reserve power contained in a trust instrument is traceable to the settlors intention, as communicated to the original trustee (via the trust instrument).

5.7 Whilst Barrett JA considered that the power of amendment is (in concept) a power of appointment or a power of revocation, or both, regard needs to be given to [16.03] to [16.06] of Thomas, G, *Thomas on Powers* (2nd edition), Oxford University Press, 2012 (***"Thomas on Powers"***) in which it was observed that whilst a power to amend resembles a power to appoint or a power to revoke, they are different powers.

The "consent principle" – Saunders v Vautier

5.8 As an alternative to a reserve power, Barrett JA at [46] discusses the use of the "consent" principle which may be used to amend the terms of a trust. Barrett JA at [46] discussed the "consent" principle which derives from the principle contained in *Saunders v Vautier*. It was observed at [46] that:

> *Where the trust instrument contains no such variation provision, principles of equity may countenance variation of the terms of the trust with the unanimous consent of the beneficiaries if all are in being, sui juris and absolutely entitled. Under the principle in Saunders v Vautier … beneficiaries in that position are entitled to put an end to the trust and require that the trust property be transferred to them.*

5.9 The High Court in *CPT Custodians Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at [43] (***"CPT Custodian"***) observed of the principle in *Saunders v Vautier* that:

> *Saunders v Vautier is a case which has given its name to a "rule" not explicitly formulated in the case itself, either by Lord Langdale MR (at first instance) or by Lord Cottenham LC (on appeal). In Anglo-Australian law the* ***rule has been seen to embody a "consent principle"*** *recently identified by Mummery LJ in Goulding v James as follows:*
>
> > *"The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument."* [emphasis added]

5.10 As an extension of the ability to terminate a trust, the consent principle may allow a trustee to hold trust property pursuant to varied trusts.

5.11 Barrett JA at [46] opined that the capacity of beneficiaries – who are *sui juris* and absolutely entitled – "*… enables them to require … that the property be held by the trustee upon varied trusts; but, if they do so require, the situation may in truth be one of resettlement upon new trusts rather than variation of the pre-existing trusts …*".

Saunders v Vautier – consent principle and there being a "resettlement"

5.12 Unlike the reserve power contained in an instrument, which Barrett JA considered were a species of the powers of appointment / revocation (or both), Barrett JA considered that the use of the consent principle may be "in truth" a "resettlement upon new trusts" rather than a variation of pre-existing trusts.

5.13 Regard needs to be given to the implications of a "resettlement" if the consent principle contained in *Saunders v Vautier* is used to give a trustee powers. Such a situation would typically (and most often) arise in the context of a trust that have vested. In particular, the

consent principle would apply upon the vesting date happening (with – for example – the trust property going to the takers in default).

5.14 As an example, considering the trusts in *re Dion*, Barrett JA at [12] observed that there were trusts declared in two separate clauses of the trust deed, with:

(a) one of the trusts applying during "the period of restriction" (i.e. during the period before the vesting date of the first trust); and

(b) the other trust, being at the end of the "period of restriction.

5.15 Barrett JA at [13] observed that the trusts during the "period of restriction" were discretionary, whereas the trusts at the end of the restricted period also (to an extent) discretionary – as the trustee had the power to appoint the income / capital, but there were takers in default of appointment.

5.16 It is the beneficiaries who obtain the capital after the period of restriction, or those beneficiaries who were appointed capital / income during the period of restriction, who would be considered absolutely entitled to such income and / or capital. As a result, upon the vesting date arriving (and assuming that there has not been an appointment of capital that defeats their interests), it is those beneficiaries who could use the consent principle.

5.17 However, the point is this – there were at least two trusts in *Re Dion*. One which was largely discretionary in nature (i.e. prior to the vesting date), and another which beneficiaries would (necessarily) have absolute entitled beneficiaries. To the extent that the beneficiaries of the "second" trust exercise the "consent" principle to confer powers onto the trustee, then there seems to be a resettlement, which may give rise to CGT event E1 (section 104-55 of the *Income Tax Assessment Act 1997* (Cth)).

Trustee not compelled to perform new trusts declared pursuant to the consent principle

5.18 Whilst the consent principle may allow the *sui juris* and absolutely entitled beneficiaries to vary terms of trusts, trustees are not necessarily compelled to accept or perform those trusts. In support of this proposition, Barrett JA referred to CPT Custodians at [44], where (in terms of Hohfield's analysis of rights), the consent principle entails a Hohfeldian

"power" (on the part of beneficiaries) which correlates to a "liability" for trustees (rather than a "right" on the part of a beneficiary and therefore a "duty" on the part of the trustee).

5.19 The High Court at [44] in *CPT Custodians* observed that:

> *A different view was taken long ago by the United States Supreme Court. In Shelton v King, the Court repeated what had been said by Miller J in 1875 when speaking for the Supreme Court in Nichols v Eaton. He saw no reason in the principles of public policy concerning frauds upon creditors, restraints upon alienation, the prevention of perpetuities and of excessive accumulations, or in the necessary incidents of equitable estates, which supported a rule of the width engrafted upon the law (then comparatively recently) by the English Court of Chancery as a limitation upon effecting the intent of testators and settlors. However that may be,* ***there is force for Anglo-Australian law in the statement that the rule in Saunders v Vautier gives the beneficiaries a Hohfeldian "power" which correlates to a "liability" on the part of the trustees, rather than a "right" correlative to a "duty"****. This is because, in the words of Professor J W Harris:*
>
> *"[b]y breaking up the trust,* ***the beneficiaries do not compel the trustees to carry out any part of their office as active trustees; on the contrary, they bring that office to an end****".* [emphasis added]

5.20 That is, on the basis that the *sui juris* and absolutely entitled beneficiaries have the power to allow trust property to be held subject to varied trusts, there is a corresponding liability for the trustee. As a result, a trustee may choose not to accept the liability to perform those (new) trusts.

Inherent jurisdiction – Court authorising a departure from the terms of the trust

5.21 Barrett JA at [47] observed of the limited power of the Court, which his Honour observed was of "uncertain provenance" to "*… sanction departure from the terms of the trust where*

some circumstance of emergency in the course of administration needs to be resolved in the interests of preserving the trust property …".

5.22 Thomas, G and Hudson, A in *The Law of Trusts* (2nd edition) Oxford University Press, 2010 at [24.05] to [24.12] (**"Thomas and Hudson"**) discusses the inherent jurisdiction of the Court to vary trusts. At [24.05], Thomas and Hudson observe that:

> *Apart from statute, there are, at most, four cases in which the court has inherent jurisdiction to modify or vary trusts affecting persons who are not sui juris subject to the preconditions that all persons who are sui juris consent and the modification and variation is clearly for the benefit of all persons who are not sui juris.*

5.23 The four cases outlined by Thomas and Hudson at [24.05] are:

(a) cases in which the Court has effected changes in the nature of an infant's property, for example by directing investment of his personalty in the purchase of freeholds;

(b) cases in which the court has allowed the trustees of settled property to enter into some business transaction not authorised by the settlement;

(c) cases in which the Court has allowed maintenance out of income which the settlor or testator directed to be accumulated; and

(d) cases in which the Court has approved a compromise on behalf of infants and possible after-born infants.

5.24 Thomas and Hudson at [24.07] observes of another three cases, being:

(a) 'salvage' cases. Tucker, L, Le Poidevin, N and Brightwell, J in *Lewin on Trusts*)19th edition) Sweet & Maxwell, 2015 (**"Lewin on Trusts")** describes these cases at [45-005] as follows:

> *The court has inherent jurisdiction to authorise otherwise unauthorised acts of management or administration of the trust property where an emergency arises connected with the trust property. But this can only be done in a case where the emergency may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, the trustees are embarrassed by the*

emergency, the consent of the beneficiaries cannot be obtained to the course proposed, and the emergency must be dealt with at once.

(b) 'emergency' cases. Lewin on Trusts describes these cases at [45-005] as follows:

Connected with … [salvage cases] … are those in which the court in its inherent jurisdiction has authorised, as a matter of salvage, the expenditure of capital in keeping up the trust property, for instance by raising money on mortgage and spending it on repairs of the property to save it from ruin which would otherwise ensue, which will be done only in a case of actual salvage, or to pay the premiums of a settled policy which would otherwise lapse. A settled policy has also been ordered to be surrendered where it is impossible to pay the premiums.

(c) 'maintenance' of minors cases – Lewin on Trusts describes these cases at [45-009] as follows:

It is the practice to authorise the maintenance of minor beneficiaries out of income directed to be accumulated and even out of capital … where this course is contrary to the strict terms of the trust instrument and the statutory power of maintenance … is excluded or otherwise not applicable.

(d) 'compromise' cases – Lewin on Trusts describes these cases at [45-010] as follows:

The court has inherent jurisdiction to approve on behalf of minor, unborn and unascertained persons compromise of genuine disputes over the destination of trust property, but there must be a real, substantial question which the court would otherwise have to try; it will not dress up an agreed variation of a trust instrument as a compromise of a dispute.

