VARIATION OF TRUSTS IN NEW SOUTH WALES

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In 1958 the United Kingdom legislature enacted the *Variation of Trusts Act*, 1958 in order to overcome the decision of the House of Lords in *Chapman* v. *Chapman*[1] in which it was held that the Chancery Court had no inherent jurisdiction to vary the beneficial interests under a trust instrument by way of sanction, on behalf of infants and possible after-born beneficiaries, of rearrangements of the trusts to secure an adventitious benefit.[2] Legislation comparable to the provisions of the United Kingdom Act now exists in all States other than New South Wales and Tasmania.[3]

In general terms, that legislation empowered the court to approve any arrangement varying or revoking any trust, or enlarging the powers of the trustees administering or managing any of the property subject to a trust, in cases involving four categories of beneficiaries. The first concerns persons having, directly or indirectly, an interest, whether vested or contingent, under

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1 [1954] A.C. 429.

2 See: Law Reform Commission Sixth Report 1957, Cmnd. 310.

3 Vic: *Trustee Act*, 1958 s.63A, S.A.: *Trustee Act*, 1936 s.59C, W.A.: *Trustees Act*, 1962-1978 1952 s.90, Qld: *Trusts Act*, 1973- s.95. The New South Wales position applies in the Australian Capital Territory by virtue of s.8 of the *Trustees Ordinance*, 1957. The legislation in these States is couched in similar terms save for South Australia where the empowering provisions are expressed more generally.

the trust who are incapable of assenting by reason of infancy or otherwise. The second concerns persons, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under a trust at a future date or upon the happening of a future event, being persons of a specified description or a member of a specified class of persons. The third concerns persons unborn.[4] The fourth concerns persons having a discretionary interest under protective trusts where the interest of the principal beneficiary has not failed or determined.[5]

Although the legislation cannot be employed to create new trusts,[6] it provides a mechanism for conferring generous administrative powers on trustees,[7] either for specific purposes or generally.[8]

In the absence of such general empowering provisions in the New South Wales Trustee Act, 1925 it is necessary, in a consideration of powers to vary trusts, to look to certain purpose specific provisions of that Act and to other developed principles whereunder the courts have found jurisdiction to intervene in a manner which amounts to, in effect, the authorisation of variation of the trusts.

The first method of achieving a variation of the provisions of a trust in New South Wales is to endeavour, so far as it is practicable, to arrange the administration of the trust in a manner that attracts the operation of the general empowering legislation in other states. This method is simple of statement and difficult of achievement, as a matter of law and possibly as a practical matter. The legal complications arise from two particular considerations. The first concerns the trusts to which the legislation in other states applies upon its proper construction. The second concerns the extent to which it is possible to change, after the creation of a trust, the law governing its administration.

In respect of the first consideration the assumption must be made for present purposes that the subject trust is not governed by the *lex fori* of those other States. Upon that basis the only method of attracting the legislation is to ensure that the place of administration of the trust is in that other State. In that event the Courts appear to accept that the legislation may be utilised, notwithstanding

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4 Cf. s.90(1)(c) of the W.A. Act which refers also to "unknown" persons.

5 For a discussion of this legislation see Ford and Lee - Principles of the Law of Trusts para. 1507-1523 and Jacobs' Law of Trusts in Australia (5th ed. 1986) para. 1707.

6 *Allen* v. *Distillers Co. (Biochemicals) Ltd.* [1974] QB 384, 394.

7 For example: powers of advancement: *In re Lister's Will Trusts* [1962] 1 WLR 1441, power to retain remuneration received or to be received by trustees who were directors of a company, shares in which were property of the trust: *In re Cooper's Settlement; Cooper* v. *Cooper* [1962] Ch. 826.

8 *In re Steed's Will Trusts* [1960] Ch. 407, 419.

that the proper law of the settlement is not the *lex fori*.[9] A more generous application of the United Kingdom legislation was given in *Re Paget's Settlement*,[10] a decision criticised by the authors of the fifth edition of Jacobs' Law of Trusts in Australia,[11] in which it was held that the jurisdiction to vary was unlimited. It would be a bold trustee who sought to apply in Victoria for a variation under that State's legislation of a trust administered in New South Wales and governed by the law of New South Wales. Therefore, in relation to the first matter, the principal objective in pursuit of the present methodology is to move the seat of administration to the State in which the empowering legislation exists.

