



Chat Legal Pty Ltd
ABN 64 621 391 553
letschat@chatlegal.com.au
GPO Box 989, Brisbane, QLD 4001
Level 16, 97 Creek Street, Brisbane, QLD 4000
<https://chatlegal.com.au>

Let's chat

Correcting trust document errors – December 2022

With:

Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

Information provided is general in nature; precise application depends on specific circumstances



Rectifying trust document errors

- Application of Walker Corporation Pty Ltd [2022] NSWSC 1609
- Trust deed established in February 1976
- Vesting date defined to be the first to occur:
 - 31 December 2032
 - Twenty-one years after the date of the death of the last survivor of the lineal descendants born before and living at the date hereof of his late Majesty King George the Fifth; and
 - The date (if any) which the Trustee shall in its discretion appoint as the distribution date of this settlement
- Original settlor is dead
- No dispute from beneficiaries
- Contradictor appointed (someone to argue against the submission)



Rectifying trust document errors

- Some history
 - Deed dated 5 February 1976
 - Mrs Hudspeth as Settlor and witnessed by Mr Laurence Bridgement (an accountant)
 - Trustee executed by two directors (Mr Walker and his father) noting a third director was also appointed (Mr Kearns) who later resigned
 - 10 amendments made since establishment
 - amending deeds (1), (2), (3), (5) and (7) would have been prompted by a need to meet lenders' requirements for the purposes of financing activities ;
 - amending deeds (4), (6), (8) and (9) appear to have been generated as a result of taxation considerations relating to distributions of income.
 - further, an aspect of amending deed (4) also contained a correction to the rather glaring error in the original trust deed about the "appointor"
- Requested to rectify original trust deed by deleting 31 December 2032 vesting date



Rectifying trust document errors

- General principles [57]:

*Essential to relief by rectification or reform of a document ... is **mistaken expression of the true agreement**. The plaintiff must **prove** that there was **disconformity between the intention and the written instrument** and that the **intention continued to the time of execution of the instrument**. The plaintiff **must displace** the hypothesis, arising from the **execution of the written instrument**, that it **expressed the true intention**. ... Such proof may be more difficult, in some circumstances impossible, if the words of the instrument are purposely used or indicate that the parties or party no longer intended to give effect to the whole of the antecedent intention. **Careless copying** is one thing. **Omission of some words** of limitation necessary to achieve the intention another. **Mistake as to the legal effect of the words used** another. The proved intention of the parties or party may be equivocal or too general or not sufficiently exact or precise to found relief. **But if the claimant convinces the Court** that the instrument does not conform with the intention of the parties or of the party which made it and **the intention is clear and precise and can be achieved by the language of an order for rectification, relief should be available.***



Rectifying trust document errors

- Whose intention is relevant:
 - Persons who would have been required to execute document
 - Settlor likely to be key
 - Court acknowledges role of settlor in 'modern discretionary trust' and therefore assumed settlor would have intentions aligned with trustee
- In the case:
 - Acknowledged that Mr Walker's intention is somewhat relevant (being one of the original directors who would have instructed advisors to proceed)
 - Considered Mr Walker's recollection from 40+ years ago but noted it may not be great
 - Mr Walker mentioned he understood the trust would last indefinitely
 - Court considered the fact that 9 deed of variations were made to the trust which would have arguably required legal consideration



Rectifying trust document errors

- [96] It seems inconceivable that any competent lawyer or accountant who had to consider the deed would not have become aware that the Trust would vest on 1 December 2032. Mr Walker himself states (in his June Affidavit at [50], see [54] above) that a financier of the Trustee would be concerned about when the Trust's vesting date would be. There is a concrete instance of that in amending deed (3). The amendment in that deed referred in terms to part of the vesting date definition in the original deed.
- [97] The significance of this is that, if Mr Walker really did have the mistaken understanding he now says he has about the vesting date of the Trust, there would apparently have been many opportunities over the years for that to have come up in discussion with the Trust's advisors, and to have been corrected. In particular, each of the amending deeds, including amending deed (3), would have required instructions to be obtained, ultimately from Mr Walker, which would presumably have involved some sort of explanation about why the amendments were necessary.



