KEY POINTS

What is the issue?

The *Trusts Act 2019* came into force on 30 January 2021, codifying and updating the existing trust law in New Zealand.

What does it mean for me?

Practitioners should understand the law that applies to the termination and variation of trusts in New Zealand, so that they can make such application if needed.

What can I take away?

An understanding of the application of each section and the differences between them.

Testing the waters

POLINA KOZLOVA ON NEW ZEALAND'S NEW TRUST LAW AND THE COURTS' ABILITY TO APPROVE VARIATIONS THAT MAY BE DETRIMENTAL TO BENEFICIARIES

The *Trusts Act 2019* (the Act), which codified much of the existing trust law in New Zealand, came into effect on 30 January 2021. Almost two years later, we have seen several cases testing the unknown waters of the Act, some of which are very relevant to the practitioners who regularly advise their clients on the effect of the Act on their trusts and the options available to them. One interesting aspect of the Act is the ability of the courts to approve variations to trust deeds that may be detrimental to beneficiaries, an ability that was not present in the *Trustee Act 1956* (the 1956 Act).

The relevant sections are ss.121, 122, 124 and 125 of the Act. Section 121 introduced statutory recognition of the *Saunders* v *Vautier* rule.[1] Section 122 recognises the rule of equity where all *sui juris* beneficiaries who together hold all the beneficial interest may vary the trust or consent to its resettlement by unanimous consent of the beneficiaries and the trustee.

Section 124 provides that the court may grant the necessary beneficiary consent where a beneficiary lacks capacity; or is a person who may acquire a beneficial interest at a future date or on the happening of a future event; or is a future person who may acquire a beneficial interest. Section 125 is new and empowers the court to waive the requirement that a beneficiary consent to a termination, variation or resettlement of a trust.

Three recent decisions that involved applications under ss.122, 124 and 125 are considered below.

TALIJANCICH v *TALIJANCICH*

In the case of *Talijancich* v *Talijancich*,[2] the High Court of New Zealand (the Court) was tasked with the interpretation of ss.122, 124 and 125 of the Act to determine whether a separate application under s.124 had to be made for the specific class of beneficiaries or whether s.125 applied in respect of all beneficiaries, and so an application under s.124 would be unnecessary.

Not all beneficiaries had given consent and others were either incapable or were not yet born. The variations sought included removing the requirement for a majority of independent professional trustees, appointing the settlor's son's wife as trustee, permitting the trustees to distribute to other trusts of which any beneficiary was also a trustee, and providing a wider power of resettlement, among others.

Polina Kozlova TEP *is a Senior Solicitor at Martelli McKegg Lawyers, New Zealand*

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The Court confirmed that under s.125, the court may waive the requirement that a beneficiary consent to a variation. The effect of s.125 is that where the court waives consent of some or all of the beneficiaries, it is the trustees who may proceed and carry out the variations under s.122. The position under s.124, however, is that it is the court that makes the order varying the trust terms rather than the trustees. This provides greater protection to the beneficiaries contemplated by s.124, being those who lack capacity, are contingent or are not yet born.

The minor and future primary beneficiaries and the contingent beneficiaries fell under the jurisdiction of s.124 and the Court therefore needed to make an order under this section. It is widely agreed that, in practice, there is not much to this application as the tests under ss.124–125 are virtually the same.

GAVIN v *GAVIN*

Gavin v *Gavin* is important as it confirmed that the court has the power to approve variations that are detrimental to the beneficiaries' interests.[3] Under the 1956 Act, the court could not approve variations that were detrimental to the beneficiaries' interests, whereas under s.124 of the Act, detriment is a factor to be considered by the court in the exercise of its discretion but is not a determinative factor.

> '*Gavin* v *Gavin* is important as it confirmed that the court has the power to approve variations that are detrimental to the beneficiaries interests'

In this case, the Court's consent was sought on behalf of minor and future unborn beneficiaries. The applications were part of a family settlement that was contingent on the granting of the orders sought. The trusts were settled by various family members. Some of the trusts in question were mirror trusts, which meant that the siblings were also beneficiaries of each other's trusts.

There was a falling out between one of the parents and the siblings that resulted in one of them bringing proceedings against the other sibling and his then co-trustee, as trustees. A settlement was reached between the parties, which required application for variations under s.124 in order to give effect to the settlement. The trustees and adult beneficiaries of the trusts in question supported and provided consent to the variations. However, an approval was needed under s.124 on behalf of the minor and unborn beneficiaries.

The importance of this case is that it accepted and approved a variation that was detrimental to a beneficiary by removing charitable beneficiaries as beneficiaries under the trust deeds altogether. The Court's reasoning for this decision was that it was appropriate in the circumstances to consent to variations on behalf of this class, having regard to the wider settlement agreed between all parties. The Court noted that the charities' interests were remote and their removal had no practical impact on any particular charity because it was unlikely to ever receive any distribution. This, weighted against the family's harmony, which would be achieved by this decision, meant that the family's interests prevailed over the charities' (unlikely) future interest.

This is a good example of how the Act can be effectively utilised to avoid a family litigation that could otherwise have lasted for years. It is expected that clients and practitioners will make good use of the Act to effect trust restructures, which would not have been as straightforward under the 1956 Act.

The decision in *Gavin* was subsequently followed in *Re Hugh Green Trusts* and,[4] more recently, in *Re Jury*.[5]

RE JURY

In *Re Jury*, applications were made under s.124 of the Act to vary trust deeds to extend the vesting day of each of the mirror trusts, which were set up with a 30-year vesting-day period. Without such variation, the only option would be to resettle the trusts, which would incur a significant tax liability and would result in the assets being exposed to creditor claims due to the clawback provisions under the *Insolvency Act 1986*, *Companies Act 1993* and *Property Law Act 2007*.

The variations sought included, among others, an extension of the vesting day to 80 years from the trust formation date, an addition of a power to appoint new trustees and remove existing trustees, exclusion of more remote members of the family as beneficiaries, the extension of the power relating to distributions to beneficiaries, the transfer of the power of appointment to the settlor's spouse on the settlor's death, and allowing the survivor to become a discretionary beneficiary of the trust they settled on the death of the first of the settlors.

The Court concluded that the variations sought would not reduce or remove a vested interest in the trust property. In fact, it was the opposite; they would increase the likelihood of the minors or their parents receiving trust property on the vesting day. Furthermore, the Court stated that any detriment to minor or unborn beneficiaries was minimal and the benefits, in the Court's view, significantly outweighed any detriment. The Court approved the variation and consented on behalf of the minor and unborn beneficiaries. It is notable that the Court's decision came out a few days before the trusts were to vest.

CONCLUSION

Although it was possible to apply to the court for variations to a trust under the 1956 Act, it seems to be the general feedback of the New Zealand legal profession that the 1956 Act lacked the flexibility present in the Act. This is particularly so in relation to matters where variations sought are detrimental to beneficiaries.

It is expected that with the Act, more and more cases will come before the courts that seek variations detrimental to some beneficiaries.

#CONTENTIOUS TRUSTS AND ESTATES #LEGISLATION #NEW ZEALAND #TRUSTS

1 [1841] EWHC J82 **2** [2021] NZHC 753 **3** [2021] NZHC 550 **4** [2021] NZHC 2184 **5** [2022] NZHC 568