The Variation of Trusts, Onshore and Offshore

Recent years have seen a resurgence of applications in the UK High Court for its approval of arrangements varying trusts under the Variation of Trusts Act 1958 ("the VTA"). The most common applications in England are designed to extend perpetuity and accumulation periods following the Perpetuities and Accumulations Act 2009. These periods can now last for a new 125 years from the date of the court order.

However, other recent applications have dealt with postponing the vesting dates of contingent interests, inserting or extending powers of appointment and even changing the definition of the beneficiaries of the trust.

ONSHORE VARIATIONS: GENERALLY

If trustees have wide overriding powers of appointment, they may be able to effect a desired variation of trusts. In the absence of such powers, then if all of the beneficiaries of a trust are capable adults, they may agree amongst themselves, with the consent of the trustees, to vary its terms. Where some of the beneficiaries are minors, incapable adults, unborn (e.g. the future children of X), or unascertained (e.g. the future widows and widowers of X’s children), the consents of all possible beneficiaries cannot be obtained, so a variation cannot be validly made without the intervention of the Court providing consent on their behalf. The necessary jurisdiction is conferred by the VTA which empowers the Court, ‘if it thinks fit’, to approve on behalf of any minor, incapable adult, and any unborn or unascertained person any arrangement varying or revoking all or any of the trusts, provided that the carrying out of the arrangement would be for the benefit of that person.

In general, adult beneficiaries must provide their consent to the application. Any adult beneficiary who lacks capacity must have a litigation friend appointed and prior approval of the variation sought from the Court of Protection (1(3) VTA). Minor beneficiaries will also need a litigation friend. Unborn and unascertained beneficiaries are usually looked after by the trustees whose role is essentially that of “watchdog”, see Re Druce’s Settlement, Potheary v Druce [1962] 1 All ER 563. However, where the trustees are claimants it may not be appropriate for them to represent unborn and unascertained beneficiaries in which case the usual route will be to appoint a minor to represent unborn and unascertained beneficiaries.
If living, the settlor(s) should be joined.

On all VTA applications (other than those merely for the lifting of protective trusts) the Court may only give its approval to an arrangement on a person’s behalf if it is shown to be for that person’s benefit. The benefit may be marginal and it may be financial, material, moral or social. If there is no benefit, the Court has no jurisdiction. However, if there is a benefit the Court has a discretion whether to approve the variation.

A good example of a recent ‘moral benefit’ is from *Pemberton v Pemberton* [2016] EWHC 2345 (Ch) where, among other variations the beneficial class was extended to include civil partners and same-sex spouses. As HHJ Hodge QC describes it “The present class [of beneficiaries] does not include three further categories: first, illegitimate beneficiaries or those who inherit through them. That is because the settlement and subsequent deeds of appointment were governed by the old rule that references to “issue” included only legitimate issue. That rule had changed for dispositions made since 1 January 1970. Secondly, the class does not include civil partners. Thirdly and finally, it does not include spouses under a same sex marriage. That again is a position that has changed for documents made after the coming into force of section 11 of the Marriage (Same Sex Couples) Act 2013. Those three classes of beneficiaries will be included after the variation.”

On benefit, HHJ Hodge QC concluded: “The incorporation of the wider class is said to represent the present understanding of what constitutes a family, including civil partners and same-sex spouses and illegitimate issue, and it is legitimate to take into consideration family harmony in considering what is for the benefit of the minor beneficiaries. It may be directly for their benefit for such classes to be included in the future because they may themselves have illegitimate children, enter into civil partnerships or same-sex marriages, and they may wish their children or partners to benefit from the settlement.”