That proposed movement raises the second consideration as to whether it is possible to change the law governing the administration of a trust. That is a question unanswered by direct authority in Australia. There has been, however, considerable debate by commentators dealing with the question of the proper law which governs the administration of a trust, which debate has a reflex upon the possibility of a change of that law. In an article written in 1953 Mr Valentine Latham suggested that the *lex situs* is the law governing administration of trusts.[12] Mr Justice Nygh in Conflict of Laws in Australia[13] suggests that the applicable law for the administration of trusts is the law of the place where the trust is to be administered, relying in part upon a number of authorities dealing with power to invest trust assets and the situation thereof.[14]

Professors Sykes and Pryles[15] offer a number of criticisms of the position taken by Mr Justice Nygh and suggest that the authorities relied upon do not substantiate the conclusion drawn. Those authors prefer the view that questions of trust administration should be governed by the proper law of the trust.[16] *In re Hewitt's Settlement; Hewitt* v. *Hewitt*[17] provides some support for that suggestion. In that case Eve J., having found from indications in the deed that a marriage settlement was governed by the law of Scotland, held that there was no power to appoint the Public Trustee under the English legislation as a new

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9 *In re Ker's Settlement Trusts* [1963] Ch.553. *Faye* v. *Faye* [1973] WAR 66, and see *Forsyth* v. *Forsyth* [1891] P.363, *In re Wilks; Keefer* v. *Wilks* [1935] Ch. 645, *Nunneley* v. *Nunneley* (1890) 15 P.D. 186.

10 [1965] 1 All. E.R. 58.

11 Para. 2813.

12 (1953) 6 Current Legal Problems 176, 185-194.

13 (4th ed. 1984) 455-456.

14 *In re Tyndall* [1913] SALR 39, *In the Will of Gibson* [1922] VLR 715, 719, *Re Kay; Mackinnon* v. *Stringer* [1927] VLR 66, 69.

15 Australian Private International Law (2nd ed. 1987) 660-661.

16 A view consistent with the position taken in the American Restatement, Second, Conflict of Laws s.272 and the Hague Convention on the Law Applicable to Trusts and on their Recognition articles 6, 7 and 8.

17 [1915] 1 Ch. 228.

trustee, a manner pertaining to the administration of the settlement. Justices Meagher and Gummow in Jacobs' Law of Trusts in Australia assert the view that, subject to express provision in the trust instrument, the law of administration is that of the seat of administration of the trustees.[18] They further suggest, with the support of two Canadian authorities,[19] that the law governing administration may change from time to time.[20] There is also some indirect support for that view to be found in *Fordyce* v. *Bridges*[21] and *Re Mitchener; Union Trustee of Australia Ltd.* v. *Attorney General for the Commonwealth (No.2)*.[22]

It is difficult to deny that Australian Courts have adopted the position that the law governing the powers of investment may be different from the law governing the creation of the trust, and that the law governing administration of certain assets of the trust may be determined by reference to the situation of those assets and the trustees.[23] In *In re Tyndall*[24] the South Australian Court applied the law of the place where the trustees and the relevant trust assets were situated to powers of investment in circumstances where the testator was domiciled in Ireland and the relevant trustees and assets were in South Australia. Mann J. in *In the Will of Gibson*[25] held that it was not a breach of trust for Victorian trustees to remit the testator's Victorian estate to England for investment in accordance with English law. The same judge in *Re Kay; Mackinnon* v. *Stringer*[26] held that Victorian trustees of a Victorian will could appoint New Zealand trustees who may be empowered under New Zealand legislation to make investments not permitted by Victorian law. Mayo J. in *In the Estate of Schulz; Playford* v. *University of Adelaide*[27] held in respect of a South Australian trust that the investment powers in respect of a gift to the University of Hamburg should be governed by the laws of Germany.

Notwithstanding the attack of Professors Sykes and Pryles it is impossible to read those cases on any basis other than that they accept, explicitly or implicitly,

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18 Para. 2808, 2809. The same view is taken in Morris - The Conflict of Laws (3rd ed. 1984) 424, and in Dicey and Morris - Conflict of Laws (10th ed. 1980) Rule 121.

19 *Re Oldfield (No.2)* [1949] 2 DLR 175, *Re Nanton* [1948] 2 WWR 113.

