REWRITING TRUSTS FOR INFANTS

IN RE GRAY, [1956] N.Z.L.R. 764.

In the execution of trusts circumstances must inevitably arise in which a strict application of the terms of the trust instrument will be detrimental to the beneficiaries. This presents no difficulties if all beneficiaries are in existence and under no disability. Specific performance of the trust may then be dispensed with and the trust modified or extinguished without reference to the wishes of the settlor or the trustees. When there are beneficiaries whose consent cannot be obtained because they are not in existence, or not sui juris, the sanction of the Court to any deviation from the strict terms of a settlement must be procured. The powers of the Court to approve such arrangements are given by its inherent equitable jurisdiction in the execution of trusts and by s. 33 of the Administration Act 1952 and s. 64 of the Trustee Act 1956.

The recent New Zealand Supreme Court decision of In re Gray, [1956] N.Z.L.R. 764 is the first reported New Zealand case on the powers of the Court to vary trusts in its inherent and statutory jurisdictions since these two jurisdictions were distinguished and defined in two recent English decisions: In re Downshire's Settled Estates, [1953] Ch. 218, C.A., and on appeal, Chapman v. Chapman, [1954] A.C. 429, H.L. In Gray's case (supra) the Court was asked to approve on behalf of an infant beneficiary a scheme whereby the trust property would be managed by a partnership consisting of one beneficiary and the trustee, and money would be raised on the security of the property. Gresson J. had no hesitation in approving the scheme under the statutory jurisdiction. The importance of the decision lay not in its application of the equitable doctrines and statutory provisions governing the Court's jurisdictions, but in the fact that it was the first indication through a reported decision of the extent to which the limitations imposed by these recent English cases would be applied in New Zealand. Gresson J. discussed In re Downshire (supra) and Chapman v. Chapman

(supra). He concluded (pp. 768, 769) that the powers of the Court in the light of these decisions were no more limited than had hitherto been supposed, and that orders under both the inherent and statutory jurisdictions transgressing these limits had been made in the past. His discussion of the cases, however, established that applications would have to be brought within the narrowly defined limits of each jurisdiction in order to be successful. It would not be sufficient merely to prove expediency and obtain the consent of adult beneficiaries.

The inherent jurisdiction of the Court to modify or vary trusts was considered until recently to be almost superseded by the statutory provisions: Garrow and Henderson, Law of Trusts and Trustees (2nd ed. 1953), 213; Godefroi, Trusts and Trustees (5th ed. 1927), 716. The House of Lords in Chapman v. Chapman (supra), however, reemphasized the importance of the jurisdiction and defined its scope. The House approved as the major proposition on the jurisdiction of the Court to modify or vary trusts, the refusal of Farwell J. "to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial": Re Walker, [1901] 1 Ch. 879, 885. To this rule Chancery had evolved four exceptions which in the opinion of the House formed the limits of the Court's inherent power to sanction deviations from the trust instrument. These exceptions are the powers of the Court to sanction arrangements on behalf of infants and possible afterborn beneficiaries—

(a) Changing the nature of an infant's property from real to personal estate and vice versa;
(b) Allowing maintenance for an infant beneficiary out of income directed to be accumulated;
(c) Allowing trustees of settled property to enter into a business transaction not authorized by the settlement, in cases of emergency, to prevent grave loss or injury to the property or the beneficiaries, thus "salvaging" the trust property; and
(d) Involving a compromise or agreement relating to disputed rights arising from the trust instrument and deviating from its terms.

In In re Downshire (supra) Lord Justice Denning maintained (p. 275) that previous decisions of the Chancery Courts had imposed restrictions on their jurisdiction many of which had subsequently to be removed by the legislature. He considered (p. 269) that the inherent jurisdiction should be unlimited provided only that—

(a) all persons who were sui juris consented; and
(b) the modification or variation was clearly shown to be for the benefit of all persons interested who were not sui juris (including unborn persons).

Despite some measure of support for this contention among the many conflicting decisions on the jurisdiction of the Court the House of Lords rejected it emphatically.