The court will scrutinise different aspects of the proposed arrangement but will, in the end, form a view as to whether the ‘benefit’ test is satisfied by looking at the whole proposal in the round. In more difficult cases – see, e.g., *Remnant’s Settlement Trusts* [1970] Ch 560, in which certain eminent (now sadly deceased) members of Ten Old Square appeared – the proposed arrangement may have a persuasive moral and social justification (to avoid family disharmony) but be very clearly financially disadvantageous for one or more minor or unborn members of the beneficial class. In such cases it may be necessary to compensate those beneficiaries who would otherwise be financially disadvantaged by the scheme, by setting aside a fund for their exclusive benefit.

The jurisdiction to vary settled land still exists under s.64 of the Settled Land Act 1925. This empowers the Court to give prior authority to any transaction by a life tenant in relation to the land provided that the Court is satisfied that the transaction is for the benefit of the settled land. See *Hambro v Duke of Marlborough* [1994] Ch 158 where Morritt J (as then) made it clear that such a transaction included one whereby the beneficial interests in the trust property...
were affected. Indeed, s.64 defines ‘transaction’ as: “In this section “transaction” includes any sale, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money and any compromise or other dealing, or arrangement”.

OFFSHORE VARIATIONS

Offshore variations are less common than applications under the VTA in England. This is probably because (1) the broad nature and breadth of powers in many offshore trusts mean the trustees are less likely to be stymied by limitations in the trust deed and (2) the lack of perpetuity and accumulation issues, which now form the majority of English VTA applications. Where a trust is well-drawn, the need to vary will arise infrequently – although knowing what you can do when it comes across your desk can be very useful indeed.

Jersey

S. 47, Trusts (Jersey) Law 1984 provides as follows:

“(1) Subject to paragraph (2), the court may, if it thinks fit, by order approve on behalf of –

(a) a minor or interdict having, directly or indirectly, an interest, whether vested or contingent, under the trust;

(b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons;

(c) any person unborn; or

(d) any person in respect of any interest of his or hers that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined,

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 terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property.

(2) The court shall not approve an arrangement on behalf of any person coming within paragraph (1)(a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person.
(3) Where in the management or administration of a trust, any sale, lease, pledge, charge, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction is in the opinion of the court expedient but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the terms of the trust or by law the court may confer upon the trustee either generally or in any particular circumstances a power for that purpose on such terms and subject to such provisions and conditions, if any, as the court thinks fit and may direct in what manner and from what property any money authorized to be expended and the costs of any transaction are to be paid or borne.

(4) An application to the court under this Article may be made by any person referred to in Article 51(3).”

These provisions are also drafted in similar terms to the English VTA, but subsection (3) above creates a discrete jurisdiction to confer additional administrative powers on the trustees where it is “expedient” so to do. These provisions are almost identical to the provisions of s. 57 of the (English) Trustee Act 1925.

Guernsey

S. 57, Trusts (Guernsey) Law 2007 provides as follows:

“(1) The Royal Court, on the application of any person mentioned in section 69(2), on behalf of -

(a) a minor or a person under legal disability having, directly or indirectly, an interest, vested or contingent, under a trust,

(b) any person unborn,

(c) any person, ascertained or not, who may become entitled, directly or indirectly, to an interest under a trust, as being (at a future date or on the happening of a future event) a person of any specified description or a member of any specified class,

(d) any person, in respect of an interest that may accrue to him by virtue of the exercise of a discretionary power on the failure or determination of an existing interest, or

(e) with leave of the Royal Court, any other person,

may, subject to subsection (2), approve any arrangement which varies or revokes the terms of a trust or enlarges or modifies the powers of management or administration of any trustees, whether or not there is another person with a beneficial interest who is capable of assenting to the arrangement.

(2) The Royal Court shall not approve an arrangement on behalf of a person
mentioned in subsection (1)(a), (b) or (c) unless the arrangement appears to be for his benefit.

These provisions are clearly modelled on the English VTA but are broader insofar as they permit the Royal Court to approve a variation on behalf of “persons under a legal disability” (under the English law the Court of Protection must also sanction the arrangement).

