The Variation of Trusts: How Far Can You Go?

Introduction

1. In this paper, we consider the following topics concerning the court's jurisdiction to vary trusts:

    1.1. The English court's jurisdiction and traditional approach to applications to vary trusts.

    1.2. Has the Bermudian court stretched the orthodoxy?

    1.3. Will Jersey follow suit, but by legislating?

    1.4. The modern approach in England: are the courts' powers being used as a "beneficiaries' charter"?

    1.5. What of the future? Should there be a reining back and a re-establishment of the orthodoxy or is there more to stretch?

(1) The Position in England

Background

2. There are numerous situations in which trustees may wish to deviate from the express terms of the trusts on which they hold property. Examples include situations where the trustees wish to exercise powers not conferred on them; where the beneficiaries wish between them to alter their beneficial entitlements; and where some provision of the trust instrument exposes the trust property to taxation, which the trustees wish to take steps to avoid.

3. The most simple means by which trustees may so deviate from the trusts are: (1) where they are the donees of a power of amendment in the trust instrument;[1] or (2) by acting with the concurrence of all the beneficiaries if they are all ascertained, of capacity and together are beneficially entitled to whole of the trust estate[2].

[1] Powers of amendment must, of course, be exercised strictly according to their terms. Such powers may well be fiduciary in nature.

[2] Pursuant to the rule in *Saunders v Vautier* (1841) 10 LJ Ch 354

4. Where those routes are not available to a trustee (for example because there is no power of amendment and the class of beneficiaries is not closed) there are two statutory routes in England:

   4.1. Section 57(1) of the Trustee Act 1925 (the "**ETA 1925**"), which permits the court to give trustees additional powers if it is expedient; and

   4.2. Section 1 of the Variation of Trusts Act 1958 (the **"VTA 1958"**), which permits the court to consent to a variation on behalf of minor, unborn and unascertained beneficiaries.

5. The court also has an inherent jurisdiction to sanction a deviation from the terms of the trust by the trustees. However, the scope of that inherent jurisdiction is extremely narrow.[3] In particular, the inherent jurisdiction does not permit the court to sanction deviation from the express terms of the trust which alter beneficial interests. The House of Lords held in *Chapman v Chapman* [1954] AC 429 that the court did not have the power to alter beneficiaries' entitlements under a trust even where the only purpose of the proposed alteration was to provide a benefit to minor, incapable, unborn and/or unascertained beneficiaries[4], and where the adult beneficiaries were all agreed that the proposed alteration should be made (in *Chapman* the benefit sought was the avoidance of estate tax to which the three settlements in question would otherwise become subject).

The ETA 1925

6. Section 57(1) of the ETA 1925 provides as follows:

> "*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*

[3] The inherent jurisdiction covers only: (1) emergency powers of administration of the trust, where the business of the trust must be maintained; (2) cases of "salvage", where the court may permit the trustees to expend capital to prevent some trust property being lost or ruined; (3) situations where the trustees wish to apply capital or income which has been directed to accumulate to the maintenance of minors; and (4) the compromise of disputes between beneficiaries as to their proper beneficial entitlements. This note will not consider any of these areas in any greater detail.

[4] *Chapman* was decided before the VTA 1958, so there was at the time no statutory power for the Court to supply consent on behalf of these beneficiaries

authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income."

7. Section 57 of the ETA 1925 permits the court, in effect, to vary a trust by conferring additional powers on the trustees where the transaction which the trustees wish to effect (but do not have power to effect) is "*in the management or administration of any property vested in trustees"* and the court thinks that the transaction is "*expedient"*.

