

WHY DOES SINGAPORE NOT HAVE A VARIATION OF TRUSTS ACT?

This article examines the trust as a tool for the transmission of wealth and discusses the duties of trustees and the rules by which they are bound. These restrictions give rise to some practical difficulties, especially in cases where the trust is of a long duration, or where the trustee wishes to undertake investments to enhance the value of trust property. The scope and operation of the English Variation of Trusts Act 1958 will be explored. It will be shown that the 1958 Act directly addresses these difficulties, but at the same time also requires the court to make difficult decisions in particular types of situations. In view of the fact that there is no equivalent to the 1958 Act in Singapore, this article discusses the various practical and legal steps that may be taken as alternatives. It will be concluded that trustees in Singapore are handicapped to some extent because the court does not have a general power to sanction variation of trusts, but this can be made up for with certain legal workarounds.

Michael **HWANG** SC*
BCL, MA (Oxon);
Barrister, Chartered Arbitrator.

Nicholas **THIO**
LLB (Hons) (UCL);
Associate, Michael Hwang Chambers.

I. What is a trust? – Trusts as a tool for wealth management

1 What is a trust? A trust exists when someone (“the settlor”) gives away and entrusts his property to another person to manage (“the trustee”). The trustee therefore becomes the legal owner of the property entrusted to him, but remains under a duty to hold the property for the benefit of certain individuals (“the beneficiaries”). Although this results in a split in the ownership of the trust property between the legal owner and the beneficial owners, equity imposes a fiduciary duty on the trustee to hold the property for the beneficiaries and in accordance with the trust deed.

* This article is based on a presentation given by the first author on 22 June 2010 at the inaugural STEP (Society of Trust & Estate Practitioners) Singapore Symposium 2010.

2 Why set up a trust? For the purposes of wealth management, the trust is an invaluable instrument. It has two principal uses: (a) the transmission of wealth and (b) the protection of assets. In respect of (a), a trust may be created in cases where one feels that an outright lifetime gift is not appropriate. Setting up a trust makes it possible to make a gift with conditions based on the client's wishes or the beneficiary's circumstances. In the case of discretionary trusts, letters of wishes providing guidelines for dealing with the trust are typically drawn up based on the age and circumstances of the intended beneficiaries. In respect of (b), the assets settled under a trust are free from claims of the settlor's creditors (or even claims against the discretionary beneficiaries) unless the trust was set up either to defraud them or within a certain restricted period before he becomes insolvent. If, however, a beneficiary has a fixed interest like a life interest or an interest in capital after the death of the life tenant, that equitable proprietary interest is available to satisfy claims of the beneficiary's creditors.

II. Duty of a trustee to obey the directions of the settlement

3 Theoretically, the most important of all the rules relating to the duties of trustees is that they must not act beyond the limits of the powers conferred upon them by law or the terms of the trust instrument.¹ Trustees must comply with the terms of the settlement out of respect for the settlor's directions. The corollary of this is that, once a trust is completely constituted, it is too late for the settlor to revoke or otherwise vary the trust. This is in the interests of certainty of title and security of title.²

4 In practice, difficulties arise in cases where a trust is of a long duration, and changes in circumstances make it difficult or inexpedient to continue the trust in the manner initially directed by the settlor. The duty of a trustee to obey the directions of the settlement absolutely³ may tie his hands when dealing with situations that the settlor could not have foreseen. This is especially so in the case of a trust set up for the purpose of transmission of wealth to the next generation, where the trust generally outlives the settlor.

1 P Matthews & C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (D Hayton ed) (LexisNexis Butterworths, 17th Ed, 2007) at p 614.

2 D Tan, K Dharmananda, H W Tang, *Halsbury's Laws of Singapore* vol 9(2) "Equity and Trusts" (Y L Tan ed) (LexisNexis Singapore, 2003) at para 110.509. Note, however, that the right to revoke may be reserved at inception.

3 This rule is subject to certain limited exceptions (eg, where power to vary trust conferred on stipulated persons and the rule in *Saunders v Vautier* [1841] EWHC Ch J82).

5 Consider the following Scenario A,⁴ where an irresponsible, immature and young beneficiary is entitled to a vested interest in income or in capital on attaining the age of majority, which she would reach in a few months' time. The trustee may think it fit to propose that her interest in income should be varied to become a protected life interest⁵ instead or that her interest in capital should be deferred⁶ (eg, to a later age of 25 or 30 years). Such a situation creates a real practical difficulty and indeed puts the trustee in a dilemma, because he would ordinarily be bound to obey the directions of the settlement. Worryingly, there would be no safeguard against a spendthrift beneficiary squandering her assets in the absence of the trustee's power to vary the trust.