The statutory jurisdiction in New Zealand is contained in the Administration and Trustee Acts. Section 33 of the Administration Act 1952 provides:

> The administrator of an estate or any person beneficially interested therein may from time to time apply to the Court, which may, upon such terms as it thinks fit, make any such orders and directions as it thinks proper with respect to—
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> (a) The time and mode of sale or lease of any estate belonging to the estate administered:
> (b) The maintenance or advancement or otherwise of minors out of their shares or interests in the estate:
> (c) The expediency or mode of effecting a partition or the mortgaging of any such real estate:
> (d) The administration of the estate for the greatest advantage of all persons interested . . . .

The section does not prima facie envisage any departure from the terms of the trust instrument except in so far as it is included in the wide scope given to the operation of clause (d). The powers given by clauses (a) and (c), it is submitted, are primarily procedural since they refer to powers already given by ss. 14, 16 and 19 of the

Act. Clause (b) merely enacts a power already available to the Court in its inherent jurisdiction and expanded by ss. 41 and 42 of the Trustee Act 1956. In so far as the section does permit deviations from the strict letter of the trust it has only been pleaded successfully in cases where unforeseen circumstances of emergency have been made out. Although Chapman J. in Quill v. Hall (1908), 27 N.Z.L.R. 545, 564, expressed the view that the section conferred a power to authorize transactions without reference to exceptional emergency, later cases did not uphold his opinion. In McCrostie v. Quinn, [1927] G.L.R. 37, 39, Sim J. considered that the jurisdiction given by the equivalent section in the Administration Act 1908 should not be exercised to sanction any deviation from the strict terms of the trust unless the case is one which comes within the rule in In re New, [1901] 2 Ch. 534. This decision, which did much to clarify the scope of the Court's inherent jurisdiction to sanction deviations from the trust instrument, held that the Court has jurisdiction in cases of emergency not foreseen or anticipated by the author of the trust to sanction deviations essential for the preservation of the estate. This rule is now embodied in the Court's inherent jurisdiction as the third exception above. Both Quill v. Hall (supra) and McCrostie v. Quinn (supra) were considered in Hatrick v. Bain, [1930] N.Z.L.R. 490, 494, in which Sir Michael Myers C.J. held that although the section confers powers as extensive as stated in Quill v. Hall (supra) they would only be exercised in cases of emergency. It is submitted, then, that s. 33 of the Administration Act 1952 does not extend the inherent jurisdiction of the Court to modify and vary trusts.

Section 64 of the Trustee Act 1956 which, with the exception of subsection (2), is almost identical with s. 57 of the Trustee Act, 1925 (U.K.), provides (subsection (1)) that ". . . where in the management or administration of any property vested in a trustee, any sale, lease, mortgage . . . or other transaction, is in the opinion of the Court expedient, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court, or the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument, if any, or by law, the

Court may by order confer upon the trustee . . . the necessary power for the purpose . . . ."

The English Court of Appeal examined and defined the scope of the English statutory provisions in In re Downshire (supra). The Court concluded (p. 119) that the object of the section was to authorize dealings with trust property which the Court might have felt itself unable to sanction under the inherent jurisdiction either because no "emergency" had arisen or the situation was such that it could reasonably have been foreseen by the settlor; but that it was no part of the legislative aim to disturb the rule that the Court will not rewrite a trust, nor was it intended to add to such exceptions to that rule as had already found their way into the inherent jurisdiction. From this decision and from the wording of the section, the limitations on its operation can be summarized as follows: the proposed variation must—

(i) Be in the management or administration of the trust property;

(ii) Be undertaken by the person in whom the control of the property is vested, i.e. the trustee;

(iii) Not eliminate vary or remould dispositions or beneficial interests declared by the trust instrument so as to constitute a rewriting of the trust;

(iv) Be in the interest of the trust as a whole and not of one beneficiary only; and

(v) Not contradict any express provision in the instrument: Trustee Act 1956, s. 2 (4) and (5).

As it was admitted in In re Downshire (supra, at p. 119) that orders transgressing these limits had in the past been made, cases in England prior to 1952 cannot be considered reliable authorities. The words "management and administration" as used in the first limitation were considered in In re Downshire to apply to "managerial supervision and control of trust property". A scheme, for example, whereby a settlor proposed to surrender his life interest in half the trust funds to accelerate the interests in reversion was considered not a disposition or transaction in the management or administration of property vested in a trustee in In re Downshire.