8. It is settled law in England that section 57 ETA 1925 does not permit the court to bestow powers which would vary the beneficial interests under the trust. In *Re Downshire Settled Estates* [1953] Ch 218, 247, Lord Evershed MR and Romer LJ held that "*the subject-matter both of "management" and of "administration" in section 57 is trust property which is vested in trustees; and in our opinion "trust property" cannot, by any legitimate stretch of the language, include the equitable interests which a settlor has created in that property."*

9. That said, the English courts have extended trustees' powers under section 57 where the exercise of the extended powers is capable of having the <u>incidental</u> effect of varying beneficial interests. This was hinted at by Lord Evershed MR in *Re Downshire*, and examined by the Court of Appeal more recently in *Sutton v England* [2011] EWCA Civ 637. In *Sutton v England* the trustees asked under section 57 to be given the power to partition and settle on sub-trusts part of a trust fund to avoid double taxation. The proposed partition and settlement of sub-trusts would have resulted in the beneficiaries of the proposed sub-trust losing their entitlement to a share of the income and capital of the whole fund. At first instance the application was refused, but the Court of Appeal was satisfied that the alteration in beneficial interests was only incidental to the substance of the application, which was held to relate to the administration of the trust (which was split between US and English beneficiaries).

The VTA 1958

10. As a result of the *Chapman* decision referred to above, Parliament enacted the Variation of Trusts Act 1958 (the "**VTA 1958**") giving the court the power to supply the consent of incapable beneficiaries to a proposed variation.

11. The VTA 1958 is short, and the only relevant provision is section 1.

(1) Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of—

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or
(b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts 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, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or
(c) any person unborn, or
(d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary 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 trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:
Provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

(2) In the foregoing subsection "protective trusts" means the trusts specified in paragraphs (i) and (ii) of subsection (1) of section thirty-three of the Trustee Act 1925, or any like trusts, "the principal beneficiary" has the same meaning as in the said subsection (1) and "discretionary interest" means an interest arising under the trust specified in paragraph (ii) of the said subsection (1) or any like trust.

(3) . . . The jurisdiction conferred by subsection (1) of this section shall be exercisable by the High Court, except that the question whether the carrying out of any arrangement would be for the benefit of a person falling within paragraph (a) of the said subsection (1) [who lacks capacity (within the meaning of the Mental Capacity Act 2005) to give his assent is to be determined by the Court of Protection].

(4) . . .

(5) Nothing in the foregoing provisions of this section shall apply to trusts affecting property settled by Act of Parliament.

(6) Nothing in this section shall be taken to limit [the powers of the Court of Protection].

12. The effect of this statutory scheme is not that the court varies the terms of the trust. Rather, the court provides (if it thinks fit to do so) its consent to the variation on behalf of incapable beneficiaries. Mummery LJ described the court's power as "*a statutory extension of the consent principle embodied in the rule in Saunders v Vautier*" (see *Goulding v James* [1997] 2 All ER 239, 247). Hence, the court's role is to scrutinize an arrangement which has already been consented to by the capable beneficiaries on behalf of the incapable beneficiaries, and, if appropriate, supply their consent (see especially *IRC v Holmden* [1968] AC 685).

Exercising the Discretion

13. Section 1(1) of the VTA 1958 states that "*the court may if it thinks fit*" approve an arrangement on behalf of one of the above classes of beneficiary if the arrangement is for those beneficiaries' benefit (save that the benefit test does not apply in the case of beneficiaries of protective trusts (the fourth class of beneficiaries)). The following principles are relevant to the exercise of the court's discretion.

14. First, the court has no power under the VTA 1958 to approve any arrangement on behalf of beneficiaries who do not fall into one of the four classes listed in section 1(1). Such beneficiaries must decide for themselves whether to agree to any proposed arrangement. In the absence of consent from all the capable beneficiaries, the court will not be able to sanction any arrangement.

15. Second, the power granted by the VTA 1958 does not permit the wholesale resettlement of the property on new trusts, but only sanctions arrangements which vary or revoke the existing trusts (*Re T's Settlement Trusts* [1964] Ch 158, 162). However, it is clear that there is no "bright-line" distinction between a variation or revocation and a resettlement, and the court will have to consider the whole arrangement and its effects to ascertain on which side of the line the proposed arrangement falls (see *Wyndham v Egremont* [2009] EWHC (Ch) at §§21-23, drawing on the guidance as to common "*indicia*" of a full resettlement in the context of the exercise of powers of appointment given by the House of Lords in *Roome v Edwards* [1982] AC 287, 292-293 per Lord Wilberforce; and *Allfrey v Allfrey* [2015] EWHC 1717 (Ch)).