6 Difficulties also sometimes arise in cases of older long-term trusts, particularly fixed trusts with life interests as opposed to discretionary trusts. Modern conditions require that the trustee undertakes investments to enhance the value of the trust property and often, as modern portfolio theory shows, a better return is produced by seeking capital growth rather than income yield. It was once rightly said, when "trustee investments" were a very restricted class of safe investments, that if "the capital can only be invested in trustee investments, heavy losses may be suffered in a period of inflation; if all the income is payable to one beneficiary, it may be largely absorbed by tax; if capital cannot be paid to beneficiaries but must be retained until the death of a life tenant, it may be largely swallowed up in death duties while some member of the family who has urgent need of capital for some reasonable purpose cannot be paid it".⁷ Trustee investments are, however, now a very wide class, usually comprising any investments that an absolute beneficial owner could invest in, whether by virtue of statute,⁸ express provisions in the trust instrument, by virtue of an investment clause that may be inserted into the trust instrument by the court under s 56 of the Singapore Trustees Act⁹ ("Singapore Trustees

4 See *Re T's Settlement Trusts* [1964] Ch 158.

5 A protective trust is a trust is one that ends upon the occurrence of certain defined events (eg, the bankruptcy of the beneficiary). At the occurrence of such an event, the trustee would have absolute discretion to apply the income from the trust property to either the beneficiary or his family. See the Singapore Trustees Act (Cap 337, 2005 Rev Ed) s 35; the English Trustee Act 1925 (c 19) s 33; and *Oxford Dictionary of Law* (J Law & E A Martin eds) (OUP, 7th Ed, 2009) at p 435.

6 Cf *Ridgwell v Ridgwell* [2007] EWHC 2666 (Ch) and *Wyndham v Egremont* [2009] EWHC 2076 (Ch).

7 English Law Reform Committee, Sixth Report (Court's Power to Sanction Variation of Trusts) (Cmnd 310, 1957) para 5.

8 See Singapore Trustees Act (Cap 337, 2005 Rev Ed) s 4.

9 Cap 337, 2005 Rev Ed.

Act”) or s 57 of the English Trustee Act 1925.¹⁰ Accordingly, a Variation of Trusts Act would not assist in this particular aspect.¹¹

7 Consider another case, Scenario B,¹² where property is settled on a discretionary trust for the benefit of a specified class of which the settlor’s future wife would be a member. Under subsequently introduced provisions in the tax statutes,¹³ however, once any future wife of the settlor becomes a beneficiary under the trust, any income received by her would be deemed to be the income of the settlor, and would be taxed accordingly. In the absence of any power of the court to sanction a variation of the trust, the operation of the new tax provisions cannot be avoided even though this could have been achieved by legitimate means if the settlement had been made on different terms excluding not just the settlor but also his wife.

III. The English Variation of Trusts Act 1958

8 It has been said that the English Variation of Trusts Act 1958 (“1958 Act”) gives the court a “very wide, and indeed, revolutionary discretion”¹⁴ to approve on behalf of certain defined groups of persons any arrangement to vary or revoke trusts. The jurisdiction of the court to vary trusts is set out in s 1(1) of the 1958 Act:

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

10 *Anker-Petersen v Anker-Petersen* [2000] WTLR 581.

11 If, however, an even hand has to be kept between income beneficiaries and capital beneficiaries so as to provide a reasonable income for the income beneficiaries, the best return for a trust fund may not be achieved via capital appreciation of investments even if there is a very broad range of permitted investments. Rather, with the consent of the income beneficiaries, one could seek to convert their life interests in income into an entitlement to, say, 3% of the value of the trust fund at the end of each financial year (taking account of income receipts and capital growth whether realised or unrealised), so long as the capital beneficiaries agree or the court is able to consent on behalf of capital beneficiaries lacking capacity or unborn or otherwise unascertained. This would, however, only be possible under the English Variation of Trusts Act 1958 (c 53) as it involves a variation of the respective beneficial interests (see paras 8–16 of this article).

12 Based on the facts in *Re Clitheroe’s Settlement Trusts* [1959] 1 WLR 1159.

13 Finance Act 1958 (c 56) (UK) ss 21(4) and 22(5).

14 *Re Steed’s WT* [1960] Ch 407 at 420–421, *per* Evershed MR.