20 A view which has the support of Latham note 12 *supra* and semble Fox J. in *Permanent Trustee Co. (Canberra) Ltd.* v. *Permanent Trustee Co. of N.S.W. Ltd* (1969) 14 FLR 246, 252-253.

21 (1848) 2 Ph.497.

22 [1922] St.R. Qd.252.

23 See the cases cited in note 14, and *In the Estate of Schulz; Playford* v. *University of Adelaide* [1961] SALR 377 and *Augustus* v. *Permanent Trustee Company (Canberra) Limited* (1971) 124 CLR 245.

24 Note 14 *supra*.

25 Note 14 *supra*.

26 Note 14 *supra*.

27 Note 23 *supra*.

the proposition that the applicable law for certain aspects of administration may be determined by the place of administration. To that extent, at least, they stand contrary to *Hewitt's* case.[28] It is but a short step to suggest that the position in Australia more generally is that the governing law for all aspects of administration is to be determined by reference to the situation of the assets and the trustees.

Despite the absence of definitive authority in the area it is submitted that a change in the place of administration of a trust could effect a change in the law governing that administration. By that means the legislation of another State could be utilised.

For present purposes, the additional complications arising from the varying private international law rules applicable to trusts of moveables and immoveables and to testamentary and *inter vivos* trusts can be left unexplored.[29]

The second method of effecting a substantive variation of the provisions of a trust is founded upon the principle that all the beneficiaries, being sui juris and fully entitled, may direct the trustee to depart from the restrictions or dictates of the trust instrument and a trustee acting in accordance with such a direction will have protection.[30] Sir John Romilly in *Griffiths* v. *Porter*[31] expressed the position to be as follows:

> It has been justly observed that the Court will not visit a trustee with the consequences of a breach of trust, committed with the sanction or by the desire of the cestui que trust, or of one committed without the sanction or desire of the cestui que trust, if, when it comes to his knowledge, he has acquiesced and obtained the benefit of it for a long period.

That principle is analogous to, and founded upon the same basis as, the rule in the eponymous case of *Saunders* v. *Vautier*.[32] In many instances there are, of course, practical impediments to the adoption of this methodology of varying the terms of a trust by reason of the lack of capacity of a beneficiary[33] or the terms of the trust conferring something less than full entitlement on the beneficiaries.[34]

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28 Note 17 *supra*.

29 See: Morris note 18 *supra* 333-364, 382-408, Nygh note 13 *supra*. 413-417, 489-490, Jacobs note 5 *supra*, para. 2802-2812. The even more abstruse area of the distinction between matters of substantive validity and matters of administration provides further ground for debate in respect of the methodology presently being considered.

30 *Wharton* v. *Masterman* [1895] AC 186.

31 (1858) 25 Beav. 236, 241.

32 (1841) 4 Beav. 115.

33 See e.g. *Wilkinson* v. *Parry* (1828) 4 Russ. 272, 276.

34 See e.g. *Green* v. *Gascoyne* (1865) 4 De G.J. & S. 565, *Eyre* v. *Marsden* (1838) 2 Keen 564, *McDonald* v. *Bryce* (1838) 2 Keen 276, *Weatherall* v. *Thornburgh* (1878) 8 Ch.D.261.

The third method is derived from a jurisdiction in equity of uncertain origin to sanction investments not otherwise authorised by the trust instrument.[35] The Court of Appeal in *In re New*[36] authorised trustees of three separate trust investments to concur in a shareholders' scheme for the reconstruction of a prosperous company, shares in which had become vested in the trustees, as part of a proposal for the exchange of shares for more realisable shares and debentures in circumstances where the trustees, under two of the trusts, had no power to invest in shares or debentures. The evidence showed that the reconstruction would be advantageous to the beneficiaries under the trusts, including infants and unborn persons.

The principles governing the existence, or perhaps more accurately the exercise, of the jurisdiction were expressed to be as follows:

> It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the Court, has been constantly exercised, chiefly at chambers. Of course, the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character.[37]

In *In re Tollemache*[38] the Court was asked to sanction trustees of a will taking over a security of a description not authorised by the terms of the trust and refused to do so. The jurisdiction exercised in *In re New*[39] was described as extraordinary and to be invoked only upon the occurrence of an emergency in the course of the administration of an estate.[40]

In two earlier cases, *Re Crawshay; Dennis* v. *Crawshay*[41] and *In re Morrison; Morrison* v. *Morrison*,[42] judges at first instance held that no jurisdiction existed to sanction arrangements proposed by trustees which constituted an investment not authorised by the trust instrument.[43] The House of Lords in *Chapman* v. *Chapman*[44] made it clear that the jurisdiction exercised in *In re New*[45] was not to be extended.