6. Section 81 of the Trustee Act 1925 (NSW) no longer available to extend vesting dates

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6.1 The Courts have in the past supplied trustees the power, pursuant to section 81 of the Trustee Act, to extend vesting dates (see for example *Stein v Sybmore* [2006] NSWSC

1004). However, since the decision of the Court of Appeal in *Ciseara v Cisera Holdings Pty Ltd* [2018] NSWCA 286; (2018) 98 NSWLR 747 (per White JA at [5] to [77] with whom Bathurst CJ at [1] to [3] and Beazley P at [4] agreed) ("***Cisera v Cisera Holdings"***).

6.2 Cisera v Cisera Holdings was the appeal decision to the decision of Justice Parker in Cisera v Cisera Holdings Pty Ltd [2017] NSWSC 960 (**"the First Cisera Decision"**).

6.3 Of the relief sought by the trustee, White JA at [6] in *Cisera v Cisera Holdings* observed that:

> *By their amended summons the applicants sought various orders that, although differently expressed, sought in substance* ***an order under s 81(1) of the Trustee Act 1925 (NSW) that the trustee be authorised to manage and administer the property of the Trust on the basis that the vesting date of the trust would be postponed****. In substance, although not in form,* ***the applicants sought orders that would provide for the extension of the vesting date of the Trust or would allow the trustee to extend the vesting date of the Trust****.* [emphasis added]

6.4 That is, the trustee in Cisera v Cisera Holdings sought orders to extend the vesting date of a trust estate pursuant to section 81 of the Trustee Act. At [25] to [31] in Cisera v Cisera Holdings, White JA outlined the reasoning of Parker J in the First Cisera Decision:

> *25. The primary judge referred to decisions on the scope of s 81 of the Trustee Act, including Arakella Pty Ltd v Paton (2004) 60 NSWLR 334; [2014] NSWSC 13 at [93]-[96]; In Re Downshire Settled Estates; Marquess of Downshire v Royal Bank of Scotland [1953] Ch 218; Stein v Sybmore Holdings Pty Ltd [2006] NSWSC 1004; (2006) 64 ATR 325; Re Dion Investments; and subsequent first instance decisions that applied Re Dion Investments, including decisions in which it was held that consistently with the decision in Re Dion Investments relief was not available under s 81 to extend the vesting date of a trust (Andtrust v Andreatta [2015] NSWSC 38 (McDougall J); Paloto Pty Ltd v*

Herro [2015] NSWSC 445 (Darke J); Bull v Boreas Pty Ltd [2015] NSWSC 761 (Rein J)).

26. *The primary judge noted (at [43]-[46]) various formulations of orders sought by the appellants under s 81 which they contended were open and were supported by prior authority, in particular Stein v Sybmore Holdings, notwithstanding the decision in Re Dion Investments, and observed that the effect of each formulation would be that the Court would permit the trustee to administer the Trust as if the vesting date were the latest of the three dates mentioned in the Trust Deed, or the later of the first two, rather than the earliest as the Trust Deed provides (at [46]).*

27. *The primary judge recorded the submission for the plaintiffs that Re Dion Investments was not authority for any wider proposition than that the addition of a power of amendment to a trust deed was not a "transaction" which could be authorised under s 81(1) (at [49]) and did not affect the authority of Stein v Sybmore Holdings. The primary judge rejected those submissions (at [49]-[51]).*

28. *The primary judge held that the application was precluded by the decision in Re Dion Investments (at [52]). The primary judge nonetheless went on to consider in detail the arguments presented by the plaintiffs. His Honour held that in s 81(1) the word "transaction" was to be read ejusdem generis with the words which precede it (at [55]) and that the common characteristic of all of the dealings listed with "transaction" is that they involve an exchange (whether of money, property, services or promises) between the Trustee and someone else and the same is true of the term "transaction" in the context in which the word is found and that it refers to something bilateral (at [56]). It did not include the extension of the vesting date of a trust.*

29. *The primary judge also considered (at [63]-[64] and [66]) that the orders sought would authorise "transactions" in such remote and broad terms as to*

fall outside the scope of s 81(1) (applying Riddle v Riddle (1952) 85 CLR 202 at 220 per Williams J, 226 per Webb J) (at [63]-[64]). His Honour also said that an order that can be made under s 81(1) must be of a kind that can later be rescinded or modified (s 81(3)). The orders sought were not of that kind (at [67]).

30. *The primary judge found that the orders sought were not "expedient". His Honour said that a determination of what is "expedient" must have regard to the intentions of the settlor, rather than the Court's substituting its own ideas as to what is preferable (at [74]). Those intentions were to be gleaned from the terms creating the beneficial interests. The primary judge held that it should be inferred that had the settlor intended that the vesting date be deferred for as long as possible then the Royal lives period would have been used on its own. It was not. The 50-year period before vesting was intended to be the maximum period of time that should elapse before the Terminal Date. This was consistent with no provision having been made for the third generation (John's children) to participate alongside the second generation, and no provision having been made for any spouse of John's children, nor for John's grandchildren or remoter descendants (at [80]). The primary judge observed that considering the position in 1974, it might reasonably have been expected that by 2024 John would have been expected to have adult children and perhaps grandchildren. If it had been contemplated that the trust would extend beyond that date, one would expect provision to be made for them to participate as beneficiaries alongside John (at [81]).*

31. *The primary judge also found that a problem of some immediacy must exist before the conferral of power under s 81 could be said to be "expedient" (at [87]-[89]). In the present case there was no such immediate problem. The concern that trust assets might vest in John's children while they were still young was purely hypothetical. The assets would only vest in the children if*

> *John did not survive until 1 January 2024. There was no reason to think that he would not survive until that date. In any event, the trustee had the power to advance the vesting date (at [90]). If the Terminal Date could be extended, the Trust Deed was ill-adapted to meet the needs in an ongoing way of John's children, their spouses and their children. The limitations in the trust deed would become increasingly troublesome as John's children grew up and had children of their own (at [91]). Capital gains tax would become payable upon the vesting of assets in 2024. But a capital gains tax liability will inevitably be incurred at the point of vesting and the Court could not assess whether the liability to capital gains tax could be borne more readily if the vesting were delayed (at [85]).*

6.5 White JA concluded at [66] in *Cisera v Cisera Holdings* as follows:

> *The power under s 81(1) must be exercised by only granting specific powers relating to the management and administration of the trust property that can be seen to be expedient. That is the ratio of Re Dion Investments and it is supported by the reasoning in Re Downshire Settled Estates. That is not to say that an order under s 81(1) must be confined to authorising a specific investment or a specific transaction in the management or administration of the trust property (Riddle v Riddle at 215 per Dixon J). But the primary judge was correct to conclude that the orders sought under s 81(1) that the trustee be empowered and authorised to manage and administer the trust property beyond the Terminal Date specified in the trust deed was in substance an application for an order to vary the terms of the trust by varying the definition of the Terminal Date that was a kind of order not authorised by s 81(1).*

6.6 That is, as a result of the Court of Appeal's decision in *Cisera v Cisera Holdings*, section 81 of the Trustee Act is no longer available to extend the vesting date of a trust.

7. The variation of trusts legislation – Division 3A of Part 3 of the Trustee Act 1925 (NSW)

7.1 At [72] in *Cisera v Cisera Holdings*, White JA observed that:

> *The introduction of legislation in other jurisdictions to address the issues demonstrates that this is a matter for Parliament. The number of unsuccessful applications in this State for what might be beneficial changes to the terms of the trusts following Re Dion Investments indicate that the issue is ripe for Parliamentary consideration.*

7.2 The legislature has since introduced Division 3A into Part 3 of the Trustee Act, which contains sections 86A to 86C, being the variation of trusts provisions.

7.3 The *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020 No 24* (NSW) was passed by Parliament on Wednesday 23 September 2020, and assented to on Monday, 28 September 2020. The Act amended the *Trustee Act* to insert a new Division 3A in Part 3 of the *Trustee Act*.

7.4 In paragraph (r) of the Explanatory Note to the *Stronger Communities Legislation Amendment (Courts and Civil) Bill 2020,* it was observed that the object of the Bill was to vary certain acts so as *"… to bring NSW into line with other jurisdictions by allowing the Supreme Court to vary or revoke a trust where that is in the interests of the beneficiaries and fulfils the purpose of the trust".* In the second-reading speech (Legislative Assembly Hansard – 16 September 2020) the then Attorney General, Mr Mark Speakman, observed of the amendments as follows:

> *Schedule 1.14 [of the Stronger Communities Legislation Amendment (Courts and Civil) Bill 2020]… to the Bill will make a number of amendments to the Trustee Act 1925 to improve the administration of trusts. Schedule 1.14(4) to the Bill amends that Act to permit the Court to approve an arrangement varying or revoking a trust where this is beneficial to the interests of the beneficiaries or to the fulfilment of the trust purpose. Section 81 of the Trustee Act currently empowers a Court to make*

orders relating to the management and administration of trust property that can be seen to be expedient.

The Court of Appeal has held that section 81 does not authorise the Court to make orders for the variation of trusts, which will be beneficial to the interests of the beneficiaries or to the fulfilment of the trust purpose, but which are not concerned with the management or administration of the trust assets. This amendment will ensure that the Court can approve arrangements to vary or revoke trusts in these circumstances. There are legitimate reasons for which a trustee make seek to modify the terms of a trust in order to discharge their duties to a beneficiary. Set laws often create trusts without consideration to future circumstances and there may be a need to amend the trust to accommodate those circumstances in a way that is consistent with the intention of a settlor. This would bring New South Wales law into line with the law in the United Kingdom and in other Australian states.