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.*

[emphasis added]

9 As can be seen, the effect of the 1958 Act¹⁵ is broadly to enable the court to give its approval to a variation of the terms of the trust on behalf of persons who are unable to give approval for themselves (*eg*, because they are minors, unborn or not yet ascertained). It follows that the court is not asked to give its approval on behalf of ascertained adults who can either consent for themselves or refuse to consent (so holding the other involved parties to ransom unless the latter can invoke the court's jurisdiction under statutes such as s 56 of the Singapore Trustees Act¹⁶ or s 57 of the English Trustee Act 1925).¹⁷ It has been said that "[t]he court is merely contributing on behalf of infants and unborn and unascertained persons binding the assents to the arrangements which they, unlike an adult beneficiary, cannot give. The 1958 Act has therefore been viewed by the courts as a statutory extension of the consent principle embodied in the rule in *Saunders v Vautier*.¹⁸ The

15 Variation of Trusts Act 1958 (c 53) (UK).

16 Cap 337, 2005 Rev Ed.

17 See *Sutton v England* [2009] EWHC 3270 (Ch), where Mann J held, *inter alia*, that a power of apportionment could not be granted to the trustee under s 57 of the English Trustee Act 1925 (c 19) because this would not merely divide out an otherwise undivided share, but would also alter the very nature of the beneficial interest. His Lordship held, *obiter*, that the same result could be achieved by a variation of the trusts under the Variation of Trusts Act 1958 (c 53).

18 The rule in *Saunders v Vautier* [1841] EWHC Ch J82 is a rule under which the beneficiaries of a trust, if of full age, sound mind, between them wholly entitled to the trust property, and in agreement, may direct the trustees to end the trust and transfer the trust property to themselves as beneficiaries absolutely. See *Oxford Dictionary of Law* (J Law & E A Martin eds) (OUP, 7th Ed, 2009) at p 488.

principle recognises the rights of beneficiaries who are *sui juris* and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intentions of a testator or settlor¹⁹ [footnote added].

10 The 1958 Act²⁰ plainly gives the court an almost unlimited power to sanction the variation of trusts in situations that fall within its jurisdiction.²¹ The 1958 Act expressly provides that the courts may sanction “*any arrangement*”. The two key principles of the 1958 Act are that: (a) the court may only make orders on behalf of those unable to give their consent, and (b) such order may only be made by the court if it would, on an overall view,²² be beneficial to the persons on whose behalf such order is sought.

11 In our Scenario A (at para 5 of this article), the English courts would be able (under the 1958 Act)²³ to sanction a variation of the trust if such a variation were for the benefit of the spendthrift beneficiary. This was indeed the case in *Re T’s Settlement Trusts*.²⁴ The proposal was that the beneficiary’s interest should be varied to become a protected life interest. Wilberforce J did not regard such protection as a “benefit in its own right”, but nevertheless made an order postponing the vesting of the capital in the beneficiary until a specified age and providing that the property should be held on protective trust in the meantime.

12 And in Scenario B (at para 7 of this article), the English courts would similarly be able to approve a variation of the trust for the benefit of any future wife of the settlor. The facts in Scenario B are based on the case of *Re Clitheroe’s Settlement Trusts*.²⁵ There, Danckwerts J approved the proposed variation of the trust to remove any future wife from the class of beneficiaries, and for the settlor to covenant to pay to the trustees £100 annually instead, the trustees being directed to hold such sums to be paid to any future wife absolutely.

13 It is thus clear that the 1958 Act²⁶ may be used to seek modifications or variations of a trust²⁷ for the purposes of securing

19 *Goulding v James* [1997] 2 All ER 239 at 247, *per* Mummery LJ.

20 Variation of Trusts Act 1958 (c 53) (UK).

21 This includes the power to create a longer statutory or common law perpetuity period: see *Wyndham v Egremont* [2009] EWHC 2076 (Ch).

22 *Wyndham v Egremont* [2009] EWHC 2076 (Ch); *Ridgwell v Ridgwell* [2007] EWHC 2666 (Ch).

23 Variation of Trusts Act 1958 (c 53) (UK).

24 [1964] Ch 158.

25 [1959] 1 WLR 1159.