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35 See *Brooke* v. *Lord Mostyn* (1864) 2 De G.J. & S.373, and the unreported cases referred to at [1901] 1 Ch. 701, 703.

36 [1901] 2 Ch.534.

37 [1901] 2 Ch. 534, 545.

38 [1903] 1 Ch. 955, on appeal from Kekewich J. [1903] 1 Ch. 457.

39 Note 36 *supra*.

40 [1903] 1 Ch. 955, 956.

41 (1888) 60 LT 357.

42 [1901] 1 Ch. 701.

43 Cf. *West of England and South Wales District Bank* v. *Murch* (1883) 23 Ch. D. 138.

44 Note 1 *supra*.

45 Note 36 *supra*.

So far as the position in Australia is concerned the existence of the jurisdiction was confirmed by Fullagar J., albeit in a dissenting judgment, in *Riddle* v. *Riddle*.[46] That jurisdiction was described as one exercisable only with great caution, and that the consideration of expediency was insufficient to justify its exercise.[47]

Although this inherent jurisdiction has now been largely if not entirely superceeded by the statutory provisions referred to below, the principles justifying its existence and governing its exercise may have a continuing relevance in terms of the approach of the Court to the construction of those statutory provisions.[48]

The fourth method of effecting a variation of the terms of a trust is applicable only to trusts for charitable purposes, and involves the implementation of a cy-pres scheme. An analysis of the principles governing cy-pres schemes and variations which such schemes effect is obviously beyond the scope of this article and can be found in the standard works.[49] The way in which a cy-pres scheme can be utilised as a legitimate means of, in effect, varying the terms of a trust for the purposes presently under consideration should, however, be noted. In the usual case the impracticality or impossibility is a matter outside the control of the trustee and "beneficiaries". In the method now being considered the impracticality or impossibility is orchestrated by the putative trustee.

In simplistic terms the requirements relevant for the exercise of the cy-pres jurisdiction reduce to three: the purpose for which the subject gift was made must be charitable, there must be a failure of the specified purpose in a legally cognisable sense and there must be disclosed a general charitable intention. Circumstances can and do exist in which the terms of or conditions attaching to charitable gifts are, for some reason, unacceptable to the nominated trustee and by means of the refusal of the trustee to accept the gift upon those terms or subject to those conditions there is brought about a failure of the purpose of the trust; having as its consequence the ordering of the administration of the trust cy-pres with the offending terms or conditions deleted.[50]

There are a number of bridges to be crossed before a variation under this methodology can be effected. First, the subject gift must, of course, be made for a charitable purpose. Secondly, the usual rule is that a trust will not fail for

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46 (1951-1952) 85 CLR 202, 227-228.

47 For statements of the general duty of the court to administer and not to vary trusts see: *Templeton* v. *Leviathan Pty Ltd.* (1921) 30 CLR 34, 56, 65, 73.

48 See *Riddle* v. *Riddle* (1951-1952) 85 CLR 202, 227-229, 235.

49 Jones - History of the Law of Charity, 1532-1827, Chesterman - Charities, Trusts and Social Welfare, Jacobs' Law of Trusts in Australia note 5 *supra* Ch.10, Ford and Lee - Principles of the Law of Trusts note 5 *supra* Ch.19.

50 In *In re Remnant's Settlement Trusts; Hooper* v. *Wenhaston* [1970] Ch. 560 Pennycuick J. invoked the *Variation of Trusts Act*, 1958 (discussed *supra*) to delete a forfeiture provision in a trust created under a will which operated upon beneficiaries practising Roman Catholicism.

want of a trustee.[51] Therefore the circumstances, including the nature of the gift and the criteria for the identification of beneficiaries, must be such that the identity of the trustee is indispensable to the trust.[52] It is only in that event that the necessary impracticality or impossibility will occur.[53]

Thirdly, it must be possible to discern the requisite general charitable intention. This is a matter of construction of the document creating the subject trust, and each case therefore falls to be considered on its own terms. There have been, however, a number of cases involving issues of the kind now being considered in which the Court has not been slow to find the existence of a general charitable intention; indeed it has been found almost as a matter of inference from the existence of the principal charitable purpose and the limiting condition.[54]