In *Re H Trust* [2007-8] GLR 118, an application was made by a trustee under similar provision in s. 52 of the 1989 Act (then in force) on behalf of an adult beneficiary who was autistic and his minor sister (the son was held to be under a “legal disability” for the purposes of the legislation). The proposed arrangement was to vary an accumulation and maintenance settlement by postponing the date of absolute vesting in a capital fund beyond the current vesting age of 25.

The Lieutenant Bailiff and Jurats (giving a common decision) authorised the proposed variation on the basis that it was of benefit to both beneficiaries. Reasons underpinning this decision were both financial (the combined fund could be retained to generate greater investment growth and returns for the beneficiaries) and social (it was desirable that proper provision should be made for the son’s care in the future). A small fund was set aside for the benefit of unborn and unascertained beneficiaries to ensure that the arrangement was also of benefit to them.

Reliance was placed on the English decision in *Re T’s Settlement Trusts* [1964] Ch 158, in which Wilberforce J said that postponing an irresponsible minor beneficiary’s interests was “the kind of benefit which seems to be within the spirit of the Act”. However, in *Wright v Gater* [2012] 1 WLR 802 Norris J rejected the suggestion that paternalistic interventions of this kind were beneficial in principle and refused to approve a scheme postponing the vesting of the then-3-year-old beneficiary’s interest to 30 in favour of an earlier vesting date of 25.

**Other jurisdictions**

Statutory provisions reproducing (with varying degrees of fidelity) the VTA can also be found in the following offshore common law jurisdictions: Bahamas (s. 70, Trustee Act 1998) Bermuda (s. 48, Trustee Act 1975), British Virgin Islands (s. 58, Trustee Ordinance 1961), Cayman Islands (s. 72, Trusts Law (2009 Revision)), Gibraltar (VTA by incorporation), Isle of Man (Variation of Trusts Act 1961) and New Zealand (ss. 61-61A, Trustee Act 1956).

**Varying foreign trusts**

There are a number of occasions when using the power of variation over an offshore trust is the only realistic option. Examples might include altering interests, redefining the beneficial class and, perhaps most common, a variation to re-add a beneficiary who has previously been irrevocably excluded. Jersey and Guernsey trustees may also find themselves presiding over English law trusts, of course.
The statutory provisions cited above will apply where the application to vary is brought in the courts of those states. But what is the position in England where applications are brought to vary foreign law trusts?

This question was reviewed recently in C v C [2015] EWHC 2699. The application related to four family settlements, one of which was governed by Kenyan law. HHJ Hodge QC\(^1\), having satisfied himself that the variation of all four settlements was for the benefit of those beneficiaries on whose behalf the court was asked to consent, considered the Kenyan law settlement in isolation. He considered, in particular, the effect of Article 8(h) of the Hague Convention on Trusts (enacted into English law in the Recognition of Trusts Act 1987), which provides that the proper law of a trust (whether expressed in the instrument or implied by close connection with a particular state) “shall govern”, among other things, “the variation or termination of the trust”.

Prior to the Hague Convention’s incorporation into English law, the courts had held (in Ker’s Settlement Trusts [1963] Ch 553) that the jurisdiction of the VTA extended to varying foreign law trusts. While that jurisdiction has not been expressly curtailed, it is now clear from Article 8(h) of the Convention that the VTA is not in play when an application is made to vary a trust governed by a foreign system of law which recognises and provides for trusts. In those circumstances, the English court must apply the proper law of that foreign state.

In C v C the judge found that he could authorise the arrangement in respect of the Kenyan law settlement because the Kenyan law made similar statutory provision for the variation of trusts based on the English VTA (for the same reason, the judge was satisfied that it was appropriate for the English court to decide the matter). The judge considered that he was exercising his “jurisdiction under the 1958 Act because there is such a jurisdiction under the law of Kenya.” However, the decision may be better understood as applying the Kenyan law directly (without reference to the VTA) as this is what Article 8(h) of the Hague Convention mandates.

