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Review of Trust Law in New Zealand: Perpetuities and the Revocation and Variation of Trusts – Third Issues Paper

The New Zealand Law Society (Law Society) welcomes the opportunity to respond to the questions posed in the third issues paper in the review of trust law in New Zealand, *Perpetuities and the Revocation and Variation of Trusts* (Issues Paper). This submission has been prepared with assistance from the Trust Law Review Working Group, formed by the Law Society's Property and Family Law Sections.

Q1: Do you think that the need to restrict dead hand control and to encourage the alienability of property continue to be valid policies that need to be upheld?

Yes, the need to restrict dead hand control and to encourage the alienability of property justify retaining some form of rule against perpetuities as part of New Zealand law.

The United Kingdom recently evaluated whether the rule against perpetuities should be retained. It is likely that, if wide public consultation were carried out, the New Zealand public would share the UK's historical concerns about dead hand control and perpetual trust and wealth scenarios.

Those advocating for retention of the rule, at least in some form, are likely to be assisted in the New Zealand context by the fact that there are currently no inheritance taxes (and this looks likely to include no gift duties from 1 October 2011) that might otherwise restrict dead hand control. There is also a general disquiet about so-called "rich persons" locking up wealth within trusts generally. This concern might be compounded if those trusts could be perpetual.

Unfortunately, helpful empirical data about whether New Zealanders do in fact want to create perpetual trusts or to maintain dead hand control is not available. Like the wider trust reform debate, many of the arguments for and against reform initiatives in this context will be driven by anecdotal and emotive positions.

A principled legal and policy case for retaining the rule built around dead hand control and alienability of property can be advanced and is likely to receive wide support, but the overall position will need to recognise that:

- (a) The case for retention only makes sense in the context of *private* trusts and makes no sense in the context of widely-held *commercial* trusts;
- (b) Many legal jurisdictions which have had the rule as part of their laws have abolished it. This is significant because many of the underlying policy drivers for retention are likely to be no different in those countries than in New Zealand. It would be unhelpful as a matter of policy for New Zealand to be inconsistent with closely comparable jurisdictions. For example, it seems likely that Canada will abolish the rule in its forthcoming Uniform Trustee Act;
- (c) Concerns with dead hand control and alienability of property might be able to be addressed more adequately by narrower and more targeted rules of a different type (easier variation of trust rules) than a complex rule against perpetuities;
- (d) Wealth in various forms is transferable and the fact that New Zealand retained a rule might see the ownership of some wealth move to jurisdictions that have no rule against perpetuities. It is conceivable that the retention of the rule in New Zealand, when other comparable jurisdictions had abolished it, might have negative economic and business implications at a time when New Zealand is trying to hold and create new sources of private wealth in New Zealand;
- (e) Although restricting dead hand control and encouraging freedom in the alienation of property are desirable policy goals, it may be difficult to find evidence of where the rule against perpetuities has influenced those goals historically in New Zealand. In most situations where the rule potentially applies to settlements and other legal arrangements, the persons in control of those situations will be unaware of the future

impact of the rule. Put differently, the operation of the rule will be unanticipated and unhelpful, doing nothing to promote the underlying policy drivers.

The foundations for the rule were created in a different time and place. While it can still be argued that those foundations might be justified, they would need to be subjected to objective scrutiny in light of the legal, economic, tax and trust conditions that now apply in New Zealand and, perhaps more importantly, in other comparable legal jurisdictions where the rule has operated.

Any legal rules regarding dead hand control need to reflect this objective scrutiny.

Q2: Do you think that the reasons given for the rule justify its existence in its current form?

Even if a case for retaining the rule can be made (for the reasons advanced in Q1) that position cannot be maintained in respect of the rule in its current form because:

- (a) It makes little sense in the case of widely-held and similar commercial trusts;
- (b) The present 80-year rule is an inappropriate statutory period in light of the existing life expectancy of people making settlements. Jurisdictions that have retained the rule have recognised this, and extended the perpetuity period beyond 80 years (e.g. to 125 or 150 years);
- (c) Most people (including their advisers) are unaware of, or ignore, the rule in practice because it is too complex. A statutory rule that does not regulate conduct because people do not understand it (despite the underlying policy imperatives that might be justified) is not useful.
- (d) The class of situations that the rule applies to may need to be modified so that the real mischief or mischiefs that the rule is seeking to prevent are addressed;
- (e) There are a number of practical problems with the operation of the existing rule. For example, numerous wills have appeared containing gifts to say grandchildren on reaching 25 thereby relying on the “wait and see” rule. Other existing trusts have been prepared on the basis that specifying an 80-year wind up date in the trust deed is equivalent to an 80-year perpetuity period for the purposes of s6 of the Perpetuities Act 1964. Other technical issues may still arise in connection with pre-1964

Perpetuities Act trusts, including the problem associated with resettlements from one settlement to another and the carry-over into the new settlement of the perpetuity period.