26 Variation of Trusts Act 1958 (c 53) (UK).

27 It is necessary to distinguish between merely modifying the original trust and creating what is in substance an entirely new trust – this is known as the “*substratum*” test.

financial benefits on behalf of the beneficiaries who would otherwise have consented to such variation had they been ascertained or *sui juris*. In England, variations have also commonly been made to save estate duty²⁸ and capital gains tax.²⁹ Any saving provides a larger sum for distribution, and remaindermen also benefit in cases where interests in possession are terminated as their interests will be accelerated.³⁰

14 Indeed, the 1958 Act³¹ has mainly been applied in connection with schemes that vary beneficial interests in the interest of saving tax.³² Historically, the impetus for change and enactment of the 1958 Act was the decision of *Chapman v Chapman*.³³ The House of Lords in that case held that the court had no inherent jurisdiction to sanction, on behalf of infant beneficiaries and unborn persons, a rearrangement of the trust for the purposes of avoiding estate duty. In 1957, the English Law Reform Committee considered that the decision in *Chapman v Chapman* was unsatisfactory and took the view that “so far as concerns those cases where the object of a variation is to lessen the impact of taxes or death duties, we can see no valid reason why the Court should not be able to do on behalf of persons who are not *sui juris* or are not ascertained what the law allows to be done by persons who are *sui juris*”.³⁴ That quotation perhaps embodies the spirit of the 1958 Act, and reflects one of the main requirements that any proposed variation or rearrangement of the trust settlement must be for the benefit of the persons on whose behalf the application is being sought.

15 However, as is not uncommonly the case, statutes are interpreted and applied with considerable latitude. By this, it is meant that the courts have been asked to consider non-financial “benefit”. Some cases, for example, involve the court’s consideration of the general or other welfare of the persons on whose behalf approval is sought.³⁵ The following cases illustrate the distinction that the courts have accepted between purely financial benefit and the true welfare of those persons on whose behalf an application was sought.

28 *Re Druce’s Settlement Trusts* [1962] 1 WLR 363; *Gibbon v Mitchell* [1990] 1 WLR 1304.

29 *Re Sainsbury’s Settlement* [1967] 1 WLR 476.

30 J E Martin, *Hanbury & Martin: Modern Equity* (Sweet & Maxwell, 17th Ed, 2005) at para 22-024.

31 Variation of Trusts Act 1958 (c 53) (UK).

32 J E Martin, *Hanbury & Martin: Modern Equity* (Sweet & Maxwell, 17th Ed, 2005) at para 22-012.

33 [1954] AC 429.

34 English Law Reform Committee, Sixth Report (Court’s Power to Sanction Variation of Trusts) (Cmnd 310, 1957) para 16.

35 See J E Martin, *Hanbury & Martin: Modern Equity* (Sweet & Maxwell, 17th Ed, 2005) at para 22-025.

(a) In *Re Weston's Settlements*,³⁶ two settlements had been made in 1964, one in favour of each of the settlor's sons (one of whom was still under age) and their children. The settlor and his sons moved to Jersey subsequently. The application was to vary the settlement to give the trustees a power to discharge the trust of the settlements and to create almost identical Jersey settlements, the object of such scheme being to take advantage of the favourable fiscal situation in Jersey. The Court of Appeal refused the application and their reasoning drew a distinction between "benefit" and monetary wealth – it was held that "(t)here are many things in life more worthwhile than money. One of these things is to be brought up in this our England, which is still 'the envy of less happier lands'"³⁷.

(b) In *Re Remnant's Settlement Trusts*,³⁸ a trust fund gave contingent interests to the children of two sisters Dawn and Merrial, and contained a forfeiture provision in respect of any of the children who practised Roman Catholicism or was married to a Roman Catholic at the time of vesting, with an accruer provision in favour of the children of the other. Dawn's children were Protestant, but Merrial's were Roman Catholic. The court approved the deletion of the forfeiture provision even though this was clearly not for the benefit of Dawn's children, who stood to gain from it. Pennycuik J held that this was for their overall benefit: "Obviously, a forfeiture provision of this kind might well cause very serious dissension between the families of the two sisters."³⁹ The judge also considered that the forfeiture clause operated as a deterrent in the selection of a spouse, and that it would be in the overall benefit of the children to be free of such problems.⁴⁰

36 [1969] 1 Ch 223.

37 *Re Weston's Settlements* [1969] 1 Ch 223 at 245: "*The court should not consider merely the financial benefit to the infant and unborn children, but also their educational and social benefit. There are many things in life more worthwhile than money. One of these things is to be brought up in this our England, which is still 'the envy of less happier lands.'* I do not believe that it is for the benefit of the children to be uprooted from England and transported to another country simply to avoid tax ... many a child has been ruined by being given too much. The avoidance of tax may be lawful, but it is not yet a virtue. The Court of Chancery should not encourage or support it – it should not give its approval to it – if by so doing it would imperil the true welfare of the children, already born or yet to be born." [emphasis added]

38 [1970] Ch 560.