**SOME RECENT ISSUES**

**Privacy**

It will now be a rare case where an application under the VTA will be heard in private. A practice has though developed where, in an appropriate case, the Court may make orders for the protection of existing and future beneficiaries, particularly minors and other vulnerable beneficiaries who may be detrimentally affected by the release of details of their financial circumstances. Such orders may restrict access to the Court documents by persons unconnected with the trusts so that they must make an application on notice to a Judge for

\(^1\) Not, despite how it may appear from this handout, the only English judge currently sitting in VTA applications.
access, and may prevent the publication of the names of the parties to the proceedings. See generally V v T, A [2014] EWHC 3432 (Ch); [2015] WTLR 173.

An application for such orders, including that the proceedings when issued be listed anonymously, may be made before proceedings are issued, *ex parte* to the Master. This should prevent any publicity by reason of the parties’ names being listed in the High Court register of claims. Such an order will usually be made to cover the period until the substantive hearing when a further application for continuance of the orders may be made.

In general, since V v T, A, matters have calmed down and Masters are making anonymity orders as a matter of course in most applications. Whilst these are interim orders, by the time the application comes on for the final hearing they have (so far) been kept in place and made permanent.

**Joinder of beneficiaries**

A frequent issue with applications under the VTA concerns the number of beneficiaries who may need to be made parties, receive legal advice, and provide their informed consent. The judgement of Warren J in the case of A v B [2016] EWHC 340 (Ch) analyses and approves a method which may, in an appropriate case, be used to obviate the need for certain remoter beneficiaries to be joined to an application varying the trusts under which they may potentially benefit.

In A v B, the trust involved included a large number of remote potential beneficiaries. These included living individuals, both adult and minor, as well as unborn and unascertained persons and charitable entities or purposes. Nevertheless, as Warren J noted, "Because of the nature of the trusts involved... it is highly unlikely that any non-party other than members of the specified class will ever benefit under those trusts."

Ordinarily, that would not eliminate the need for a variation of the trusts affecting remote potential beneficiaries to be agreed by adults and approved by the court on behalf of minors, unborn and unascertained persons. The trustees, however, took the view in this case that it would not be proportionate to involve these remote potential beneficiaries in discussions about the future of the trusts, let alone join them as parties to the proceedings, if there was a proper course by which they could undertake the variation without having to join them.

A method of obviating the need to join those beneficiaries was identified (by a member of Ten Old Square, of course). It operated by precluding any objection or challenge to the arrangement being made by these potential, but very remote, beneficiaries who were not parties to or represented in these proceedings.

The trustees intended to execute three deeds, one in relation to each of the arrangement funds. Under those deeds, the trustees were to release their powers as to appointment, revocation and release, but only to the extent that it deprived the remote members of the wider class of any right which they might otherwise have to challenge the arrangement.
Warren J was satisfied that the method was technically effective and that it could properly be adopted.

Another way of viewing this release was that it removed such persons as potential beneficiaries for the instant before the arrangement took effect (hence neither their consents to the arrangement, nor the court’s approval of it on their behalf, were required), but reinstated them immediately after the arrangement becomes effective according to the terms of the varied trusts. This is in effect an extension of a not uncommon practice in variations of excluding certain beneficiaries from benefit prior to issuing the application and then adding the back later on (subject, of course to having appropriate powers to do so).

As Warren J admitted, the alternative view of ‘fleeting removal’ “has its attractions and describes in practical terms the result of the release.” He could not, moreover, see any reason why it would be necessary to release the power altogether and felt that it could be released to the extent necessary to allow the variation to take effect. As he explained, “It does not seem to me to matter whether, conceptually, there is a limited release or whether there is a total release but subject to the reinstatement (as part of the variation) of the power of appointment but modified so as to take effect only in accordance with the varied trusts.” Accordingly, the variation could be brought and approved without having to join innumerable beneficiaries.

