Revision Box Questions: Guidance for approach

Revision Box Chapter 15

1. From reading the materials on the variation of express trusts, ensure that you can answer the following questions:

(a) What is meant by ‘variation’ of a settlement?

The chapter’s starting point is that although the theme of a trustee carrying out a settlor’s instructions is a strong one, that circumstances can arise when there can be considerable variation of what the settlor initially instructed if doing so would promote efficient administration of the trust or is considered necessary to preserve the value of the beneficiaries’ entitlements. This can take place as an extension of a trustee’s powers, or even by way of a substantial alteration in the beneficial interests falling due under a trust. At its most extreme, there are also circumstances in which beneficiaries themselves by their collective agreement can bring the trust to an end altogether, and in a slightly less extreme version of this, can collectively agree to give a trustee enhanced powers to deal with the trust as it is.

(b) What issues arise in decisions to vary trusts and what, if any, policy considerations arise as a result?

(c) In what circumstances will a variation of an original settlement be sought?

The materials under (a) helped to explain the different ‘levels’ of departure from a settlor’s original intentions which are possible, and this helps us to understand both the circumstances in which variation of a settlement might be sought and also the policy issues which can be found here. For parts (b) and (c) it is important to understand that just as the creation of many express trusts occurs in the context of tax planning, so does much variation activity. This in and of itself raises meta questions of the morality of tax planning alongside the legality of it. Tax planning is of course the lawful counterpart for tax evasion. It is lawful to structure one’s tax affairs to reduce exposure to taxation, but the demands on public finance, and particularly what is known as the ‘tax gap’ (the divide between what’s needed by public finance and what is collected from taxpayers) means this is itself controversial. This can be seen captured in Lord Denning’s observation in Re Weston’s Settlements (1969) that whilst the avoidance of tax may be lawful, it is not yet a virtue. This can quite easily be applied to meta questions of the morality of tax law, but this statement was made in the context of how variations could exacerbate the position whereby many children have already been ‘ruined by being given too much’. This highlights two key areas of policy arising where applications are made for trusts to be varied. One is that there are often successive interests to accommodate, and that a variation in one beneficiary’s interest may affect someone with a later entitlement. And underlying all of this is how variation will override a settlor’s original intentions, raising fundamental questions of distinguishing between trusts and gifts, and the legal framework seeking to ensure that a trust will only arise where one is intended, and which governs the commission of a breach of trust. In practice many trusts are drafted widely to allow for
increasing a trustee’s powers and even variation of beneficial interests, but as a number of cases show, a settlor’s wishes are seldom paramount, and are frequently overridden.

(d) What are the key provisions that allow for the variation of trusts?

Here you must be aware of the courts’ inherent jurisdiction and also variation under the Variation of Trusts Act 1958.

There is longstanding consensus and supporting authority - centrally Chapman v Chapman (1954) - that inherent jurisdiction is narrow, and actually confined to what has been termed ‘emergency or salvage’ (for example releasing funds to carry out vital repairs of property). It has become extended to a range of unforeseen contingencies, but there has remained the need to show some element of emergency. This applies only to variation of beneficial interests (with wider inherent powers elsewhere for matters of trust administration, e.g. in authorising remuneration of a trustee). And although the courts’ capacity to approve compromises for disputed entitlements of infant or future beneficiaries this is not strictly a variation matter (because there is actually dispute as to the terms of the trust), in reality many such things don’t escalate as disputes and treated as variations, but with Chapman disapproving this wider angle on variation. The Variation of Trusts Act 1958 itself originated in contention about the scope of inherent jurisdiction, and now empowers the court with discretion to approve any arrangement varying or revoking all or any of the trusts, or enlarging the trustees’ powers of management and administration over the property subject to the trusts for a number of categories of person listed under s 1(1). But Re Ball is authority that the courts will not approve a proposal for a total resettlement that alters completely the substratum of the trust, with Lord Reid’s view in Re Holmden (1968) that this statutory variation must be regarded as one made by the beneficiaries themselves, rather than by the court, with the court acting merely on behalf of those beneficiaries who are unable to give their own consent and approval.