16. Third, the court will scrutinize the arrangement carefully. In *Re Van Gruisen's Will Trusts* [1964] 1 WLR 449, Ungoed-Thomas J held that the court should: (1) be concerned with the <u>whole</u> of the proposed arrangement, rather than merely the aspect said to benefit the relevant class of beneficiary; (2) scrutinize the arrangement in a practical and businesslike way; and (3) consider the benefits each party will obtain as well as their respective bargaining strength. Further, the arrangement should be a "*fair and proper one*" (see *Re Remnant's Settlement Trusts* [1970] Ch 560, 565).

17. Fourth, the court will consider how the proposed arrangement will benefit each member of the relevant class of beneficiaries individually rather than as a class (see *Re Cohen's Settlement Trusts* [1965] 1 WLR 1229, 1236-1237). However, the court will not be unduly risk-averse when considering the prospective benefit and will be content to take the same risk of the benefit failing to accrue as any reasonable adult would take, although the court

will very likely wish any risk to the relevant class of beneficiary to be mitigated by insurance (see, e.g., *Re Robinson's Settlement Trusts* [1976] 1 WLR 806, 809-810).

18. Fifth, while the court generally considers the word "benefit" to connote a financial benefit (see, e.g., *Re Tinker's Settlement* [1960] 1 WLR 1011), it can also take non-financial benefits into account. For example, the courts have accepted that the following are benefits, notwithstanding that they are not financial: the elimination of potential family dissension following removal of a stipulation that beneficiaries not be Roman Catholics (*Re Remnant's Settlement Trusts*); the requirement that children be settled in life before receiving sufficient income from the trust to remove their need to work (*Re Holt's Settlement* [1969] 1 Ch 100); the discharge of a moral obligation which the court is satisfied the beneficiary would feel (*Re C.L.* [1969] 1 Ch 587, 598-600); any relevant social and educational benefits (*Re Weston's Settlements* [1969] 1 Ch 223, 245); and the continuation of an historic link between the heirs of two baronies and their ancestral family seat (*Wyndham v Egremont* at §§4 & 14-15).

19. Sixth, the wishes of the settlor will be taken into account. However, those wishes will not be conclusive since the court is primarily concerned with the proposed benefit to the relevant class of beneficiaries (see *Re Remnant's Settlement Trusts* at 567 and *Goulding v James*).

20. Seventh, regard will be had to the trustees' views of the proposed arrangement, although those views will not be conclusive (see *Re Steed's Will Trusts* [1960] 1 Ch 407, 420-422). It is also common for the court to have regard to any stated intention of the trustees as to how they will exercise their powers, whether pre-existing powers or powers conferred by the proposed arrangement (see, e.g., *Re Druce's Settlement Trusts* [1962] 1 WLR 363, 369-370).

Conclusion: A Careful Scrutiny

21. It is evident from the foregoing that the jurisdiction conferred pursuant to the VTA 1958 is confined, and that the court has traditionally been scrupulous in scrutinizing the proposed variation and looking after the interests of the incapable. Indeed, the reported cases show that the court will not simply apply a rubber stamp to proposed arrangements.[5] It will consider all aspects of the proposed arrangement in the exercise of its discretion,

[5] There are numerous cases where proposed arrangements have been rejected and it is not uncommon for the court to refuse to approve an arrangement in the form proposed and to adjourn a hearing for amendment and reconsideration of certain matters in the arrangement.

and will demand clear evidence of the benefit to be gained, as compared to the interest forgone, by the relevant class of beneficiary.

(2) The Position in Bermuda

Introduction

22. The Bermudian Trustee Act 1975 (the "**BTA 1975**") contains a similar, but not identical provision to section 57 of the ETA 1925, in section 47 BTA 1975; and a similar, but not identical provision to the English VTA 1958, in section 48 BTA 1975.