7.5 Division 3A of Part 3 of the Trustee Act contains sections 86A to 86C of the Trustee Act. Section 86A of the Trustee Act provides as follows:

86A Court order to approve arrangement

(1) If property is held in trust under any instrument creating the trust, the Court may, if it thinks fit, by order approve any arrangement to—

(a) vary or revoke all or any of the trust, or

(b) enlarge the powers of the trustees for the purpose of managing or administering any of the property subject to the purpose of the trust.

(2) An order under this section may be made by the Court only on behalf of—

(a) any person under the trust having an interest directly or indirectly, or vested or contingent, who by reason of being a minor or other incapacity is incapable of assenting, or

(b) any person who may become entitled, directly or indirectly, to an interest under the trust, and the entitlement is contingent on a future date or event that has not occurred at the time of application for an order under this section, or

(c) any unborn person, or

(d) any person in respect of any discretionary interest of the person under protective trusts where the interest of the principal beneficiary has not failed or determined.

(3) This section—

(a) extends to a trust created before the commencement of this section, and

(b) does not apply to trusts affecting property created by another Act, and

(c) does not limit the operation of section 81.

(4) In this section—

***discretionary interest**, in relation to protective trusts, means an interest arising under section 45(6).*

***principal beneficiary** has the same meaning as in section 45.*

***protective trusts** has the same meaning as in section 45.*

7.6 That is, paragraph 86A(1) of the Trustee Act provides that the Court may, if it thinks fit, approve an arrangement to (amongst other things) vary any trust and / or to enlarge the powers of a trustee.

7.7 Subsection 86A(2) of the Trustee Act provides for whom the Court may make an order on behalf of. It includes, relevantly for current purposes, minors (paragraph 86A(2)(a) of the Trustee Act), discretionary objects (paragraph 86A(2)(b) of the Trustee Act) and unborn beneficiaries (paragraph 86A(2)(c) of the Trustee Act).

7.8 Subsection 86B(1) of the Trustee Act provides that the: " … *Court must not approve an arrangement on behalf of any person under section 86A unless the carrying out of the order would be for the benefit of that person.*"

7.9 Section 86C of the Trustee Act provides for notification provisions.

7.10 The provisions contained in Division 3A of Part 3 of the Trustee Act are said to bring New South Wales into line with other State jurisdictions and the United Kingdom. That is, the provisions contained in Division 3A of Part 3 of the Trustee Act are similar to the variations of trusts provisions in other States, such as that contained in section 63A of the *Trustee Act 1958* (Vic) (**"the Victorian Act"**) and the *Variation of Trusts Act 1958* (UK) (**"the UK Act"**).

7.11 Moore J in *McNee v Lachlan McNee Family Maintenance Pty Ltd* [2020] VSC 273 at [104] summarised the history and premise of section 63A of the Victorian Act as being as follows:

> *Section 63A replicates s 1(1) of the Variation of Trusts Act 1958 (UK)… s 63A, like the UK legislation, was passed in response to the decision in Chapman v Chapman, where the House of Lords rejected the contention that a court has inherent jurisdiction to approve variations to a trust on behalf of minor, unborn and unascertained beneficiaries merely on the ground that the variation is for their benefit. The remedial legislation, it has been said, overcomes this limitation by enabling the court to give approval to an arrangement on behalf of persons who are unable by their incapacity to give such approval. The court in effect supplies the capacity which the beneficiary lacks.*

7.12 In terms of the UK Act at [53-072] in *Lewin on Trusts*, Thomson Reuters, 2020 (20th edition) (**"Lewin on Trusts"**) it is observed that an order under the UK Act "*… expresses approval of the arrangement…*" but that the "*… precise operation is still, surprisingly, uncertain*".

7.13 The question that arises is whether:

(a) an order of the Court is merely an approval by the Court on behalf of all of the beneficiaries who cannot provide assent; or

(b) the order made by the Court varies the trusts.

7.14 In this regard, the historical context of variation of trusts legislation is relevant.

7.15 In *Chapman v Chapman* [1954] A.C. 429 (***"Chapman v Chapman"***), the House of Lords considered that the Court had no inherent jurisdiction to approve a variation of trust on behalf of minors, unborn and unascertained beneficiaries merely on the grounds that the variation was for their benefit (absent the special elements of salvage, compromise, etc – all found in the Court's inherent jurisdiction power).

7.16 In *Re Chapman's Settlement Trusts (No. 2)* [1959] 1 W.L.R. 372 (which granted relief on the matters sought in *Chapman v Chapman*) the **trustees** made the application (and were successful) under the UK Act as there were no beneficiaries of full age and capacity.

7.17 The variation of trusts legislation is remedial legislation, and overcomes the limitation identified in Chapman v Chapman by enabling the court to give approval to an arrangement on behalf of persons who are unable by their incapacity to give such approval; where the Court in effect supplies the capacity which the beneficiary lacks (*Re Holmden's Settlement Trusts* [1968] AC 685 at 710H-711A, per Lord Guest).

7.18 The variation of trust legislation is a statutory extension of the principle in *Saunders v Vautier* as noted by Barrett JA at [46] in *Re Dion*:

> *Where the trust instrument contains no such variation provision, principles of equity may countenance variation of the terms of the trust with the unanimous consent of the beneficiaries if all are in being, sui juris and absolutely entitled. Under the principle in Saunders v Vautier (1841) 4 Beav 115; 49 ER 282 (affd (1841) Cr & Ph 240; 41 ER 482), beneficiaries in that position are entitled to put an end to the trust and to require that the trust property be transferred to them. Their capacity to produce that result also enables them to require, as an alternative, that the property be held by the trustee upon varied trusts; but, if they do so require, the situation may in truth be one of resettlement upon new trusts rather than variation of the pre-*

> *existing trusts (and the trustee may not be compellable to accept and perform those new trusts: see CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53; 224 CLR 98 at [44]).* ***Legislation such as the Variation of Trusts Act 1958 (Eng) builds on that foundation by enabling the court to supply the consent of persons not in being, unascertained or incapable of consenting to an "arrangement . . . varying or revoking all or any of the trusts, or enlarging powers of the trustees of managing or administering any of the property subject to the trusts"****. Mummery LJ said in Goulding v James [1997] 2 All ER 239 at 247 that the variation of trusts legislation is "a statutory extension of the consent principle embodied in the rule in Saunders v Vautier.*

7.19 That is, on one view Court order does not make the variation. The Court order merely provides a consent to the arrangement by and on behalf of those who otherwise cannot give consent (*Goulding v James* [1997] 2 All ER 239 at 246-248).

7.20 In *Perpetual Trustees Victoria Ltd v Barns* at [36] and [40], the Victorian Court of Appeal observed that in exercising the power contained in section 63A of the Victorian Act, the Court must consider the benefits and disadvantages of the proposed variation overall, taking into account the purpose of the trust and the settlor's intention in establishing the trust.

7.21 In *Application by Perenna Nominees Pty Ltd* [2022] VSC 193 (**"Perenna Nominees"**), McMillan J at [83] considered the relevant considerations in determining whether to exercise the power set out under section 63A of the Victorian Act to be as follows:

(a) whether the arrangement would be for the benefit of the beneficiaries who are unable to supply consent (see also George v Kollias [2007] VSC 46 at [41] per Hansen J and Pennycuick J in Re Remnant's Settlement Trusts [1970] 1 Ch 560 at 565. In this regard, it has been noted that the benefit

(b) is not restricted to financial benefit and can encompass other non-financial benefits such as social, familial, moral or educational benefits *George v Kollias at* [45]; Lord Denning MR in *Re Weston's Settlements* [1969] 1 Ch 223 at 245.

(c) whether the arrangement is by its nature a fair and proper one overall (Perpetual Trustees Victoria Ltd v Barnes [2012] VSCA 77 at [36] per Williams AJA, with whom Buchanan and Bongiorno JJA agreed (**"Perpetual Trustees Victoria Ltd v Barnes"**); *George v Kollias* at [41]-[42]). This factor takes into account the particular advantages which the various parties will gain from the arrangement, and their respective bargaining strength (*Perpetual Trustees Victoria Ltd v Barnes* at [36], Mummery LJ in *Goulding v James* [1997] 2 All ER 239 at 249, Ungoed-Thomas J in *Re Van Gruisen's Will Trusts* [1964] 1 WLR 499 at 450).

(d) whether the arrangement is consistent with the purpose of the trust and the settlor / testator's intention in establishing it (*Perpetual Trustees Victoria Ltd v Barnes* at [36], Ashley J in *Re Keysborough Blue Danube Soccer Club* [2003] VSC 119 at [35] and Lord Wilberforce in *Re Burney's Settlement Trusts* [1961] 1 WLR 545 at 550).

(e) the cost of administering the trust.

7.22 Incerti J in *Brown v Hunt* [2021] VSC 683 considered that an "*… arrangement can only be approved by a court where it would benefit those who cannot consent to the variation…*" (and see Hansen J in *George v Kollias* [2007] VSC 46).