The fifth method of effecting a variation of trust is by the invocation of the Court's inherent power in certain limited and exceptional cases. The authors of the fifth edition of Jacobs' Law of Trusts in Australia[55] identify three classes of case in which the power to authorise deviations from the terms of the trust exists:

(a) to effect changes in the nature of an infant's property,[56]
(b) to allow maintenance out of income to beneficiaries where the testator or settlor had directed income to be accumulated,[57]
(c) to approve a compromise on behalf of infants and possible after-born beneficiaries.[58]

There are only two observations which need to be made concerning this aspect of the Court's inherent powers. First, the categories of case in which the inherent power is attracted are closed and confined to those listed above.[59] The

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51 *D'Adhemor* v. *Bertrand* (1865) 35 Beav. 19, *Re Lawton; Gartside* v. *Attorney-General* [1936] 3 All ER 378.

52 See *Re Packe; Saunders* v. *Attorney-General* [1918] 1 Ch. 437, *Royal North Shore Hospital of Sydney* v. *Attorney General (N.S.W.)* (1938) 60 CLR 396, *Re Stable Deceased the Legacy Club of Brisbane v. Marston* [1957] St. R. Qd.90.

53 Cf.: *In re Campden Charities* (1881) 18 Ch.D. 310, *In re Weir Hospital* [1910] 2 Ch. 124.

54 See: *In re Robinson; Wright* v. *Tugwell* [1923] 2 Ch. 332, *In re Dominion Students' Hall Trust* [1947] Ch. 183, *In re Lysaght* [1966] Ch. 191, *In re Woodhams* [1981] 1 WLR 493.

55 Para. 1705, and see Ford and Lee - Principles of the Law of Trusts note 5 *supra* para. 1504, and *Chapman* v. *Chapman* note 1 *supra* 451-461, 469.

56 See eg. *In re Jackson; Jackson* v. *Talbot* (1882) 21 Ch. D. 786, *Glover* v. *Barlow* (1831) 21 Ch. D. 788.

57 See eg. *In re Collins; Collins* v. *Collins* (1886) 32 Ch. D. 229, *Havelock* v. *Havelock; In re Allan* (1880) 17 Ch. D. 807.

58 See eg. *In re Lucas; Bethune* v. *Lucas* [1947] 1 Ch. 558, *In re Duke of Leeds and the Coal Acts, 1938 to 1943* [1947] 1 Ch. 525.

59 See *In re T's Settlement Trusts* [1964] Ch. 158, *Allen* v. *Distillers Co. (Biochemicals) Ltd.* [1974] 1 QB 384, *Mason* v. *Farbrother* [1983] 2 All E.R. 1078.

existence of those categories provides no basis for an assertion that the Court has any more general jurisdiction in circumstances where every person who is sui juris assents and the change is shown to be for the benefit of infants and after-born beneficiaries.[60] Secondly, as observed by the authors of Jacobs' Law of Trusts in Australia[61] the statutory provisions now in force have, for practical purposes, largely superceeded this aspect of the inherent jurisdiction.

The sixth method of achieving a variation from the terms of a trust is through the utilisation of provisions contained in the *Trustee Act*, 1925. The principal enabling powers are contained in s.81. That section authorises the Court to confer upon trustees the necessary power to effect transactions, including sale, lease, mortgage, surrender, release, purchase, investment, acquisition and expenditure, which in the opinion of the Court are expedient in circumstances where in the management and administration of property such transactions cannot be effected by trustees by reason of the absence of power. The conferral of power may be "on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries" as the Court sees fit.

Cases in which that section, or its equivalent in other jurisdictions, has been utilised are legion.[62] The principal constraint in or requirement of the section is that the Court must conclude that the conferral of the power is expedient: "a criteria of the widest and most flexible kind".[63]

For the purposes of the present discussion a number of further restrictions upon the circumstances in which the jurisdiction may be involved should be recognised. First, the test of expediency requires the Court to consider the interests of the "trust as a whole"[64] or of "all the beneficiaries under the trust".[65] It is easy to foresee circumstances in which this requirement may go unfulfilled in an application the object of which is to achieve a variation from the strict terms of the subject trust.[66]

Secondly, the focus of the section is upon purely administration powers.[67] It has been held in *Chapman* v. *Chapman* [68] that the Court had no power to vary

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60 *Chapman* v. *Chapman* note 1 *supra* 450-462.