23. Sections 47 and 48 of the BTA 1975 bear very striking similarities to sections 56 and 57 Trustee Act (Northern Ireland) 1958.[6]

The BTA 1975

24. Section 47 of the BTA 1975 gives the court the power to confer upon a trustee powers to effect a transaction *"affecting or concerning"* trust property (as opposed to a transaction *"in the management or administration"* of trust property (as in section 57 of the ETA 1925)). Section 47 of the BTA 1975 provides as follows

> "*(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.*"

[6] There is little authority on the point, but in *Condell v Moore* (Unreported, 30 June 1998) Girvan J rehearsed the background to claim in which an application under section 57 of the Northern Irish Act had failed due to the lack of consent an adult beneficiary.

The Application of the BTA 1975

25. The Bermudian court has construed section 47 of the BTA 1975 expansively.

26. In *GH v KL* [2011] SC (Bda) 23 Civ, the trustees of a will trust sought a variety of variations to the trust. Some were administrative, such as the addition of a successor professional trustee, the replacement of a person unwilling to act, and the variation of the trustees' powers of investment. Others altered beneficiaries' entitlements, such as to permit a payment to the children of the life tenant. The additional power which the trustees requested the court grant them to achieve these variations was a power to apply the capital of the estate by executing a Deed of Declaration declaring that they will continue to hold the estate on the will trusts with certain specified variations. In other words, a power of amendment enabling them to alter the terms of the trust, including the terms as to beneficial entitlements.

27. In a short judgment, Ground CJ held that:

    27.1. The absence, in section 47 of the BTA 1975, of the limitation to transactions "*in the administration or management*" of trust assets found in section 57 of the ETA 1925 must have been deliberate on the part of the legislature;

    27.2. The alternative words used (transactions *"affecting or concerning"* the trust assets) were derived from section 64 of the English Settled Land Act 1925.[7] Assistance was therefore to be derived from English authorities decided under section 64 of the Settled Land Act 1925, including *Raikes v Lygon* [1988] 1 WLR 281 and *Hambro v Duke of Marlborough* [1994] Ch 158. In *Hambro v Duke of Marlborough* an application was made to convey settled land to the trustees of a new trust. Attempts to argue that "*transaction"* should be read narrowly, to include only transactions "*essentially bilateral and in substance an investment for the benefit of the settled land or the beneficiaries under the settlement"* (at p.165) failed. Morritt J held that given the court had to be satisfied that the proposed transaction was for the benefit of the settled land or the beneficiaries, once "*that condition is satisfied then there is*

[7] The Settled Land Act confers a power on the court under section 64 to authorise "*any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner."*

every reason for giving the words the widest meaning they can reasonably bear" (at 166; our emphasis added);

27.3. What the trustees wished to do was within the definition of "transaction", as defined by section 47(4) of the BTA 1975, transaction having an expansive meaning; and

27.4. The trustees' proposals were expedient. In so holding, Ground J dismissed Eversheд MR's comments in *Re Downshire Settled Estates* [1953] Ch 218, 266 (that "*it is no part of the functions of Her Majesty's courts to recast settlements from time to time, merely with a view to tax avoidance even if they had the power to do so which, in our opinion, they have not,"*) as obiter and held (at §9) that "*if the proposal is otherwise plainly expedient, then there is no limitation in the statute which prevents its sanction simply on the grounds that it is designed in the interests of tax efficiency, and nothing to justify my importing such a restriction. That is particularly so where, as here, the trustees and all the adult beneficiaries support the proposal."*[8]

28. *GH v KL* was followed in *Re ABC Trusts* [2012] SC (Bda) 65 Civ. However, *Re ABC Trusts* was a case where the additional powers sought by the trustees appear to have been administrative in nature (a modern charging clause, a power to extend the perpetuity period in respect of non-charitable trusts and the removal of a requirement to consider the law of Prince Edward Island when determining whether or not a particular object was charitable). It seems to us therefore that these powers could have been given in England under section 57 ETA 1925; in other words, *Re ABC Trusts* is not in fact an example of the Bermudian court taking a different, and more expansive, approach to its section 47 of the BTA 1975 jurisdiction.