39 *Re Remnant's Settlement Trusts* [1970] Ch 560 at 566.

40 *Re Remnant's Settlement Trusts* [1970] Ch 560 at 566: "I think I am entitled to take a broad view of what is meant by 'benefit', and so taking it, I think this arrangement can fairly be said to be for [the children's] benefit ... *I think the court is entitled and bound to consider not merely financial benefit but benefit of any other kind.*" [emphasis added]

(c) Finally, in *Re Cohen's Settlement Trust*,⁴¹ an application was made to vary a settlement so as to make the interest of the grandchildren vest on a specified date, and not upon the death of a life tenant. The reason was to reduce the estate duty payable. The consequence of this was that any children born after the specified date would lose their interests. In situations like these, the question is one of degree. Although it has been said that the court will not give its approval where the benefit is a matter of chance, but on the other hand will not require absolute certainty of benefit, such an application invariably involves some uncertainty so the court will have to make a judgment call.

16 By now, it should be apparent that applications for the variation of trusts under the 1958 Act⁴² extend well beyond the ambit of arrangements for the purposes of tax avoidance or savings. What is also apparent is that many applications involve the court arriving at some form of moral judgment as to whether or not an application to vary should be allowed. For example, in *Re Weston's Settlements*⁴³ considered above, the court had to decide whether it would be more beneficial for the young beneficiaries to be enriched through tax savings or to be brought up in their home country. Such issues are morally significant value judgments that involve the balancing of various tangible and intangible factors. These questions are, by nature, ones which may be decided in different ways, depending on how the issues are canvassed and also on the judge's own values. Accordingly, even though the 1958 Act was a welcome development in conferring on the court an almost unlimited jurisdiction to vary trusts, it assumes that the courts have the moral legitimacy to impose orders or sanction applications that may have potentially far-reaching and life-changing consequences. Jurisdictions such as Singapore which have not adopted the 1958 Act spare their courts the agony of having to do so.

IV. Variation of trusts – What can be done in Singapore

17 Although the Singapore courts do not enjoy the same wide jurisdiction as their English counterparts under the 1958 Act,⁴⁴ there are still various legal and practical steps that may be taken under statute or at common law to avoid problems or to cure, to a limited extent, some problems. These are set out below.

41 [1965] 1 WLR 1229.

42 Variation of Trusts Act 1958 (c 53) (UK).

43 [1969] 1 Ch 223.

44 Variation of Trusts Act 1958 (c 53) (UK).

A. *Discretionary trust*

18 This is perhaps the most straightforward albeit limited workaround. A discretionary trust, as the name implies, allows the trustee to decide on how much income from the trust is to be given to each beneficiary. This means that beneficiaries do not have an automatic entitlement to the trust income – this brings the added benefit that creditors of beneficiaries may not attach trust income to recover debts of the beneficiary (and trust income or assets are protected in the event of a beneficiary’s insolvency). This form of trust settlement ultimately allows the trustee great flexibility, although this is often guided by the settlor’s letter of wishes. The usage of a discretionary trust would also, by its very definition, go some way towards mitigating difficulties faced by our trustees in Scenario A above.

B. *Power of amendment in trust instrument*

19 This is often used in combination with a discretionary trust as the two can be complementary to each other. A trust instrument may give the trustees wide powers to amend the trust, add persons to the class of beneficiaries under a discretionary trust, or even to exclude persons from such a class.⁴⁵ The discretionary trustees may also be given power to vary or revoke any of the administrative powers and provisions of the settlement or to add any further administrative powers and provisions as the trustees may consider expedient.⁴⁶ A power of amendment coupled with a discretionary trust therefore confers on the trustees considerable latitude to vary the original trust settlement. Naturally, however, there would be restrictions on the exercise of such wide-ranging powers in the absence of the court’s supervisory jurisdiction (as would be the case under the 1958 Act⁴⁷ where variations require the court’s permission). The most obvious would be that such a power must be exercised only for the purpose for which it was granted.⁴⁸

45 A typical power of amendment couched generously may read as follows: “The trustees may at any time by deed with the consent of the Principal Company amend, extend, modify, revoke or replace all or any of the trusts powers and provisions of this Deed or of the Rules with effect from such date as is specified in that deed to the effect that any such amendment, extension, modification, revocation or replacement may be retrospective or retroactive in effect.” See P Matthews & C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (D Hayton ed) (LexisNexis Butterworths, 17th Ed, 2007) at paras 47.15–47.16.