Q3: Are there any other problems with the rule?

Most of the problems with the rule have already been identified but the fact remains that despite the mitigating effects of the “wait and see” mechanisms in the Perpetuities Act 1964, the operation of the rule has potentially onerous legal effects and it might be argued that a rule of this type is no longer applicable in such a dynamic and changing world.

It is impossible to envisage what the legal and global world will be like in 80 or 150 years time. Trying to control a future situation with a legal rule now (that operates retrospectively) in respect of settlements is somewhat misconceived, if not ambitious.

Q4: Are there other reasons why the rule should be retained?

The Law Society has not identified any other reasons why the rule should be retained.

Q5: Do you favour any of the following reform options:

- *further statutory reform of the rule, such as extending the perpetuity period (for instance, to 125 or 150 years) or limiting the types of dispositions to which the rule applies (for instance, exempting commercial transactions from the rule);*
- *abolition of the rule;*
- *replacement of the rule with a new rule in support of the same policy, such as one that limits the duration of a trust rather than being concerned with vesting.*

If there is a convincing case for retaining the rule in some form, then it seems likely that a reformed rule (based on overseas analogies) will be narrower and more targeted (e.g. exempting commercial transactions and narrowing the scope of transactions to which it will apply) and apply for an extended period of, say, 150 years.

Alternatively, it could be a refined rule that extinguishes (or prohibits) the life of certain legal arrangements/transactions after a specified period (say 150 years). Put differently, the focus of the rule would be conceptually different dealing with the duration of a legal arrangement transaction, as opposed to any requirement of vesting (the latter being technically problematic in many practical contexts).

After considering the international position and the benefits for retention, abolishing the rule may still be the best course because if there were clear evidence of dead hand control and perpetual trust creation following abolition, then this concern could be addressed by specific legislative reforms at that time.

Q6: Do you think that any changes should apply retrospectively to existing trusts?

Some of the “curative” aspects of a new rule could possibly be extended retrospectively to provide positive and beneficial relief to “perpetuity” situations that were effectively overlooked or unintended and significantly harsh in terms of their perpetuities outcome.

The advantage of retrospective treatment might help to overcome the practical problem of having different statutory rules applying to trusts and other legal arrangements/transactions.

Q7: Are you aware of any problems with section 21 of the Perpetuities Act 1964 and how do you think these could be resolved?

The Law Society is aware of many wills that would be in a similar form to that referred to in *Re Armstrong, Perpetual Trust Ltd v Roman Catholic Bishop of the Diocese of Christchurch*¹. This situation appears to have arisen because of reliance on a precedent that provided for a defective trust to accumulate. Accordingly there are still problems associated with s21.

Q8: If all the beneficiaries agree to a variation or the Court has approved a variation should the settlor’s intention be relevant to whether a variation takes place?

There is an underlying tension between the two arguments.

On the one hand, a settlor, having alienated property for the benefit of others, should take no further part in controlling the way in which that property is enjoyed by the beneficiaries. To some degree, this is an extension of the dead hand argument.

It might also be said that where property is settled on certain terms, the recipients of that property (the trustees as to the legal estate, the beneficiaries as to the equitable estate) are bound to enjoy the property on those terms.

¹ *Re Armstrong, Perpetual Trust Ltd v Roman Catholic Bishop of the Diocese of Christchurch* [2006] 1 NZLR 282.

Despite some of the complexities of the existing common law position, it is a well established position in New Zealand and on balance it is considered that the first argument should prevail.

Q9: Should the extended rule in *Saunders v Vautier* (ie, allowing the revocation or variation of a trust based on the consent of the beneficiaries) be set out in legislation?

It would be helpful to codify the rule in the context of proposed amendments to the statutory provisions allowing variation. Codification of the rule and the common law extensions of the rule would be useful.

The Commission's suggestion at paragraph 5.67 of the Issues Paper is appropriate.

Q10: Should there be limits on the extent to which a trust can be varied? Do you consider that the concept of leaving the substratum of the trust intact should be a restriction on variation or resettlement?

In this response it is assumed that *Saunders v Vautier*² revocation/variation/resettlement is not possible.

Two scenarios then arise. First, there is the possibility of variation in terms of the trust deed. Secondly, there is possibility of variation by the Court.

Where variation takes place pursuant to the trust deed, the extent to which substratum arguments have force will depend on the variation provisions in the trust deed. If the trust deed is drafted in terms where the variation power is sufficiently wide, then there is no merit in reading down the variation provision in a restrictive way.

Whether a particular variation is within the terms of the trust deed is a matter of interpretation in context. Whether particular actions of variation/resettlement fall within the ambit of the trust deed are well able to be tested (e.g. *Kain v Hutton*³). Variation clauses should continue to be construed on a case-by-case basis.