In regard to the third limitation orders have been made authorizing the trustee to purchase the interest of the life tenant, pay off mortgages on the reversionary interests, and divide the remaining assets among the reversioners (Re Forster's Settlement, Michelmore v. Byatt, [1954] 1 W.L.R. 1450). The sale by the trustees of a reversionary interest which was the subject of the settlement in Re Cockerell's Settlement Trusts, [1956] Ch. 372 was also authorized. The second of these instances was merely a sale of trust property and did not alter any of the trusts under the settlement. It is submitted that Forster's case (supra) involved an alteration of the life tenant's beneficial interest and is therefore not reconcilable with the limitations imposed by the Court of Appeal in In re Downshire (supra) on the operation of the section. Harman J. in Forster's case (supra) admitted that he entertained doubts about the Court's jurisdiction to sanction the arrangement but justified it as a special case since the Court had already authorized four transactions in the same settlement affecting the beneficial interests of the remaindermen before In re Downshire (supra). But similar proposed rearrangements were refused by Upjohn J. in Re Heyworth's Contingent Reversionary Interest, [1956] Ch. 364, and it is submitted that Forster's case (supra) would not now be followed.

The substitution of a modern investment clause in a settlement to allow investment of capital moneys in equities was refused in Re Powell-Cotton's Re-Settlement, Henniker-Major v. Powell-Cotton, [1956] 1 W.L.R. 23 as involving a rewriting of the trust, but an extension of the investing powers under a settlement was approved in Re Brassey's Settlement, Barclays Bank Ltd. v. Brassey, [1955] 1 W.L.R. 192.

Despite the new powers conferred by these statutory provisions the Court's power to approve alterations of trusts on behalf of infants and unborn persons was still severely limited by this rule that the Court will not rewrite a trust. In almost every case where alterations had been rejected, despite their proven benefit to those not in esse or sui juris, judges have expressed their regret that jurisdiction to approve the scheme was not given

them. Apparently the only reason for the imposition of this restriction was that suggested by Lord Morton in Chapman v. Chapman (supra), that where the deviation was to avoid taxation, as this was and the majority of such applications are, the Court would be embarrassed if the legislature countered the scheme by altering taxation laws to prevent the avoidance. Thus a most undignified game of chess would develop. The prevention of such embarrassment is, however, small compensation to the infants whose inheritance is threatened with serious depletion from taxation. In any event, the argument is not valid in the case of proposed deviations which involve the rearrangement of beneficial interests but are intended to benefit those under age, not by avoiding taxation, but in some other manner. Moreover, deviations with an identical object but which did not involve any alteration of the beneficial interests under the trusts have been approved in In Re Downshire (supra) and Re Cockerell (supra). In the face of such an authority as Chapman v. Chapman, however, Courts in England and New Zealand had to withhold their assistance from infants and unborn beneficiaries despite the resultant detriment to them. This is still the position in England.

In New Zealand, however, s. 64 (2) of the Trustee Act 1956 has effectively remedied this unfortunate lack of jurisdiction. This subsection, which is a completely new provision and has no counterpart in the English statute or in the forerunner of s. 64 (the Statutes Amendment Act 1936, s. 81), provides that where it is desired to rearrange the trusts to which any property is subject but the rearrangement cannot be effected because those who take or may take any beneficial interest under the trusts include unborn or unascertained or unknown persons or persons under a disability the Court may approve the rearrangement on behalf of those persons if it is not to their detriment.

Although there have been no reported decisions on the effect of this subsection on the limitations on the Court's jurisdiction under s. 64 (1), it is apparent that its main purpose is to enable a rewriting of the trust where the proposed rearrangement is beneficial to those interested under it. This far-reaching reform completely

abrogates in New Zealand the restriction imposed by Chapman v. Chapman (supra), In re Downshire (supra) and In re Gray (supra) on the powers of the Court to modify and vary trusts under s. 64 (1) of the Trustee Act 1956.

The restrictions that remain closely approximate to those proposed by Denning L.J. in his dissenting judgment in In re Downshire (supra). The sanction of the Court to a proposed deviation from the trust instrument can now be obtained under s. 64 of the Trustee Act 1956 if—

(i) All adult beneficiaries consent; and
(ii) The rearrangement is not to the detriment of the infants or unborn persons interested; and
(iii) The rearrangement does not contradict any express provision in the trust instrument.

The Courts in New Zealand, then, may under this provision assist infants and unborn beneficiaries unrestricted by Chapman v. Chapman (supra) which will continue to deny them relief in England if to do so would involve rewriting the trust.