29. Kawaley CJ acknowledged in *Re ABC Trusts* that on CJ Ground's construction of section 47 of the BTA 1975 (in *GH v KL*), the court's power, in effect, to amend a trust under section 47 was in fact wider "*than that conferred by the provisions of section 48 which explicitly deal with variation alone"*. To our mind, this raises an important question (which was not dealt with in either *GH v KL* or *Re ABC Trusts)*: what was the point in enacting section 48 (which, closely following the English VTA 1958, requires the consent of adult beneficiaries and satisfaction of the "*benefit*" test), if a variation to beneficial

[8] This perhaps recalls the famous, although now unfashionable, dicta of Lord Tomlin in *Commissioners of Inland Revenue v Duke of Westminster* [1936] AC 1, 19 that "*every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be"*. (recently in the news once again, following the death of the sixth duke).

interests can be achieved under section 47 of the BTA 1975? And what is more, can be achieved without the capable beneficiaries' consent, and under a test (of expediency) which does not require the court to determine that the variation is in the interests of incapable beneficiaries whose interests may well be affected by the variation?

30. Can the legislature really have intended the expansive construction which Ground CJ gave section 47 in *GH v KL*? If it did, why did it think that there was any need at all for section 48?

31. Although there are few reported decisions on the section 47 power (and those that exist are first instance decisions), it is clear that Ground CJ's interpretation of section 47 of the BTA 1975 has set Bermuda apart from other common law jurisdictions and has been perceived as a useful tool available to trusts governed by Bermudian law, but not trusts governed by some other jurisdictions.[9] David Hayton has described section 47 of the BTA 1975 as "*a particularly useful law which other offshore jurisdictions might enact in clearer form."*[10] Other jurisdictions therefore appear to be watching with interest, and wondering whether they can, and should, follow Bermuda's lead.

(3) The Current Consultation in Jersey

The Current Jersey Law

32. The current statutory regime in Jersey, the Trusts (Jersey) Law 1984 (the "**TJL 1984**"), contains powers similar to those available in England and Wales:

    32.1. Articles 47(1)-(2) confer jurisdiction for the court to provide the consent of incapable beneficiaries to a variation of trust, similar to the jurisdiction under the VTA 1958; and

    32.2. Article 47(3) provides a jurisdiction to extend a trustee's powers to enable it to effect a transaction in the administration or management of trust assets, similar to the jurisdiction under section 57 ETA 1925.

33. Article 47 provides as follows:

[9] For a detailed analysis of the Bermudian cases, see Keith Robinson, "*Variation of trusts in Bermuda—a rose by any other name"* T. & T. 2012, 18(5), 439-444.
[10] David Hayton, "*The future of the Anglo-Saxon trust in the age of transparency"* Tru. L.I. 2015, 29(1), 30-38, 36.

"*(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)."

The Consultation

34. The Jersey Chief Minister's Department issued a consultation paper on 11 April 2016 identifying 12 areas to consider the proposed amendment of the TJL 1984.[11] One of those areas is article 47 of the TJL 1984. The consultation paper characterizes the current powers under article 47 TJL 1984 as "*limited*", and suggests that the benefits of enlarging the court's power to vary trusts would include:

34.1. "*the ability for the court to assist where there is a cumbersome or poorly drafted trust or one which does not include more modern provisions*";

[11] See http://bit.ly/2bQwfle.

34.2. a means to avoid concern that the giving of consent to a variation could trigger tax consequences under the law of certain jurisdictions;

34.3. the ability to overcome the objections of a single recalcitrant adult beneficiary who refuses to consent to an arrangement on which all other parties are agreed;

34.4. the saving of time when the consent of a large number of beneficiaries from disparate locations would be required; and

34.5. a method of ensuring that Jersey does not remain at a competitive disadvantage compared to Bermuda.

35. The paper raises various potential problems if the court had an enlarged power to vary, and notes that "*[t]he interpretation by the Bermuda court has not yet been examined by way of adversarial argument, or on appeal. Doubts on the long-term efficacy of the Bermuda interpretation have, therefore been raised*."