Where the Court's intervention is sought in relation to a variation, there should not be any absolute rules in terms of the scope of variation. Context is still important. For example,

² *Saunders v Vautier* (1841) Cr & Ph 240; 41 ER 482.

³ *Kain v Hutton* HC Christchurch M198/00, 3 December 2004.

adherence to the settlor's original purpose may justifiably be given more weight in a superannuation trust context as opposed to a private discretionary trust.

Given the view expressed in the answer to Q8, there should not be specific legislative restriction on the Court's variation powers in the context of this question. We comment on other restrictions in the responses to later questions.

Q11: How far should it be possible to enlarge the powers of the trustee under the legislation from those set out in the deed?

The power to enlarge the powers of the trustee should be consistent with the overseas law reform suggestions set out at paragraph 5.18 of the Issues Paper.

The Court's power to enlarge trustees' powers should not be used to remove a power of appointment or to remove a trustee.

The Court already has jurisdiction to remove trustees who have misconducted themselves in the administration of the trust (s51).

Q12: Should section 64A be rewritten to explicitly allow the Court to approve resettlements in addition to variations and revocations?

Resettlements should be included. The Court has already shown a willingness to contemplate resettlements as falling within the existing s64A powers.

Q13: Are there any problems with the requirement that the Court should not approve an arrangement on behalf of any person that is "to his detriment"?

In practice the requirement does not appear to cause any particular problems.

Q14: On whose behalf should the Court be empowered to provide consent for a revocation or variation of a trust? Do you see any problems with allowing the Court to consent on behalf of any of the categories or persons listed in paragraph 5.69?

Legislative clarification should aim to give the Court effective tools. The list at paragraph 5.69 is adequate, but some comments are made in relation to particular classes.

The classes currently covered by s64A should remain. The Court should be able to approve an arrangement on behalf of an untraceable person, so long as reasonable efforts have been

made and the proposed arrangement does not operate to that person's detriment in line with the Scottish proposal at paragraph 5.32.

The issue of non-consenting beneficiaries is problematic. At paragraph 5.69 the Commission suggests that the Court might consent on behalf of a beneficiary who would benefit from the arrangement, but who has refused to consent to it. The requirement of benefit is wider than the existing "no detriment" provision of s64A. The approach should be consistent.

There are widely different circumstances where a beneficiary may not be consenting. While it might be reasonable to suggest that the Court should be able to consent on behalf of a non-consenting beneficiary when that beneficiary is one of 3,500 beneficiaries (the *Farmers Trading Company Limited*⁴ situation), would it be reasonable to override the views of a beneficiary who is one of four?

It is difficult to see that allowing the Court to override the consent of a beneficiary in the latter example is consistent with the underlying *Saunders v Vautier* rationale for codification and reform.

Q15: Should the Court have the discretion to direct trustees to seek the consent of any person for whom Court approval would be possible?

Implicit in this question is the proposition that a failure to consent by the person involved will lead to the Court being unable to approve the arrangement.

This emphasises the issue raised in the answer to Q14, namely to what extent should a non-consenting beneficiary's wishes be overridden by the Court? Should the Court be able to override the wishes of a beneficiary by imposing an objective test? By analogy, many commercial contracts contain provisions requiring the consent of a party to certain actions, but providing that that consent is not to be arbitrarily or unreasonably withheld. If such a proviso were included, it might overcome the problem (if it exists) of a capricious beneficiary thwarting an arrangement which is of benefit to at least some of the beneficiaries and of no detriment to that person.

Such a provision would, however, be inconsistent with an approach based on the proprietary rights of beneficiaries.

Q16: What should be the relationship between section 64 and section 64A? Should new legislation clarify that variations to a trust instrument should only be made with the agreement of the beneficiaries, or only under section 64A, or are there some merely administrative amendments that should be able to be made more simply under section 64?
Where the beneficiaries agree, the classification of the variation/amendment sought should not matter.

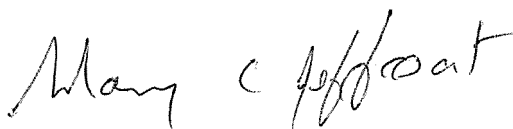
We agree that the underlying rationale between s64 and s64A appear to be different. Section 64 appears to be premised on the obligational view of trusts.

Consistency with the underlying rationale distinction suggests that s64 should be retained for administrative amendments giving effect to the settlor's intentions but that more substantial variation should require consent, subject to the comments above in relation to the circumstances in which an absence of consent may be overridden.

Conclusion

If you have any queries regarding this submission please contact the Property Law Section manager, Kim Oelofse, by telephone (04) 463 2991 or email (kim.oelofse@lawsociety.org.nz).

Yours sincerely



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⁴ *Farmers Trading Company Ltd v Persons directed to be served* HC Auckland M1533/93, 9 February 1995.