7.23 Ungoed-Thomas J in *Re Van Gruisen's Will Trusts, Bagger v Dean* [1964] 1 All ER 843 considered as follows:

> *The court is concerned whether the arrangement as a whole, in all circumstances, is such that it is proper to approve it. The court's concern involves, inter alia, a practical and business-like consideration of the arrangement, including the total amount of the advantages which the various parties obtain, and their bargaining strength.*

7.24 There are numerous decisions in other jurisdictions whereby the variation of trust legislation has been used to extend the vesting date of a trust.

Re Plator Nominees [2012] VSC 284

7.25 Justice Davies in *Re Plator Nominees* [2012] VSC 284 (**"Plator Nominees"**) extended the vesting date of a trust using the trust variation provisions contained in section 63A of the Victorian Act. The extension was to a date not later than 21 years after the death of the last of a particular beneficiary's living relatives born on or before the settlement date of the trust.

7.26 Davies J exercised the power contained in section 63A of the Victorian Act given the following four (4) relevant factors:

(a) there was evidence that the settlors of the trust intended for it to continue after their deaths for the benefit of their children, and extending the vesting date would give effect to that intention (see Plator Nominees at [11]);

(b) each of the *sui juris* beneficiaries consented to the arrangement (Plator Nominees at [12]);

(c) the contradictor appointed to represent the interests of the other beneficiaries under the Trust, including the beneficiaries who are not *sui juris,* was of the view that the extension of the vesting date is in their best interests and supports the order ([12] in Plator Nominees);

(d) the vesting date bore no specific relevance (Plator Nominees at [13]);

(e) there was no identifiable reason why the trustee's otherwise extensive powers of variation did not include the ability to extend the vesting date (Plator Nominees at [13]);

(f) Finally, her Honour recognised that the vesting of the trust would give rise to significant capital gains tax liabilities, and some of the trust's assets would lose their pre-capital gains tax status, and affirmed this ought not to weigh against the making of an order under section 63A of the Victorian Act (Plator Nominees at [14] and [15]).

Coote v Clarke [2007] WASC 97

7.27 The decision of Hasluck in *Coote v Clarke* [2007] WASC 97 (**"Coote v Clarke"**) concerned an application under section 90 of the *Trustees Act 1962* (WA) for the Court's approval on behalf of certain infant beneficiaries of an arrangement to extend the vesting date of a family trust by a period of 45 years.

7.28 Justice Hasluck approved the extension. In doing so, the Court:

(a) Considered that the arrangement would be of benefit to the infant beneficiaries on the basis of their continued contingent entitlement to dividends from the profits of the business owned and operated through the trust ([33] in *Coote v Clarke*);

(b) There was the 'real prospect of capital gains tax being avoided' if vesting were to be deferred ([33] in *Coote v Clarke*); and

(c) the arrangement would be of no foreseeable detriment to the infant beneficiaries ([34] in *Coote v Clarke*).

Thomas Hare Investments Ltd v Hare (2012) 34 VR 656

7.29 Habersberger J in *Thomas Hare Investments Ltd v Hare* (2012) 34 VR 656 (**"Thomas Hare"**) made orders approving an arrangement for the extension of the vesting date of a discretionary trust pursuant to section 63A of the Victorian Act.

7.30 Each of the trust's sui juris beneficiaries consented to the arrangement, but there was an unascertained class of potential beneficiaries on behalf of which the Court was asked to supply consent.

7.31 The Court approved the arrangement as:

(a) the extension could only benefit the potential beneficiaries, by extending the period of time during which they could become a beneficiary ([39] in Thomas Hare); and

(b) the extension would effect a deferral of capital gains tax implications which would also clearly be of benefit to the trust's beneficiaries ([39] in Thomas Hare);

(c) Habersberger J accepted the notion that "*… the court should not decline to exercise its power to approve a variation, if it be otherwise appropriate to do so, merely because one of the objects of the variation was to obtain some tax advantage …*" ([36] to [37] in Thomas Hare).

Application by Perenna Nominees Pty Ltd [2022] VSC 193

7.32 In Perenna Nominees, McMillan J approved an arrangement extending the vesting day of a trust estate pursuant to section 63 of the Victorian Act. At [98] to [102], McMillan J outlined the principles and factors which the Court had regard to in exercising its power pursuant to section 63A of the Victorian Act, which were:

(a) The proposed arrangement is to extend the Trust's vesting date could be regarded as for the benefit of the minor and potential unborn beneficiaries of the Trust. In this regard, it was considered that extending the vesting date of the Trust is of clear benefit to its potential unborn beneficiaries and in that it will provide more time for such potential beneficiaries to come into existence ([99] *Perena Nominees*);

(b) There was a finding that on balance, the extension of the vesting date would offer more advantage to the minor and potential unborn beneficiaries of the Trust than it would disadvantage. Whilst the minor beneficiaries may be disadvantaged by the widening of the class of potential beneficiaries to some extent, the Court accepted that an extension is also of significant benefit to the minors by providing an opportunity to benefit from the trust's future income by way of distribution ([99] in *Perenna Nominees*);

(c) The Court considered that when assessed in a businesslike manner, the arrangement is a fair and proper one overall. Relevant in this regard is the fact that each of the Trust's sui juris beneficiaries consented to the proposed arrangement, and will have the opportunity to benefit from future income distributions if the vesting date of the Trust is extended ([100] in Perenna Nominees);

(d) There was evidence that there was a desire for the family business (operating in the trust) to continue operating following the death of certain family member, which could occur if the trust terms were extended, whereas if the trust were to vest, the family business is likely to be wound up ([100] in Perenna Nominees);

(e) The arrangement allowed for the preservation of the Trust assets and the deferral of significant capital gains tax liabilities ([101] in Perenna Nominees).

(f) an arrangement which effects an extension of the vesting date of the Trust is consistent with the purpose of the disposition, and the intentions of those behind the establishment of the trust ([102] in Perenna Nominees).

7.33 At [103], Davies J in Perenna Nominees found as follows:

> *As such, I am satisfied that it is appropriate in the circumstances to exercise the discretion under s 63A to approve, on behalf of the minor and unborn beneficiaries of the Trust, an arrangement to extend the Trust's vesting date. The factors relevant to the exercise of this discretion include that the proposed arrangement is financially beneficial to the Trust's minor beneficiary as well as any potential unborn beneficiaries, and has been consented to by each of the sui juris beneficiaries. It also allows for the deferral of significant impact of taxes and duties on the Trust assets, and furthers the intention and purpose of the Trust as a vehicle for the family construction business.*

8. Paragraph 86A(1)(b) of the Trustee Act – enlarging (and restriction) of powers

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8.1 Paragraph 86A(1)(b) of the *Trustee Act* expressly provides for the approval of any arrangement to *"… enlarge the powers of the trustees for the purpose of managing or administering any of the properties subject to the purpose of the trust…".*

8.2 That is, paragraph 86A(1)(b) of the *Trustee Act* expressly provides for the enlargement of powers but does not expressly provide for the restriction of powers. As outlined in Lewin *on Trusts* at [53-034] the following points are relevant:

(a) Whilst section 86A(1)(b) of the *Trustee Act* makes no reference to restriction of trustees' powers, it is implicit that the jurisdiction permits a Court to approve a variation which restricts a power where such a restriction is for the benefit of the beneficiaries for whom the Court is concerned - see *Duke of Somerset v Fitzgerald* [2019] EWHC 726 at [31]-[35]. It was observed in [31] to [34]:

31. On this point I am persuaded by the following additional submissions of Counsel:-

(1) There is no obvious policy reason, having regard to the background to the 1958 Act, why a variation which varies the trusts of a settlement by, for example, revoking any of the trusts should be permitted, but not where such a variation involves the removal or restriction of a power;

(2) A revocation of trusts, which is expressly contemplated in s.1(1) of the 1958 Act ("any arrangement varying or revoking all or any of the trusts") is quite likely to involve a removal of trustee powers at the same time as the revocation of the trusts;

(3) The most likely reason for the express reference in s.1(1) of the 1958 Act to a variation which enlarges the powers of the trustees of managing or administering any of the property subject to the trusts (but not one which removes or restricts them) is to make it clear that if a variation is proposed under the 1958 Act whereby powers of management or administration are to be enlarged, there is no need to invoke the Court's jurisdiction under s.57 of the Trustee Act 1925.

32. The third submission chimes in with the fact that before the 1958 Act came into force, there was some doubt as to whether there was power to enlarge investment powers under s.57 of the Trustee Act 1925. Shortly after the 1958 Act

came into force the question arose as to whether such an application should be brought by trustees under s.57 or s.1 of under the 1958 Act: see In re Coates' Trusts [1959] 1 WLR 375 at 378 and In re Byng's Will Trusts [1959] 1 WLR 375 at 381. The view was expressed by Vaisey J. in the latter case that it was safer to proceed under the 1958 Act.

33. I respectfully agree with the editors of Lewin that where the sole purpose of the application is to alter the powers of the trustees of managing or administering trust property and where the application does not involve any variation of the beneficial interests, the better practice is now to apply under s.57 of the Trustee Act 1925. It is more natural for the application to be brought by the trustees as Claimants. There is no need to obtain the approval of the court on behalf of minor or unborn beneficiaries. S1(6) of the 1958 Act provides that nothing in s.1 of that Act is to be taken to limit the powers conferred by s. 64 of the Settled Land Act 1925 or s.57 of the Trustee Act 1925.