36. Aside from the question of competitive disadvantage, are Jersey's qualms with the current law justified? Taking the first point in favour of the proposed amendment (court assistance with modernizing old terms): this ought to be precisely the sort of area which is covered by the current legislation. An example, cited in the consultation paper, of obsolete or inadequate trust terms being modernized is *Re Greville Bathe Fund* [2013] (2) JLR 402, but the modernization of the terms in this case was effected under Article 47(3) of the TJL 1984[12]. The Jersey Royal Court's assistance was sought in respect of a fund which had been established for the benefit of the employees of Ann Street Brewery Company Ltd in 1949 and which had no written terms. A re-organisation of the company's business was thought to have had an inadvertent effect on the fund and the identity of its beneficiaries, and it was recognized that the trust ought to be governed by some express, modern, terms. The court construed the trust so as to identify who the beneficiaries were, holding that permitting a variation of the trust under article 47(1) to encompass all the employees of the parent company would be unacceptable without the consent of all the ascertained beneficiaries. The Royal Court also conferred on the trustees some modern administrative powers.

37. As to the second to fourth points in favour of the proposed amendment (consent not forthcoming from capable beneficiaries, whether because they are worried about tax implications of providing it, generally recalcitrant, or because it is not practically feasible

[12] A point made by the Chancery Bar Association in its response to the consultation: see http://bit.ly/2cm9TmS.

to find them and ask them), we can see that such grounds could justify a limited extension to the court's powers to vary trusts: for example, the current requirement of the consent of all capable beneficiaries could be made subject to the court providing that consent if it takes the view that the variation is in the interests of beneficiaries whose consent it does not have and either

37.1. It is unfeasible to find and contact all the relevant beneficiaries for their consent; or

37.2. The beneficiaries' consent has been sought and is being unreasonably withheld.

38. There are, however, three points which we consider merit thought before an extended power to vary trusts is introduced by legislation.

39. The first is human rights: the use of an extended power to vary trusts so as to alter beneficial entitlements could come into conflict with the human right not to be stripped of property rights. Jersey enacted the Human Rights (Jersey) Law 2000 which incorporates article 1 protocol 1 to the European Convention on Human Rights (the "**ECHR**"):

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

40. Whilst of cold comfort to a discretionary beneficiary, it could be said that altering beneficial interests under a discretionary trust does not conflict with Article 1 because a discretionary beneficiary has no "possession" (property); he has a mere hope that one day he might be selected for benefit but unless and until he is, he has no property and therefore he can have no complaint that his property has been expropriated if the beneficial interests under the trust are altered. Beneficiaries with fixed interests (e.g., life tenants) might well have a valid complaint that their human rights have been defied if their interests are varied without their consent.

41. The second is to what extent an extended power to vary would open the door to trust attackers, for example creditors and ex-spouses of beneficiaries. For example, Mrs Mubarak's path to a variation of the trust in *Re IMK Family Trust* [2008] JLR 250 in order to give effect to the order she had obtained from the English family court under the Matrimonial Causes Act 1973 might well be made far simpler: if an extended power of variation was invested in the Jersey court, the Jersey court could probably have ordered

the variation sought in that case rather than having to find that Mr Mubarak had, by a letter he sought to disown, consented to the variation.

42. The third is that the price of this added flexibility for trustees and current beneficiaries is a corresponding loss of certainty for the settlor: if legislation is introduced permitting the court to vary the beneficial interests under the trust, the settlor has no real ability to fix the trusts on which she wants to settle her assets.

(4) The Modern Approach: a "Beneficiaries' Charter"?

43. The foregoing consideration of the state of the law in England and Bermuda and the consultation in Jersey reveals a divergence between the jurisdictions, with the law in England setting its face against variations which alter beneficial entitlements, the law in Bermuda embracing such variations and Jersey considering to follow Bermuda's suit, but by putting it on the statute books.

44. But is there really such a divergence? Has there been a movement away from the strict approach in England? And if so, will that forward momentum continue? In short, is the tide changing in England too, and are the English courts more ready to treat the English legislation we have discussed as a "beneficiaries' charter"?