46 Note the possible overlap with s 56 of the Singapore Trustees Act (Cap 337, 2005 Rev Ed), discussed at paras 20–21 of this article.

47 Variation of Trusts Act 1958 (c 53) (UK).

48 *Hole v Garnsey* [1930] AC 472. See also *Society of Lloyd’s v Robinson* [1999] 1 WLR 756, where it was said (in the context of a commercial trust) that, although the power must not be exercised beyond the reasonable contemplation of the parties, it would be going too far to say that such a power may never be exercised to alter rights or to bring a new class of property within the scope of the trust.

Such powers may also be fiduciary in nature to prevent them from being exercised to benefit the trustee. Or the settlement can be structured such that the power to amend or vary may be exercisable only with the express consent of a third party, whose power to withhold consent may itself be either a fiduciary or personal power.⁴⁹ The extensive powers conferred upon trustees with an amendment provision in the trust instrument coupled with some in-built checks to ensure proper exercise have made the power of amendment a popular feature of many trusts. This is especially so in the case of trusts which last indefinitely or for a very long period where the circumstances may change significantly, a prime example here being the pension trust.

C. *Trustees Act*

20 Section 56 of the Singapore Trustees Act⁵⁰ deals with the power of the court to authorise dealings with trust property. In general terms, this provision allows for an act unauthorised by the trust instrument to be effected by the trustees where, if in the court's opinion, the act is expedient – the key requirement, however, is that the power is only available in questions arising from the *management or administration* of the trust property. Unlike the English court's jurisdiction under the 1958 Act,⁵¹ it is clear from the words of the Singapore Trustees Act that it is not available for the purpose of altering or remoulding beneficial interests:

Power of court to authorise dealings with trust property

56.—(1) 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 —

- (a) 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
- (b) 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.

[emphasis added]

49 See P Matthews & C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (D Hayton ed) (LexisNexis Butterworths, 17th Ed, 2007) at para 47.17.

50 Cap 337, 2005 Rev Ed.

51 Variation of Trusts Act 1958 (c 53) (UK).

21 The object of s 56 of the Singapore Trustees Act⁵² is therefore to ensure that trust property should be managed as advantageously as possible in the interests of the beneficiaries and, in view of that object, to authorise specific dealings or types of dealings with the property.⁵³ In England, the jurisdiction of the court under s 57 of the English Trustee Act 1925 (on which s 56 of Singapore Trustees Act is based) co-exists side by side with that under the 1958 Act,⁵⁴ but this is not the case in Singapore (since there is no equivalent to the 1958 Act in Singapore). But even without the benefit of the 1958 Act, it is evident from the wording of s 56 of the Singapore Trustees Act that the court may sanction a wide range of transactions or arrangements as long as they do not vary the respective beneficial interests. For example, the English courts have authorised in one case many transactions (including the trustees being given the power to invest in assets of any kind anywhere as if they were the beneficial owners, subject to obtaining advice from an investment adviser) for the purpose of enabling the trustees to take advantage of the services of a portfolio manager;⁵⁵ authorising the sale by trustees of a reversionary interest which they had no power to sell under the trust instrument until it fell into possession; and conferring on the trustees power to invest in certain shares which were not included amongst the investments authorised by the settlement.⁵⁶ As has been said earlier, the limitation of s 56 of the Singapore Trustees Act is principally that the court's jurisdiction does not extend to sanctioning arrangements that require a variation of beneficial interests.⁵⁷ For this reason, therefore, the Singapore Trustees Act would not be of much assistance to the trustee in our Scenarios A and B above, and the well-advised settlor would be prudent to resort at the outset to a discretionary trust with a power of amendment written into the trust instrument.

D. Inherent jurisdiction of the court to vary at common law

22 For the sake of completeness, it is necessary to mention that the court retains an inherent jurisdiction to vary trust settlements in certain narrowly-defined situations. First, the court has the power, in an

52 Cap 337, 2005 Rev Ed.

53 P Matthews & C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (D Hayton ed) (LexisNexis Butterworths, 17th Ed, 2007) at para 47.108.

54 Variation of Trusts Act 1958 (c 53) (UK).

55 *Anker-Petersen v Anker-Petersen* [2000] WTLR 581.

56 *Re Brassey's Settlement* [1955] 1 WLR 192; [1955] 1 All ER 577.