61 Para. 1706.

62 See eg. the cases cited in Jacobs' Law of Trusts in Australia note 5 *supra* para. 1706, and in Ford and Lee - Principles of the Law of Trusts note 5 *supra* para 1204.

63 *Riddle* v. *Riddle* note 48 *supra* 214 per Dixon J.

64 *In re Craven's Estate; Lloyds Bank* v. *Cockburn (No.2)* [1937] 1 Ch. 431, 436 per Farwell J.

65 *In re Earl of Stafford deceased; Royal Bank of Scotland Ltd.* v. *Byng* [1980] 1 Ch. 28, 45 per Buckley L.J., and see *Riddle* v. *Riddle* note 48 *supra*.

66 For example, the application in *In re Craven's Estate* note 64 *supra* was rejected on this basis.

67 *In re Downshire Settled Estates; Marquess of Downshire* v. *Royal Bank of Scotland* [1953] 1 Ch. 218.

68 Note 1 *supra*.

beneficial interests under a trust. The New South Wales section made, however, specific reference to adjustment of the respective rights of beneficiaries. The inclusion of that reference in the section has, however, been given no substantive operation for presently relevant purposes by the Courts. In *Ku-Ring-Gai Municipal Council* v. *Attorney-General*[69] the Full Court held that s.81 did not authorise the Court to make an order the effect of which would be to change the terms of a trust under which the Council held certain land, by the deletion of a condition that no games be played on the land on Sundays which may materially interfere with the use and enjoyment thereof on a Sunday. The purpose was foreign to the management and administration of the property held on trust.

Further, in *Perpetual Trustee Co. Ltd.* v. *Godsall*[70] Rath J. rejected an attempt to invoke s.81 in a manner which would have amounted to a substantive change in the trusts created by the testator. His Honour said at 795:

> ... powers, whether conferred by the instrument of trust or by s.81, are conferred upon trustees to facilitate and not to subvert the beneficial disposition in the trust instrument. Neither the words in s.81(1) ("adjustment of the respective rights of the beneficiaries") nor the words in s.81(2) ("whether by extension or otherwise of the trusts ... conferred on the trustees by the trust instrument") should be taken as authorising the court to increase, or decrease, the interests of beneficiaries. "Adjustment" refers to the altered condition of the trust property as a result of conferring or exercise of the new power. The beneficiaries' rights are to be accommodated to the new situation; but the court cannot create a new set of beneficial rights. In s.81(2) the word "trusts" does not, in my view, refer to beneficial dispositions.

The position therefore is that whilst s.81 may be invoked to vary, in effect, the provisions of a trust in terms of the facultative powers for management or administration it cannot be availed of to produce substantive changes to the provisions of or beneficial interests under the trusts.[71]

Finally, mention should be made of a series of specific provisions in the *Trustee Act*, 1925 which facilitate deviations from the strict terms of certain trusts. Under s.82(1) the Court may authorise a trustee of freehold or leasehold land to pay or apply capital of the trust for the purposes of effecting improvements, repairs and certain replacements. Incidental powers of borrowing may also be conferred. Section 82A empowers trustees to expend specified amounts for the purposes identified in s.82(1), without authorisation of the Court, where the trustee considers the expenditure to be expedient in the interests of all persons beneficially interested in the land.

Pursuant to s.84 the Court may authorise a trustee of property held in trust for a minor to sell the whole or part of the property. The Court may confer on the trustee such powers as are necessary or proper for that purpose. The section

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69 (1955) 55 SR (NSW) 65.

70 [1979] 2 NSWLR 785.

71 It was held in *In re Royal Society's Charitable Trusts* [1956] 1 Ch. 87 that the United Kingdom equivalent of s.81 could not be used to implement a cy-pres scheme.

applies whether the trust is for the minor solely or together with any other person and whether the interest of the minor is or is not in possession.

For reasons which are not entirely obvious the New South Wales legislature has not followed the examples of the United Kingdom and the other States on powers to vary trusts. This has left New South Wales courts with limited jurisdiction and has left trustees in that State, who have legitimate reasons to seek a variation to the terms of trusts, with a poorly defined path to a solution. It is not difficult to imagine the reluctance of a trustee in that position to venture upon certain of the methodologies referred to above, should they otherwise be applicable to his trust. It is less difficult to image a trustee in that position accepting that his options are sterile.