45. While the strict approach we summarized above describes the current state of the law in England, a very recent decision suggests that the English court is prepared to stretch the scope of the VTA 1958, and permit the interests of certain beneficiaries to be ignored or minimized for the sake of practicality and proportionality.

46. In *A v B* [2016] EWHC 340 (Ch); [2016] WTLR 745, Warren J made an order under the VTA 1958 to vary three trusts. The principle object of the arrangement was to extend the perpetuity periods of those trusts and there were several administrative variations too (see §§17-20). There was a large class of potential beneficiaries under the trusts, as well as a narrower class of beneficiaries who were members of the settlors' immediate family. All of the members of the narrower class had consented to the arrangement. As part of the arrangement, the trustees would partially release certain powers of appointment which release would deprive the members of the wider class ever from benefitting from the trusts, while ensuring that all members of the narrower class could benefit. The Judge sanctioned the arrangement without demanding agreement from the adult beneficiaries of the wider class and without considering whether each individual unborn and/or unascertained person would be benefitted by the arrangement.

47. The Judge was content to make the order because:

    47.1. the potential beneficiaries were "*very remote…, in effect, the issue of the T[estator's] father, their wives, husbands, widow[s], widowers… and also charities and possibly in relation to the 1983 fund, everyone else in the world*" (at §23);

    47.2. the effect of the partial release by the trustees of their powers meant that the wider class of beneficiaries ceased being beneficiaries prior to the arrangement taking effect and so the court did not have to consider their benefit (at §§26-28, following an earlier decision in *Christie Miller's Marriage Settlement Trusts* [1961] 1 WLR 462);

    47.3. the partial release was not a fraud on the trustees' power of release (at §§30-32);

    47.4. it was "*strongly arguable*" that the arrangement was for the benefit of the wider class since it preserved assets in the event that any of that class ever benefitted from the trusts (at §33);

    47.5. the "*nature of the trusts involved*" meant that it was "*highly unlikely*" that any of the wider class would ever benefit (at §21); and

    47.6. the arrangement was a "*sensible and practical approach*" (at §34) in circumstances where none of the parties had considered it "*sensible or proportionate*" (at §22) to involve the wider class of beneficiaries to constitute them as parties.

48. There are a number of important points arising from this judgment which merit consideration, and which suggest a new willingness to expand the jurisdiction conferred by the VTA 1958:

    48.1. The Judge appears to have stretched the VTA 1958 in favour of the applicant beneficiaries by approving an arrangement:

        48.1.1. without the consent of potential adult beneficiaries; and

        48.1.2. without considering fully the benefit of unborn and/or unascertained beneficiaries. Indeed, it is not clear that the Judge applied the test demanded by the VTA 1958 in this case, since he did not investigate how the wider class of beneficiaries would benefit financially or otherwise, save for his comment that the existence of some such benefit was "*strongly arguable*"

(and it should be noted that the Judge did not receive representations from anyone in the wider class – see §33).

48.2. The fact that the wider class of beneficiaries was remote was apparently a reason to ignore (or diminish the importance of considering) their individual benefit in favour of the benefit to the narrower class of beneficiaries. This appears to be the first time that the size and remoteness of a class of beneficiaries has been held to oust (or diminish) the statutory requirement to consider their interests pursuant to section 1(1) of the VTA 1958.

48.3. There is a tension between the notion that the trustees' partial release of powers was part of the arrangement, and the argument that it should be treated as occurring prior to the arrangement which was to be approved by the Judge, so as to remove his need to consider the benefit of the wider class. This appears to cut across the stipulation that the court should take the whole of the arrangement into consideration. The earlier decision in *Christie Miller* was a very short judgment of Wilberforce J without reasoning. Such a decision may not be able to bear the weight the Judge placed upon it.

48.4. It is not clear from the judgment why the "*nature of the trusts*" was such that the wider class of beneficiaries' benefit should be ignored. This may be considered to be an example of the court allowing the settlor's intentions (or the intentions of the trustees and the expectations of the narrower class of beneficiaries) to trump beneficiaries' entitlements.