Although it will only be appropriate in proper cases, this method presents an efficient route toward achieving variation that does not need the full involvement of all of the potential beneficiaries.

**ALTERNATIVE METHODS**

Section 57 TA 1925 is an alternative jurisdiction for varying certain trust provisions. It provides:

(1)Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2)The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.
An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925.

This section confers on the Court jurisdiction to extend or alter administrative or management powers of trustees, either on a one-off basis or by creating new powers. Under the English version of s. 57 (see further below) beneficial interests cannot be altered by this route. However, it can still offer some practical advantages where the trust’s shortcomings are administrative. This is because the jurisdiction of the Court is different than under a traditional variation. It is a pure discretion and it is founded upon the absence of a power. There is no question of approving on behalf of the beneficiaries and it is not necessary to join them all. Whilst the ultimate question for the Court will be the benefit for the beneficiaries, the question is one of ‘expediency’ judged from the standpoint of the trust as a whole (Re Craven [1937] Ch 431), or, to put it another way to “to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries” (Re Chapman [1953] Ch 218).

It is even possible to make an application under s.57 Trustee Act 1925 without naming any defendants under the CPR and by relying on the provisions of CPR 8.2A. A recent example of this is Re Portman Estate [2015] EWHC 536 (Ch) where Birss J approved an application to extend investment powers and include a power to trade without naming any beneficiaries as parties. This is, of course, a practical, pragmatic and cost-efficient approach.

S. 57 can only be used where beneficial interests are not altered – although it is worth bearing in mind that the English Court has sailed very close to the line on s.57 applications in the past, such as approving a sub-fund partition (to carve out a sub-fund for US resident beneficiaries to avoid double tax problems) in Sutton v England [2012] 1 W.L.R. 326. In this case, Mann J had refused to make the order at first instance on the basis that it would alter beneficial interests. However, he was overruled by the Court of Appeal that since the partition only had an ‘incidental’ impact on the beneficial interests, s.57 still worked.

S. 57 Trustee Act 1925 has its analogues in s. 58 Trusts (Guernsey) Law, 2007 and s. 47(3) Trusts (Jersey) Law 1984.

HYBRID VARIATIONS

A couple of jurisdictions have adopted a hybrid variation jurisdiction.

S. 47 of the Bermuda Trustee Act 1975 states:

Power of court to authorise transactions relating to trust property
(1) Where any transaction affecting or concerning any property vested in trustees, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by any provision of law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2) The court may, from time to time, rescind or vary any order made under this section or may make any new or further order.

(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

(4) In this section, “transaction” includes any sale, exchange, assurance, grant, lease, partition, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any investment or application of capital, and any compromise or other dealing, or arrangement.

Note the deliberately broad definition of ‘transaction’. This is effectively an amalgam of s.57 Trustee Act 1925 and s. 64 Settled Land Act 1925. It co-exists with the more ‘traditional’ variation power in s. 48 and appears to derive from none other than s. 56 Trustee Act (Northern Ireland) 1958 (which has identical wording).

This provision can allow for a variation of beneficial interests without obtaining any consent purely on the basis that it is for the benefit of the trust as a whole (not necessarily for each subset of beneficiaries). This allows for a considerably streamlined process in terms of cost and expense. A few examples of the exercise of s. 47 include extending a Bermuda perpetuity period, adding a charity as a beneficiary and empowering distributions to certain beneficiaries. There is a good discussion of the jurisdiction in the judgment of Ground CJ in GH v KL [2011] SC (Bda) 23 Civ which was applied in Re ABC [2012] SC (Bda) 65 Civ by Kawaley CJ.

There was some discussion back in 2012 about amending s. 47(3) Trusts (Jersey) Law 1984 along these lines but nothing has happened yet. Until then, trustees wanting to take advantage of this jurisdiction will have to pick between Bermuda and Northern Ireland.

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