57 It is noted, however, that the court would have the wide-ranging power to insert investment clauses into trust instruments under s 56 of the Singapore Trustees Act (Cap 337, 2005 Rev Ed) (without needing the consent of adult beneficiaries or the consent of the court on behalf of unborn, unascertained or minor beneficiaries) as this would appear not to vary the nature of the respective beneficial interests: see para 6 of this article.

emergency situation, not foreseen or anticipated by the settlor, to authorise the trustees to perform certain acts in order to protect the trust property, where the trustees would not ordinarily be authorised to perform such acts. This power is available where the proposed acts are in the best interests of the trust estate and where the consent of all the beneficiaries cannot be obtained because they are not in existence or are under a disability. It is known as the salvage jurisdiction of the court. The paradigm example is where expenditure is necessary to save buildings from collapse.⁵⁸ But in one case, the salvage jurisdiction has been applied to a situation where the court approved a scheme of capital reconstruction of a company, splitting the shares into different and smaller denominations, and authorised the trustees to take the new shares, subject to an undertaking to apply for further authorisation to retain the shares after one year.⁵⁹ Second, the court has the power to approve a variation from the terms of a trust in cases where a genuine dispute arises as to the respective beneficial interests, and the parties come to a compromise as to their rights. This is known as the compromise jurisdiction of the court, and the rationale is that a compromise is an estoppel that prevents the parties from asserting that the position is otherwise than as agreed.⁶⁰ Accordingly, the court is enforcing the trusts as they are agreed to be, and no one has standing to assert otherwise.⁶¹

E. Summary

23 In sum, the steps and measures described above are all available to settlors, trustees and the courts in Singapore. The law affords the well-advised settlor significant latitude and freedom to structure the trust to provide for contingencies in the future by means of the discretionary trust accompanied by a power of amendment written into the trust instrument. In cases where such provisions are not made in advance, trustees are generally only permitted to make arrangements for the purposes of administration and management of the trust – but this power unfortunately does not extend to sanctioning adjustments to beneficial interests.

24 Although an equivalent version of the 1958 Act⁶² has not been enacted in Singapore, this is compensated for by the fact that our revenue laws are favourable to those seeking to set up trusts in Singapore. This is in line with our ambition to be a successful player of

58 *Re Jackson* (1882) 21 Ch D 786.

59 *Re New* [1901] 2 Ch 534.

60 *Binder v Alachouzos* [1972] 2 QB 151.

61 P Matthews & C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (D Hayton ed) (LexisNexis Butterworths, 17th Ed, 2007) at para 47.24.

62 Variation of Trusts Act 1958 (c 53) (UK).

the international trust services industry, and to be appealing as a safe and protected offshore jurisdiction for trust funds to manage their money and activities.⁶³ In England, it has been said that “it is well known that much and perhaps the main use which has been made of the Variation of Trusts Act 1958 has been to produce schemes which will have the effect of reducing the liabilities either on capital of the trusts or the income of the beneficiaries”.⁶⁴ Under s 13Q(1) of our Income Tax Act,⁶⁵ trusts which are “locally administered”, as well as “holding companies” established to manage such trusts, are exempted from paying tax.⁶⁶ Under s 13Q(2), the share of the proceeds accruing to the respective beneficiaries will also be exempt from income tax. Under s 13G(1), income of foreign trusts which are administered by trustee companies in Singapore is exempt from tax. Section 13G(2) ensures that each beneficiary’s share of the trust income will not be taxed, provided that the beneficiaries are foreign individuals or companies.⁶⁷ Collectively, these provisions mitigate any difficulty or hardship caused by what would otherwise be substantial taxation on certain trust property and trust income.

V. Other Commonwealth jurisdictions

25 By way of comparison, a survey of three other Commonwealth jurisdictions shows that the approach is somewhat divided, although legislation with effect similar to that of the 1958 Act⁶⁸ exists in both Hong Kong and Australia.

A. Malaysia

26 In Malaysia, the position is the same as that in Singapore. Section 59(1) of the Malaysian Trustee Act 1949⁶⁹ is *in pari materia* with s 56(1) of the Singapore Trustees Act,⁷⁰ considered above (which gives the court power to authorise dealings with trust property in matters relating to the management and administration of the trust property, where the court considers such acts expedient).

63 See generally T S Tey, “Singapore’s Trust Services Industry – International Pressures and Calibrated Responses” (2010) 16(1) *Trusts & Trustees* 19.

64 *Re Weston’s Settlements* [1969] 1 Ch 233.