48.5. While it will clearly be relevant to the exercise of the court's discretion that the arrangement is sensible, practical, and proportionate, it is striking that these factors appeared to dominate in this case. This may indicate an increased willingness to permit the interpretation or application of statutory law to be stretched to fit practical, sensible and proportionate steps by trustees and capable beneficiaries, perhaps even where the benefit to the primary class of beneficiaries is less clear.

49. Another feature of this decision is that the parties were anonymized. While the practice of anonymizing trust applications is common in Bermuda and elsewhere, the recent trend in England is not to allow it unless there are good reasons for it. In a recent case, *V v T & A* [2014] EWHC 3442 (Ch), Morgan J re-established that all hearings, including trust applications, should generally be in public and (with the Chancellor's authority) that judgments should only be anonymized where a party argues for anonymity or reporting

restrictions, and that the anonymization procedure should not be abused (at §30). The reasons why the judgment in *A v B* was anonymized are not revealed by the judgment. The anonymization of variations of trust where (as in *A v B*) consent of all capable beneficiaries is not required may well operate as a barrier to any such variations being challenged, as the relevant beneficiaries may not even know that they are (or were) beneficiaries of the trust.

50. In another recent case, *Pemberton v Pemberton,* decided by HHJ Hodge QC on 13th July 2016, HHJ Hodge may[13] have followed Warren J's suit in approving a tax beneficial variation of trust, to resettle a family estate on new discretionary trusts with modern administrative powers, extending the perpetuity period and widening the class of beneficiaries. Until the judgment is available, it is not possible to say whether this case is a simple application of the orthodox law, or a stretch of it. It is plain from the case name that the Judge did not follow Warren J's suit in anonymizing the judgment.

(5) The Future

51. Should this apparent move towards the court having a liberal power to vary trusts continue?

52. We think that careful consideration should be given to the dangers of such course, for example:

    52.1. The requirement for the court to consent on behalf of incapable beneficiaries operates as a salutary check on the manipulation of trusts by capable beneficiaries, and is necessary protection for those who cannot fend for themselves. Removing or diminishing that protection could simply empower the strong and obliterate the weak;

    52.2. An unlimited jurisdiction to re-fashion the trusts as and when the court, led by those who benefit from the re-fashioning, considers appropriate, could lead to settlors not being willing to settle their wealth in the first place (or settle it in the jurisdiction which have invested such wide powers of variation in its court);

    52.3. The protection to beneficiaries' rights afforded by the First Protocol to the ECHR needs to be considered;[14] and

[13] The judgment is not yet available
[14] Which also applies in England, as in Jersey.

52.4. It should be kept well in mind that the court will very rarely, if ever, have the benefit of adversarial argument on an application to re-fashion a trust. Trustees will wish to remain as neutral as possible (and the courts have been anxious to prevent trustees from taking a stance in these applications – see *Goulding v James*). The promoters of the scheme may well have used their influence within the family to pull others in line, or at least ensure their silence. The downsides of the proposed refashioning may not therefore always be visible to the court.

53. In those circumstances,

53.1. We do not think that stretching a jurisdiction which was intended to give trustees trust powers in relation to trust assets in order to allow the variation of beneficial entitlements under a trust is a safe course. Incapable beneficiaries need protection from the capacious. The court, denuded of adversarial argument on the matter, is in a poor position to judge the potential downsides of a proposed variation which affects beneficial interests, unless it is put in the position (as it is under the VTA 1958) of having to consider the matter from the perspective of incapable beneficiaries and provide their consent; but

53.2. We can see some room for a limited extension of the court's present power to vary, so that the court does have a power to vary where capable beneficiaries are refusing to consent or cannot sensibly be found and asked, but any such variation should have safeguards, including the safeguard of the court having to provide its consent on their behalf and therefore having to look at the proposed variation from their perspective and determine that it is in their interests.

54. We can only wait and see whether Ground CJ's judgment in *GH v KL* will be able to withstand the scrutiny of adversarial argument in another case and/or the Bermudian Court of Appeal; and whether Jersey will elect to invest in its court a wider power of variation than currently exists and, if so, what form such a power takes.

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8th September 2016