34. Where however, it is desired at the same time to vary the beneficial trusts and to enlarge the powers of the trustees of managing and administering the trust property, the application has to be made under the 1958 Act. It would be procedurally cumbersome to require the application in those circumstances also to be made under s.57 of the Trustee Act or s.64 of the Settled Land Act 1925. Applications under the 1958 Act are not usually brought by the trustees.

(b) In the event that an enlargement of the powers sought, then the proper course may be to make an application under section 81 of the Trustee Act. Indeed, paragraph 86A(3)(c) of the Trustee Act provides that section 86A does not limit the operation of section 81 of the Trustee Act (see *Duke of Somerset v Fitzgerald* at [33]-[35] and also *Bailey v Bailey* [2014] EWHC 4411) that is unless the enlargement of the powers varies the beneficial interests or the restriction of any powers fall outside the scope of section 81 of the *Trustee Act.*

However, it is unclear as to the interaction of section 81 and section 86A of the Trustee Act, particularly given that on one view, orders pursuant to section 81 of the Trustee Act allows for the "*… adjustment of the respective rights of the beneficiaries …*" (see paragraph 81(1)(a) of the Trustee Act) and subsection 81(2) of the Trustee Act specifically contemplates the "… alteration whether by extension or otherwise of the trusts or the powers …".

(c) A variation may include a power for the trustees to vary, revoke or add to the administrative powers of the trustees, subject to safeguards where appropriate – such as a requirement to obtain legal advice on an exercise of the power (see *Duke of Somerset v Fitzgerald* at [37]-[43]).

(d) Trustees have no power to release or restrict their powers which are coupled with duties (i.e. fiduciary powers - see section 28 of the *Conveyancing Act 1919* (NSW)), without an express power for the purpose in the settlement or assent of all the beneficiaries being of full age and capacity. However, if there is no such express power in the settlement, then section 86A of the Trustee Act may confer such a power in the trustees subject to any safeguards that the Court considers appropriate.

9. What is an "arrangement" and whether a trustee has standing to make an application

9.1 This section considers two (2) questions with respect to the application of Division 3A of Part 3 of the Trustee Act, being:

(a) what an "arrangement" is, as that term is used in subsection 86A of the Trustee Act; and

(b) whether the Trustee has standing to make the application.

9.2 However, prior to considering the two questions, regard ought to be given to the considerations relevant when exercising the powers contained in section 86A of the Trustee Act, which provides as follows:

> ***86A Court order to approve arrangement***
>
> *(1) If property is held in trust under any instrument creating the trust, the Court may, if it thinks fit, by order approve any arrangement to—*
>
> *(a) vary or revoke all or any of the trust, or*
>
> *(b) enlarge the powers of the trustees for the purpose of managing or administering any of the property subject to the purpose of the trust.*
>
> *(2) An order under this section may be made by the Court only on behalf of—*
>
> *(a) any person under the trust having an interest directly or indirectly, or vested or contingent, who by reason of being a minor or other incapacity is incapable of assenting, or*
>
> *(b) any person who may become entitled, directly or indirectly, to an interest under the trust, and the entitlement is contingent on a future date or event that has not occurred at the time of application for an order under this section, or*
>
> *(c) any unborn person, or*
>
> *(d) any person in respect of any discretionary interest of the person under protective trusts where the interest of the principal beneficiary has not failed or determined.*
>
> *(3) This section—*
>
> *(a) extends to a trust created before the commencement of this section, and*
>
> *(b) does not apply to trusts affecting property created by another Act, and*

(c) does not limit the operation of section 81.

(4) In this section—

***discretionary interest**, in relation to protective trusts, means an interest arising under section 45(6).*

***principal beneficiary** has the same meaning as in section 45.*

***protective trusts** has the same meaning as in section 45.*

9.3 As a starting proposition, in order for subsection 86A(1) of the Trustee Act to apply, the Court must be satisfied that there is an "*… instrument creating the trust… "*.

9.4 The provisions contained in Division 3A of Part 3 of the Trustee Act are similar to the variations of trusts provisions in other States, such as that contained in section 63A of the *Trustee Act 1958* (Vic) (**"the Victorian Act"**) and the *Variation of Trusts Act 1958* (UK) (**"the UK Act"**).

9.5 In *Application by Perenna Nominees Pty Ltd* [2022] VSC 193, McMillan J considered the relevant considerations in determining whether to exercise the power set out under section 63A of the Victorian Act to be as follows:

(f) whether the arrangement would be for the benefit of the beneficiaries who are unable to supply consent. In this regard, it has been noted that the benefit is not restricted to financial benefit and can encompass other non-financial benefits such as social, familial, moral or educational benefits.

(g) whether the arrangement is by its nature a fair and proper one overall, taking into account the particular advantages which the various parties will gain from the arrangement, and their respective bargaining strength.

(h) whether the arrangement is consistent with the purpose of the trust and the testator's intention in establishing it.

(i) the cost of administering the trust.

9.6 Incerti J in *Brown v Hunt* [2021] VSC 683 considered that an "*… arrangement can only be approved by a court where it would benefit those who cannot consent to the variation…*" (and see Hansen J in *George v Kollias* [2007] VSC 46).

9.7 Ungoed-Thomas J in Re Van Gruisen's Will Trusts, Bagger v Dean [1964] 1 All ER 843 considered as follows:

> *The court is concerned whether the arrangement as a whole, in all circumstances, is such that it is proper to approve it. The court's concern involves, inter alia, a practical and business-like consideration of the arrangement, including the total amount of the advantages which the various parties obtain, and their bargaining strength.*

9.8 As a result, any application made under section 86A of the Trustee Act to vary the terms of a trust and / or enlarging the powers (with the effect of also determining the terms) ought to also satisfy the above criteria.

9.9 The term "arrangement" as used in section 86A of the Trustee Act includes any proposal to vary or revoke any of the trusts, and need not be in the nature of a contract as between parties (refer Lord Evershed M.R. in *Re Steed's Will Trusts* [1960] Ch. 407 at 419, with whom Willmer and Upjohn LJJ. Agreed at 422-423).

9.10 At 420-1, Lord Evershed M.R. noted that the word "arrangement" as provided for in the UK Act by observing as follows:

> *There was some discussion of the use of the word "arrangement". Again, if I may respectfully say so, the language used by the learned judge seems to indicate that an arrangement must be in some sense inter partes, some kind of scheme which two or more people have worked out. I do not myself accept that.* ***I think that the word 'arrangement' is deliberately used in the widest possible sense so as to cover any proposal which any person may put forward for varying or revoking the trusts.***
>
> [emphasis added]

9.11 Ashley J in Re Keysborough *Blue Danube Soccer Club* [2003] VSC 119 at [34] considered that an "arrangement" under section 63A of the UK Act '*… embraces both administrative matters and variations in the beneficial interests…*'.

9.12 That is, the term "arrangement" ought not be given any limitation, with the only requirement is that the arrangement vary or revoke any trusts and / or enlarge powers.

10. The effect of an order – is the variation made by the Court or does the Court merely approve the proposed variation

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10.1 Prior to considering whether the Trustee can move the Court pursuant to section 86A of the Trustee Act, regard ought to be given to the nature such orders – which itself is a vexed issue.

10.2 In terms of the UK Act at [53-072] in *Lewin on Trusts* it is observed that an order under the UK Act "*… expresses approval of the arrangement…*" but that the "*… precise operation is still, surprisingly, uncertain*".

10.3 The question that arises is whether:

(c) an order of the Court is merely an approval by the Court on behalf of all of the beneficiaries who cannot provide assent; or

(d) the order made by the Court varies the trusts.

10.4 In this regard, the historical context of variation of trusts legislation is relevant.

10.5 In *Chapman v Chapman* [1954] A.C. 429 (***"Chapman v Chapman"***), the House of Lords considered that the Court had no inherent jurisdiction to approve a variation of trust on behalf of minors, unborn and unascertained beneficiaries merely on the grounds that the variation was for their benefit (absent the special elements of salvage, compromise, etc – all found in the Court's inherent jurisdiction power).

10.6 In *Re Chapman's Settlement Trusts (No. 2)* [1959] 1 W.L.R. 372 (which granted relief on the matters sought in *Chapman v Chapman*) the **trustees** made the application (and were successful) under the UK Act as there were no beneficiaries of full age and capacity.

10.7 The variation of trusts legislation is remedial legislation, and overcomes the limitation identified in Chapman v Chapman by enabling the court to give approval to an arrangement on behalf of persons who are unable by their incapacity to give such approval; where the Court in effect supplies the capacity which the beneficiary lacks (*Re Holmden's Settlement Trusts* [1968] AC 685 at 710H-711A, per Lord Guest).

10.8 Subsection 86A(2) of the *Trustee Act* provides as follows:

> ***An order under this section may be made by the Court only on behalf of—***
>
> *(a) any person under the trust having an interest directly or indirectly, or vested or contingent, who by reason of being a minor or other incapacity is incapable of assenting, or*
>
> *(b) any person who may become entitled, directly or indirectly, to an interest under the trust, and the entitlement is contingent on a future date or event that has not occurred at the time of application for an order under this section, or*
>
> *(c) any unborn person, or*
>
> *(d) any person in respect of any discretionary interest of the person under protective trusts where the interest of the principal beneficiary has not failed or determined.* [emphasis added]

10.9 That is, subsection 86A(2) provides for who the Court may make an order *"… on behalf of…".* The section does not provide who may actually make the application.