65 Cap 134, 2008 Rev Ed.

66 Being “locally administered” means that the trust must be administered by a trust company in Singapore.

67 See T S Tey, “Singapore’s Trust Services Industry – International Pressures and Calibrated Responses” (2010) 16(1) *Trusts & Trustees* 19.

68 Variation of Trusts Act 1958 (c 53) (UK).

69 Act 208.

70 Cap 337, 2005 Rev Ed.

B. *Hong Kong*

27 In Hong Kong, the law in this area is similar to the English position – the equivalent to the 1958 Act⁷¹ is the Variation of Trusts Ordinance.⁷² Section 3(1) of the latter Ordinance is *in pari materia* with s 1(1) of the 1958 Act.

C. *Australia*

28 In Australia,⁷³ five of six states⁷⁴ have each enacted legislation empowering the court to vary or revoke the terms of a trust on the application of certain persons, of whom the trustee is one. The New South Wales legislation does not have a specific section empowering the court to vary trusts. Interestingly, however, s 81(2) of the New South Wales Trustee Act 1925 empowers the court *under its general power to sanction expedient transactions* to alter the trust or powers conferred on the trustees by the trust instrument so as to prevent a breach of trust from arising where such an alteration would, in the court's view, be expedient. This jurisdiction, however, seems limited to matters similar to those set out in s 81(2)(a) to (d) which cover the authorisation of trustees to sell trust property, postpone the sale of trust property, carrying on any business forming part of the trust property and employing capital money.⁷⁵

VI. Conclusion

29 The above discussion notwithstanding, there is no gainsaying of the fact that in Singapore, owing to the absence of a local equivalent to the 1958 Act,⁷⁶ a significant gap exists as far as the power of the court to sanction variations of trust settlements is concerned. There are various practical⁷⁷ and legal workarounds to this problem, but the main

71 Variation of Trusts Act 1958 (c 53) (UK).

72 Cap 253.

73 See generally D Ong, *Trusts Law in Australia* (Federation Press, 3rd Ed, 2008) at p 302 ff.

74 Trusts Act 1973 (Qld) s 95; Trustee Act 1936 (SA) s 59C; Variation of Trusts Act 1994 (Tas) ss 13–15; Trustee Act 1958 (Vic) s 63A; and Trustees Act 1962 (WA) s 90.

75 See generally *Jacobs' Law of Trusts in Australia* (Heydon & Leeming eds) (LexisNexis Butterworths, 7th Ed, 2006) at para 1706.

76 Variation of Trusts Act 1958 (c 53) (UK).

77 In one Singapore case, the executors of a deceased's estate successfully applied for a declaration from the Singapore courts to the effect that the estate would not be liable to pay tax in the US, even though certain sums were bequeathed to the deceased's American relatives. The deceased was an American citizen who lived in Singapore, who bequeathed sums to relatives in both Singapore and the US. The High Court in Singapore, exercising its powers under O 80 r 2(2) of the Rules of

(cont'd on the next page)

shortcoming is that they do not allow for the adjustment of beneficial interests in unforeseen circumstances if such power of amendment or variation is not written into the trust instrument from the start (which a well-advised settlor would have done). It is obviously sensible that such advice be sought in the case of trusts of long duration where significant changes in circumstances may occur, lest the trustees or beneficiaries should suffer real difficulties later on and find their hands tied.

30 On the flipside, the Singapore courts are perhaps the (only) beneficiaries of not having an equivalent to the 1958 Act⁷⁸ here as they do not have to grapple with the uncertainty of trying to decide what amounts to a “benefit” and what does not – this issue comes alive in cases where it is pleaded that those on behalf of whom the application is sought stand to enjoy non-financial benefits. As has been illustrated in the English cases, with judges having to balance competing interests and life values, this area can be a moral minefield that the Singapore courts have thus far been able to avoid.

Court and basing its decision on the principle of conflict of laws that the court is not to enforce the revenue laws of a foreign state, made a declaration that the deceased’s estate “having paid the estate duties and other taxes payable in Singapore, have no duty to pay estate tax, income tax, or any other taxes or duties imposed by the Municipal State or Federal Government, owed by her estate in the United States of America to the United States of America or to any State or Municipality therein”. It was further declared that the “Executors will not be liable to beneficiaries who, as a result of such non-payment, are subjected to any taxes or penalties imposed in the United States of America”. See *In the Matter of the Estate of Oh Helen Hing* (OS No 1226 of 2002/F, unreported), Order of Court dated 28 October 2002.

78 Variation of Trusts Act 1958 (c 53) (UK).