

# How the courts can vary the terms of a trust

## Anthony Grant

The laws relating to trusts change so quickly that all trust deeds should have a wide power of variation. But not all trusts deeds have this power, giving rise to difficulties.

Trustees who need to vary a trust must ask the court to use its inherent jurisdiction over trusts to permit a variation.

Hopefully, all the beneficiaries will agree to the variation but if some are unco-operative, s 125 of the Trusts Act 2019 empowers a court to waive the need for their consent. Section 125 is a new section, recommended by the Law Commission.

In the case of the *Candida Trust* [2024] NZHC 976, an order was sought to dispense with the consent of some very remote beneficiaries. If the trust were not varied, there would likely be an unwanted tax bill of more than \$3.3 million, which would have imposed a significant burden on the trust and its beneficiaries.

With the approval of the major beneficiaries, the trustees signed an extensive deed of variation in the hope that the court would approve it under its inherent jurisdiction.

## Comprehensive variations

The trustees decided that if they were going to vary the terms of the trust, they should not hold back but seek all the changes they might want. So they sought a comprehensive set of variations to bring the trust up to date with the requirements of the 2019 Trusts Act.

The deed of variation, approved by most of the beneficiaries, sought to make the following changes to the terms of the trust:

- extending the life of the trust to 125 years;
- including new beneficiaries;
- removing some remote people as contingent final beneficiaries;
- vesting in a person the power to appoint and remove trustees;
- empowering the trustees to appoint and remove discretionary beneficiaries;



Anthony Grant

The decision illustrates the different powers the court used to make the various orders

*Candida* illustrates how s 125, when combined with the inherent jurisdiction of the High Court to supervise trusts, can be used to overcome some of the constraints of the earlier law

- including a power to vary the deed of trust; and
- updating the trust deed to include provisions relating to default duties and other provisions in the Trusts Act 2019.

The court noted that the power to waive the consent of all beneficiaries was included in the 2019 Act on the Law Commission's recommendation that beneficiaries with "interests of a remote or negligible nature" should not be able to frustrate the making of variations that were "desired by beneficiaries with far more significant interests". [24]

Radich J held that it was appropriate to permit all the variations to the deed of trust and to dispense with the requirement to obtain the consent of the remote beneficiaries.

The decision is interesting in its illustration of the different powers the court used to make the various orders.

- The court used its inherent jurisdiction to declare that the trustees could sign an amended deed of trust which incorporated the changes in the deed of variation.
- It made an s 125 order, waiving the requirement that the remote beneficiaries should consent to the deed of variation.
- It made an order under its inherent jurisdiction to confirm that some grandchildren were not required to consent to the deed of variation.
- It made an order under s 81 of the Trusts Act 2019 that the applicants' costs should be paid in full from the trust's assets.

Section 125 of the Trusts Act was enacted to overcome the difficulty that existed with obtaining consent from remote beneficiaries. The *Candida* decision illustrates how s 125, when combined with the inherent jurisdiction of the High Court to supervise trusts, can be used to overcome some of the constraints of the earlier law.

As for its inherent jurisdiction, the court noted simply and constructively that "the Court is empowered to act effectively in the supervision and management of Trusts." [34] ■

**Anthony Grant is an Auckland barrister and trustee specialising in trust and estates ■**