10.10 In this regard, it is noted that variation of trust legislation is a statutory extension of the principle in *Saunders v Vautier* as noted by Barrett JA at [46] in *Re Dion*:

> *Where the trust instrument contains no such variation provision, principles of equity may countenance variation of the terms of the trust with the unanimous consent of the beneficiaries if all are in being, sui juris and absolutely entitled. Under the principle in Saunders v Vautier (1841) 4 Beav 115; 49 ER 282 (affd (1841) Cr & Ph*

> *240; 41 ER 482), beneficiaries in that position are entitled to put an end to the trust and to require that the trust property be transferred to them. Their capacity to produce that result also enables them to require, as an alternative, that the property be held by the trustee upon varied trusts; but, if they do so require, the situation may in truth be one of resettlement upon new trusts rather than variation of the pre-existing trusts (and the trustee may not be compellable to accept and perform those new trusts: see CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53; 224 CLR 98 at [44]).* ***Legislation such as the Variation of Trusts Act 1958 (Eng) builds on that foundation by enabling the court to supply the consent of persons not in being, unascertained or incapable of consenting to an "arrangement . . . varying or revoking all or any of the trusts, or enlarging powers of the trustees of managing or administering any of the property subject to the trusts"****. Mummery LJ said in Goulding v James [1997] 2 All ER 239 at 247 that the variation of trusts legislation is "a statutory extension of the consent principle embodied in the rule in Saunders v Vautier.*

10.11 That is, on one view Court order does not make the variation. The Court order merely provides a consent to the arrangement by and on behalf of those who otherwise cannot give consent (*Goulding v James* [1997] 2 All ER 239 at 246-248).

10.12 In short, by making orders under the provisions, the Court provides the consent of the persons who cannot provide such consent.

10.13 It should be noted that section 86A(1) of the Trustee Act differs to subsection 1(1) of the UK Act, which provides that:

> *… the court may if it thinks fit by order approve on behalf of …*[four classes of beneficiaries] *… any arrangement (****by whomsoever proposed****, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts …*

10.14 That is, the UK Act contains the words "*… by whomsoever proposed …*", which are absent in sections 86A to 86C of the Trustee Act. Those words are also contained in subsection 63A(1) of the Victorian Act.

10.15 However, subsection 86A(2) of the Trustee Act must be considered in the context of the basis of the power and the effect of the order. In this regard, an order under section 86A(1) of the Trustee Act the "approval" of an "arrangement".

10.16 As outlined in Lewin on Trusts at [53-072] and [53-074], the precise operation of variation of trust legislation is uncertain.

10.17 On the one hand, it may be that the variation of trust legislation authorises the Court to merely approve an arrangement on behalf of those who themselves cannot assent. If beneficiaries that are of full age and capacity also asset, then (and along with the Court's approval of an arrangement), the consent principle in *Saunders v Vautier* may apply to vary the trusts.

10.18 The difficulty with this approach is that s 27A of the Conveyancing Act 1919 (NSW), which requires a disposition of an equitable interest to be in writing.[1]

10.19 Alternatively, it may be that the order of the Court *ipso facto* varies the trusts, and as a result s 27A of the Conveyancing Act has no application. This is what was held in Re Hambleden's Will Trusts [1960] 1 W.L.R. 82 without argument. This approach was followed, after full argument at first instance in *Re Holt's Settlement* [1969] 1 Ch 100 on the basis of being practically convenient.

10.20 It is observed at [53-073] in Lewin on Trusts that the "*… question still awaits a definitive answer…*".

10.21 In any event, the nature of the relief relates either to approval or a direct order authorising a variation of trusts (or enlarging of powers) where there are beneficiaries that cannot

[1] The UK authorities having regard to the operation of the equivalent as contained in 53(1)(c) of the *Law of Property Act 1925* (UK).

provide assent. It is on this basis that a trustee may apply for an order pursuant to section 86A of the Trustee Act.

10.22 It is noted that at [94] in *Re Dion*, Barrett JA observed, in the context of orders pursuant to section 81 of the Trustee Act as follows:

> *Variation of the terms of a trust (including by way of conferral of some new power on the trustee) is not something within the ordinary and natural province of a trustee. It is not something that it is "expedient" that a trustee should do; nor, fundamentally, is it something that is done "in the management or administration of" trust property. A trustee's function is to take the trusts as it finds them and to administer them as they stand. The trustee is not concerned to question the terms of the trust or seek to improve them. I venture to say that, even where the trust instrument itself gives the trustee a power of variation, exercise of that power is not something that occurs "in the management or administration of" trust property. It occurs in order that the scheme of fiduciary administration of the property may somehow be reshaped.*

10.23 In particular, [94] in Re Dion needs to be considered in its context, where his Honour considered at [96] of orders made pursuant to section 81 of the Trustee Act for the "*… the creation of what is, in terms, a power of the trustee to amend the trust instrument is a superfluous and meaningless step …*", and that when an order is made pursuant to subsection 81(1) of the Trustee Act, then that order "*… confers on a trustee power to undertake a particular dealing (or dealings of a particular kind) …*" which does not vary the "trust deed" (but supplements and where necessary overrides the trust deed) (see at [97] in *Re Dion*).

10.24 In Lewin on Trusts at [53-078], the authors discuss who the claimants ought to be. It is observed that:

> *Trustee should not apply, however, unless they are satisfied that the proposals are beneficial to the persons interested and have a good prospect of being approved by the Court, and further that if they do not make the application no one else will.*

10.25 The authors in Lewin on Trusts cite Re *Druce's Settlement Trusts* [1962] 1 W.L.R. 363 as authority for that proposition.

10.26 However, the authors in Lewin on Trusts at [53-078] observe as follows:

> *In a case where there are a significant number of beneficiaries and the application affects all of them, for example where the main object of the application is to extend the perpetuity period, it may well be appropriate for the trustees to be the claimants. Similar considerations apply where the purpose of the application is to enlarge, vary or restrict the powers of the trustees for the benefit of all beneficiaries*.

10.27 In *Duke of Somerset v Fitzgerald* [2019] EWHC 726 at [16] it was considered with respect to a trustee to constitute a maintenance fund that it was "*… natural for the trustees to be at the forefront…*", and at [35] with respect to administrative powers, that they were of "*… principal concern and province of trustees …*".

10.28 That is, an order pursuant to section 86A of the Trustee Act may be sought by a trustee.

10.29 In any event, regard should be given to subsection 92(1) of the *Trustee Act*, which provides that:

> ***An order under this Act*** *of the appointment of a new trustee or* ***concerning any property subject to a trust*** *may be made on the application of any person interested in the property, whether under disability or not,* ***or of any person duly appointed trustee therefore****.* [emphasis added]

10.30 A trustee would be both *"interested in the property",* and clearly a person duly appointed trustee.

10.31 As a result, a trustee may be a moving party for relief pursuant to Division 3A of Part 3 of the Trustee Act.

11. Paragraphs 86A(2)(a) to (d) of the Trustee Act – for whom may orders be made for?

11.1 Section 86A(2) of the Trustee Act provides as follows:

> *An order under this section may be made by the Court **only on behalf of**—*
>
> *(a) any person under the trust having an interest directly or indirectly, or vested or contingent, who by reason of being a minor or other incapacity is incapable of assenting, or*
>
> *(b) any person who may become entitled, directly or indirectly, to an interest under the trust, and the entitlement is contingent on a future date or event that has not occurred at the time of application for an order under this section, or*
>
> *(c) any unborn person, or*
>
> *(d) any person in respect of any discretionary interest of the person under protective trusts where the interest of the principal beneficiary has not failed or determined.*

11.2 The persons contemplated at paragraphs 86A(2)(a), 86A(2)(c) and 86A(2)(d) of the Trustee Act are (relatively speaking) straight forward.

11.3 The terms of the trust (of course) must be considered to determine whether (for example) there are minors or if the beneficiaries may include persons who are yet to be born (that is, the class of objects are not yet closed). In this regard, the principles outlined by Kearney J in *Bullas v Public Trustee* [1981] 1 NSWLR 641, may be of relevance, being that where notwithstanding the ages of certain beneficiaries there may be (future) children who may become beneficiaries given:

(a) the possibility of adoption where the adopted child would have all of the benefits of a natural child pursuant to paragraph 35(1)(a) of the *Adoption of Children Act 1965* (NSW);

(b) the possibility of future ex-nuptial children who would have all of the benefits of a natural child pursuant to section 6 of the *Children (Equality of Status) Act 1976* (NSW); and

(c) relevant advances in medical science.

11.4 In terms of those to which paragraph 86A(2)(b) of the Trustee Act speaks, regard needs to be given to the terms of the trust.

11.5 In terms of a "standard" discretionary trust, where there are objects of the power to appoint income (each financial year) and capital, with takers-in-default of appointment (prior to the vesting date), then paragraph 86A(2)(b) of the Trustee Act ought to be satisfied.

11.6 In such circumstances, there are typically no "beneficiaries" absolutely entitled to any of the income or capital. The objects of the power to appoint of either capital or income do not have any interest in the trust property, but rather a *"… right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity …"* (see Lord Wilberforce in *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617-618).

11.7 The takers-in-default of appointment have an interest in property which is vested in interest (but not in possession), defeasible and subject to a contingency (see Campbell J (as his Honour then was) in *Stein v Sybmore* [2006] NSWSC 1004 at [25] to [27] and also Mahoney JA (with whom Kirby P agreed) in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 426-7).

11.8 That is, in such circumstances there is no beneficiary "absolutely entitled" to the trust property, with the result that the "consent principle" as provided for in *Saunders v Vautier* (1841) 49 ER 282; affd (1841) 41 ER 482 cannot apply with respect to the Trust Estate (and see Mummery LJ in *Goulding v James* [1997] 2 All ER 239 at 247 and *CPT Custodian v Commissioner of State Revenue* (2005) 224 CLR 98 at 118 ([43]).

11.9 Indeed, variation of trust legislation is a statutory extension of the "consent principle" in *Saunders v Vautier* as noted by Barrett JA at [46] in *Re Dion.*

11.10 In such "standard" or typical discretionary trusts, the entitlements of all of the beneficiaries is *"… contingent on a future date or event that has not occurred at the time of application for an order under this section …"* with the result that paragraph 86A(2)(b) of the Trustee Act is satisfied.

12. Satisfaction of section 86B of the Trustee Act

12.1 Subsection 86B(1) of the Trustee Act provides that the *"… Court must not approve an arrangement on behalf of any person under section 86A unless the carrying out of the order would be for the benefit of that person…".*

12.2 Subsection 86B(1) of the Trustee Act is a proviso that is also found in the UK Act (see Tucker et al, *Lewin on Trusts*, Sweet & Maxwell, 2020 (20th ed) (**"Lewin on Trusts"**). At [53-042] in Lewin on Trusts it is observed that *"… what is and what is not a sufficient benefit depends largely on the particular terms of the original trusts and the proposed arrangement …".*

12.3 In terms of the benefit issue, at [53-043] in Lewin on Trusts, the authors observe the following:

> *If the arrangement is beneficial even by the narrowest margin, the jurisdiction is founded; but the proviso does not require approval in the event that the Court retains a discretion. The Court will not confine itself to looking at the alleged benefit to those persons for whom it has jurisdiction to approve, but will examine the arrangement as a whole, in light of the purpose of the trust as disclosed by the trust instrument and any other available evidence. It will undertake a practical and business-like consideration of the arrangement, including the total amounts of the advantages with which the various parties obtain, and their bargaining strength. So minors whose existing interests on an actuarial calculation is small may still be in a strong bargaining position and*

the arrangement should take into account of that. Nevertheless, the 1958 Act does not require that in every possible circumstance there will be a benefit for the person on whose behalf the Court is acting. The arrangement may be acceptable although in certain events no benefit, or even a loss, may result. The Court will take the same sort of risk as a reasonable adult would be prepared to take. But if the risk is at all substantial, it is usual to insure against it.

11.4 The Court is to consider in a practical and business-like manner, having regard to events which may or may not happen and the risks that may or may not be acceptable. Regard also needs to be given to non-financial considerations. Regard is to be given to whether the arrangement is beneficial to each beneficiary, or group of beneficiaries, for whom the Court is concerned.

13. Whether a wholesale power of variation may be obtained under the variation of trusts provisions - In the matter of the Alan Synman Family Trust [2013] VSC 364

13.1 *In the matter of the Alan Synman Family Trus*t [2013] VSC 364 ("**Alan Synman**") was an application by a Trustee for the approval pursuant to section 63A of the Victorian Act of an arrangement to vary a trust on behalf of persons who, by reason of minority, were incapable of assenting.

13.2 In particular, the trustee sought a general power of variation of the Trust Deed in the following terms:

> *7A(a) THE Trustee for the time being may, at any time and from time to time, by deeds revocable or irrevocable revoke add to or vary all or any of the trusts terms and conditions contained in this Deed or the trusts terms and conditions contained in any variation or alteration made to this Deed and may, in like manner, declare any new or other trusts terms and conditions concerning the Trust Fund or any part or parts of the Trust Fund the trusts whereof shall have been so revoked added to or varied provided that the*

rule against perpetuities is not infringed and provided that such new or other trusts powers discretions alterations or variations shall not affect the beneficial entitlement to any amount set aside for any beneficiary prior to the date of the variation alteration or addition.

(b) EXCEPT as provided in clause 7A(a) this Deed shall not be capable of being revoked added to or varied.

13.3 Gianne J at [24] in Alan Synman observed that section 63A of the Victorian Act requires that the Court be satisfied that the carrying out of the arrangement would be for the benefit of the persons who are incapable of assenting. At [23] Ginnane J considered that the "*…Court should not approve the arrangement on behalf of the three grandchildren….*" as "*… I do not consider that it is possible to determine that the carrying out of the arrangement would be for their benefit…*".

13.4 The Court at [25] was not satisfied that there would be such benefit, and observed that:

I am not so satisfied in this case. The proposed clause 7A would provide a wide power of variation, although the power would be a fiduciary power. Mr Synman, through Masyn, would in all probability exercise that power for the benefit of his family. It appears that, considered separately, at least some of the variations that he foreshadows are likely to benefit the three grandchildren, for instance by including them in the class of objects of the Trustee's discretion. However, as Mr Synman fairly and logically states, the variations that Masyn proposes are not limited to those which he identifies and discusses and which are described above. A purpose of the present application is to avoid the situation of the Trustee having to return to court each time it wishes to amend the Trust Deed, when there are persons with an interest under the Trust, who are unable to assent.

13.5 At [26], Ginnane J considered that:

In this, and in most applications under s 63A, the appropriate path is for a trustee to seek the Court's approval of an arrangement to vary specific provisions of the Trust Deed, rather than seeking approval of an arrangement giving the trustee a general power of variation. By the former path, the Court can, in most circumstances, best assess whether the carrying out of the arrangement would be for the benefit of persons who have an interest under the trust and who are incapable of giving their assent. It is far more difficult to reach that conclusion when the Court does not have the detail of all the variations that the trustee will make, once given the general power of variation.

13.6 That is, the Court considered that each future variation ought to be considered by the Court. The same approach was taken by the New South Wales Court of Appeal in Re Dion, where the Court only granted specific powers and not a wholesale power of amendment pursuant to section 81 of the Trustee Act (see [100] in Re Dion as an example).

14. Splitting a trust – *George v Kollias* [2007] VSC 46

14.1 The decision of Hansen J in *George v Kollias* [2007] VSC 46 (**"George v Kollias"**) related to an application under the Victorian Act to split a discretionary testamentary trust into fifteen (15) separate trust estates.

14.2 Some of the terms of the trust were recited by Hansen J at [6] to [13], with the following observations made in particular at [6] and [7]:

> *6. By her will, after providing for some legacies and a devise of her house property at Mornington, the testatrix left the residue of her estate to her trustees on trust to pay debts and expenses and two legacies and, following that, to hold the residue (called "my residuary estate") "to set up a trust fund ('the fund') to consist of:-*
>
> *(i) my residuary estate; and*

(ii) any income added to the fund from time to time."

The fund was to be known as "the S M Carnegie Trust" (cl 7).

7. Clause 8 identified the beneficiaries of the fund, as follows:

"8. THE BENEFICIARIES of the fund shall comprise:-

(a) (i) the children of JUNE PATRICIA KIRK (nee TALLIS) being GEORGE WILLIAM KIRK, ROBERT TALLIS ANDREW KIRK, JAMES ALEXANDER KIRK and ROSALIND PATRICIA MACKAY;

(i) the children of GEORGE MICHAEL TALLIS being GEORGE ANDREW TALLIS, KATHERINE MARY BAIN, BELINA SUSAN ROTH and JENNIFER ANNE GEORGE;

(iii) the children of SUZANNE JOYCE KNIGHT (nee TALLIS) being JENNIFER SUZANNE COLLINS, JEFFREY DONALD KNIGHT and IAN TALLIS KNIGHT; and

(iv) the children of JEFFREY PETER TALLIS being RICHARD LEARMONTH TALLIS, MARK PETER TALLIS, CAROLINE MARY MACLACHLAN and JOHN GEORGE TALLIS.

(b) any person who shall at any time be or have been a spouse or defacto spouse of the persons referred to in (a) above;

(c) any child, grandchild or great grandchild of the persons referred to in (a) above born before the termination date.

(d) any company which now or before the termination date is incorporated in Australia of which a Director or person who

beneficially owns a share carrying a right to vote at general meetings is a beneficiary by reason of sub-paragraphs (a), (b) or (c) above."

14.3 The trust estate was discretionary in nature. Clause 11 of the Will provided as follows:

> *11. MY TRUSTEES shall by the 30th day of June of each year pay all or part of the income and all or part of the capital of the fund to any one or more of the beneficiaries referred to in paragraph 8 in the shares and in the amounts and at the times my trustees in their absolute discretion shall think fit without any obligation to make payment for all or any of the said beneficiaries or to ensure equality among those to whom payments are made.*

14.4 The substance of the variation was to split the one discretionary testamentary trusts into fifteen (15) separate trusts ([34] in *George v Kollias*).

14.5 At [46] in *George v Kollias*, the following factors were submitted to the Court in favour of the application to split the trust, being:

(a) the avoidance of family dissension;

(b) an enhanced flexibility and capacity to make distributions adapted to the individual needs of the 15 family lines;

(c) the opportunity for more varied and appropriate investment strategies; an increased ease of administration;

(d) the capacity to reduce costs; and

(e) education by reason of increased opportunities for beneficiaries to act as trustees.

14.6 However, Hansen J ultimately refused the application to split the trust. At [68], Hansen J in *George v Kollias* observed the following:

It is not an irrelevant consideration that the present single fund exists because that is what the testatrix determined upon as being appropriate in the circumstances which included the reasonable foresight of a large number of beneficiaries. A division of the fund into 15 parts with the consequent diminished ability to make payments of income and capital would constitute a significant change in her intended position. This is a relevant although not determinative consideration. The question remains one of benefit for the represented beneficiaries and whether it is fit and proper to approve the arrangement. Nevertheless the departure from that intended is substantial and it is proposed to occur at a very early stage in the life of the Trust before the majority of beneficiaries have been born.

15. Variation provisions for misplaced trust deeds - *In the Application of Nyasa No. 19 Pty Ltd* [2023] NSWSC 578

15. The ordinary course of dealing with lost trust deeds is for the trustee to obtain judicial advice pursuant to section 63 of the *Trustee Act* as to the manner in which the trustee is justified in managing and administering the terms of the trust. See for example, *Barp Nominees Pty Ltd* [2016] NSWSC 990, *In the Application of Brailey Holdings Pty Ltd (ACN 001 190 441)* [2018] NSWSC 1493, *In the Application of DEK Technologies Pty Ltd as trustee for the DEK Technologies Unit Trust & Ors* [2023] NSWSC 544 and *Vanta Pty Ltd v Mantovanio* [2023] VSCA 53.

15.2 In *In the Application of Nyasa No. 19 Pty Ltd* [2023] NSWSC 578 (**Nyasa**), Justice Kunz made orders pursuant to section 86A of the *Trustee Act* declaring the terms of a lost trust deed, rather than providing judicial advice pursuant to section 63 of the *Trustee Act*. At [2] in *Nyasa*, Justice Kunz observed that the *"… Court is satisfied that the Trustee has brought clear and convincing proof not only of the existence, but also of the contents, of the missing Trust Deed – namely that they are relevantly in the same terms as the other Trust Deed which is in evidence. However, that is not the end of the matter".*

15.3 His Honour at [18] noted that judicial advice *"… is permissive and not mandatory, hence it is usually in the form that the Trustee "is justified" in acting in a particular way".* His Honour also noted that an order pursuant to section 63 of the *Trustee Act:*

(a) is an order not provided in the context of adversarial proceedings;

(b) does not create a *res judicata*;

(c) does not carry with it the resolution of consequence of a breach of some kind; and

(d) does not finally determine the rights of parties.

15.4 The Court concluded that it was appropriate to make Orders under section 86A of the *Trustee Act* so as to conclusively determine the terms of the relevant trust. At [37] in *Nyasa*, Justice Kunz observed the following:

> *The issue which led the plaintiff in this case to make an alternative application under s.86A in preference to seeking judicial advice, are real. There is a potential, genuine practical benefit to trustees in cases of lost trust deeds to be able to approach the Court to be able to obtain a generally binding and conclusive determination as to the terms of a trust deed which would govern the future administration of the trust.*

15.5 At [38], Justice Kunz observed the following:

> *While the Court has accepted the submission that s.86 is available in this case, that may not always be so. In any event, a simpler and more straightforward solution would be desirable. This would require an amendment to the Act. I will refer these reasons to the Attorney-General as a responsible minister with recommendation that consideration be given to conferring such a power on the Court, being to declare on a final and binding basis what are the terms of a particular trust where the trust deed has been lost.*

16. Whether the perpetuities period may be 'refreshed' - *Re Holt's Settlement* [1969] 1 Ch 100

16.1 Megarry J in *Re Holt's Settlement* [1969] 1 Ch 100 (**"Re Holt's Settlement"**) considered the question as to whether a variation under the UK Act could, in effect, reset the perpetuities period. At 118[E]-[G] in *Holt's Settlement*, the question was posed as follows:

> *The kind of question that arises is this. Suppose an instrument taking effect in 1959, as the original trusts did in this case, and a variation made under the … [Variation of Trusts Act 1958 (UK)]… which merely alters a few words: will such a variation allow the … [Perpetuities and Accumulations Act 1964 (UK)]… to apply to the trusts in their revised form? Again, suppose that, as here, there is a revocation of the old trusts and a declaration of new trusts, so that in form there is a new start, although in substance merely a variation: does this alter the position? Could something be done by the second method which cannot be done by a method which in form as well as in substance is a mere variation? Is it possible to have a variation under the Act of 1958 once every generation, and then with each variation start afresh with a relaxed perpetuity rule and a new accumulation period bounteously provided by the Act of 1964?*

16.2 Megarry J in *Holt's Settlement* at 103-104[G]-[A] observed of the UK perpetuity provision:

> *Whether advantage can be taken of the Perpetuities and Accumulations Act, 1964, depends on the wording of the Act itself. Section 1(1) says "Where the instrument by which any disposition is made so provides…" (disposition including, according to section 15(2), a disposition of an interest in or right over property), the perpetuity period is to be such number of years not exceeding 80 as is specified in instrument; and section 1(2) says that where a period is specified in an instrument creating a power of appointment, that period is to apply to any disposition under the power as it applies to the power itself. The "instrument" by which the disposition is made is in this case the arrangement coupled with the order of the Court and the period specified in the arrangement is 80 years from the operative date, ie, the date of the Court's order approving the arrangement.*

> *According to section 15(5), the Act applies only to "instruments" taking effect after the commencement of the Act so that, if the Court approved the arrangement, it would take effect from the date of the Court's order, ie after the commencement of the Act.*

16.3 After considering that the powers of advancement contained in a settlement are limited by the terms of that settlement – and indeed that the *"… power in deeds "belongs" to the old settlement…"* (at 120[A]) Megarry J in *Holt's Settlement* observed that there were no such limits when the UK Act was being used:

> *The property, as it seems to me, is freely disposable. Under an arrangement approved by the Court the trusts may be brought wholly to an end. On the other hand, they may be varied; and there is no limit, other than the discretion of the Court and the agreement of the parties, to the variation which may be made. Any variation owes its authority not to anything in the initial settlement but to the statute and the consent of the adults coming, as it were, ab extra. This certainly seems to be so in any case not within the Act where a variation or resettlement is made under the doctrine of Saunders v Vautier by all the adults joining together; and I cannot see any real difference in principle in a case where the Court exercises its jurisdiction on behalf of the infants under the Act of 1958.*

16.4 Megarry J in *Holt's Settlement* considered that an arrangement under the UK Act (coupled with the order of the Court) constituted an *"instrument"* for the purposes of the *Perpetuities and Accumulations Act 1964 (UK)*, such that the perpetuities period could be, in effect, refreshed:

> *It seems to me that the arrangement, coupled with the order of the Court, constitute an "instrument", or, since the singular includes the plural, "instruments", which take effect after July 15, 1964. Whether the documents are regarded as separate instruments or as altogether constituting one composite instrument, the effect is produced by the complex of documents; and what takes effect after July 15, 1964, is*

a result of this complex of documents. In my judgement, therefore, it is permissible to insert provisions deriving their validity from the Act of 1964 into an arrangement approved under the Act of 1958.

16.5 That is, Megarry J considered that an order under the UK Act could have the effect of, in effect, refreshing the perpetuities period such that the period would derive its limitations under the *Perpetuities and Accumulations Act 1964 (UK).*

16.6 The equivalent provisions in New South Wales are contained in the *Perpetuities Act 1984 (NSW)* (**the *Perpetuities Act***). Subsection 7(1) provides that:

For the purposes of the rule against perpetuities, the perpetuity period applicable to an instrument created by a settlement shall be 80 years from the date on which the settlement takes effect.

16.7 Subsection 7(2) of the *Perpetuities Act* provides:

Where an appointment of an interest is made under a special power of appointment, the perpetuity period shall be reckoned from the date on which the settlement creating the power takes effect.

16.8 The relevant term for the purposes of section 7 of the *Perpetuities Act* is *"settlement"*, being the date from which the perpetuities period is reckoned. The term *"settlement"* is defined in subsection 3(1) of the *Perpetuities Act* as follows:

"Settlement" includes –

(a) a Will;

(b) an instrument, testamentary or otherwise, exercising a power of appointment, whether general or special; and

(c) any other instrument, transaction or dealing whereby a person makes a disposition,

but does not include an Act of Parliament…

16.9 The term *"disposition"* is also defined in subsection 3(1) of the *Perpetuities Act* as follows:

"Disposition" includes –

(a) the conferring or exercising of a power of appointment and any other power or authority to dispose of property; and

(b) any alienation of property…

16.10 Therefore, the question is whether an order under the provisions is an order (coupled with any consents of the sui juris beneficiaries) is a *"settlement"* pursuant to paragraph (b), being *"an instrument exercising a power of appointment…"*, or pursuant to paragraph (c), *"an instrument, transaction or dealing whereby a person makes a disposition…".*