Rectifying trust document errors

- Onus on person claiming their intention to prove the mistake
- In this case, it could not be argued the vesting date of 31 December 2032 was simply a drafting error
- Evidence from Mr Walker deemed unreliable and therefore cannot conclude that Mr Walker intended for the trust deed to take the form which it would take if the application were successful
- NB: Although Mr Kearns was a director at the time, as he did not sign the deed, Court did not consider any such evidence as having weight (also Mr Kearns is deceased)
- NB: Mr Walker's father is also deceased
- NB: Confirmations made as part of some amending deeds also 'reconfirm' terms (including vesting provisions)



Rectifying trust document errors

- Curious the case mentions other cases where rectification was granted
- Noted other cases did not have a 'contradictor'
- Also noted some of the other cases were further disputed



Rectifying trust document errors

- *Mantorani v Vanta Pty Ltd (No 2)* [2021] VSC 771
 - Lost trust deed case and when there is sufficient clear and convincing evidence of existence
- *The Application of M&L Richardson Pty Limited* [2021] NSWSC 105
 - No copy of trust deed executed
 - Trust confirmed to be established and terms adopted
 - ACIS provided evidence they established the trust and bank account in existence for a number of years (bank's have stringent requirements)
- *Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue* [2018] NSWCATAP 147
 - Self-serving deed of rectification not accepted in dispute with revenue authorities
 - Rectification sought to correct beneficiary class of established trust deed (due to grouping purposes)



Rectifying trust document errors

- Going to Court is best
- Others consider a self-serving document as seeking to correct errors as soon as they are known and can be used as evidence in the event matters proceed to Court
- Existence of any evidence to support what is being corrected
- Who are you correcting the document for
- Whose intention is being proven and are they available to sign such statements
- Context of errors



Recent examples

- Trust deed fully executed but undated
 - Bank requested correcting when company (which trust holds dividend access shares) sought a line of credit
 - Note trust had been dormant since client's daughters finished university
- Trust deed incorrectly executed as original individual trustees did not have signature witnessed and original settlor witnessed by one of the original trustees
 - Bank requested correcting
 - Deficiency identified in earlier review and noted to client, but was ignored
 - NB change of witnessing requires in 2022 onwards but note best practice
- Three deed of amendments included a hyphen in between a client's name when original trust deed did not include hyphen
 - Bank requested correcting



Recent examples

- Trust deed not executed
 - Bank requested confirmation prior to opening bank account for company which trust holds shares in
 - Note that there was a change of trustee where there was no documentation
 - The director of the original trustee was an ex-wife of the current director of the current trustee
 - Principal of the trust was the current director
 - Original settlor could not be located
 - Well known legal provider prepared a deed of confirmation to adopt original trust deed terms and confirm the change of trustee – **document signed by current trustee only**
- Trust deed where trustee never signed for 10 years (but settlor executed)
 - Pre-emptive correcting



Recent examples

- Deed of variation executed by settlor and original trustee
 - Variation sought to delete a beneficiary and replace them
 - Variation misspelt beneficiary name
 - Variation power required written consent of Appointor
 - Appointor did not execute deed of variation
 - Lawyer prepared deed of variation
- Deed of variation executed by settlor and original trustee
 - Variation sought to change trustee by replacing trustee definition
 - Unit trust deed
 - Trustee required to provide three months-notice
 - Majority of unitholders have power to appoint replacement trustee
 - Lawyer prepared deed of variation



Recent examples

- All for one trust (no appointor consent required to vary):
 - 2005 Deed of variation executed by original trustee and settlor to reflect name change of trustee
 - 2008 Deed of variation executed by original trustee solely to remove an original appointor as appointor of the trust (and leave one remaining original appointor) (*case law exists that suggests consent of a person in such a role is required so to avoid the 'chicken and egg issue'*)
 - 2013 Deed of variation executed by original trustee and settlor to change trustee by replacing the trustee role in the parties detail to a company:
 - Appointor had power to change trustee in terms of trust deed
 - Primary Beneficiaries were defined to be 'the child/children born to the body of the Trustee'
 - 2014 Deed of variation executed by original trustee and settlor to change primary beneficiaries to the '[name of Original Trustee] of her children':
 - Change of default beneficiaries a stamp duty event (trust acquired a property in between two variations)
 - Trust deed excludes former trustees from being a beneficiary



Recent examples

- Other issues when rectifying change of trustee documents:
 - Stamping
 - Changing assets across
 - Processing (late fees on share transfers etc.)



Non-trust deed errors

- Trustee name on title wrong (since 30+ years ago)
- Trust not disclosed on title
- Deceased husband name still on title as joint tenants with wife

Are discretionary trusts worth the effort?



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- UPE and Division 7A
- Section 100A
- Trust law considerations (trustee obligations)
- Compliance scrutiny
- Difficulty to split assets as part of succession plan
- International tax considerations (foreign controlled)



Are companies just better?

- Just as flexible as trusts (dividend only shares)
- Simpler compliance (idea of director/shareholder easy to understand and changes can be 'self-made' via ASIC Connect)
- Flat tax rate
- Franking credits (including refundable credits)

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Making trust changes yourself?

- Buyer beware
- Trusts are complex
- Taxation affecting trusts complex and significantly differ depending on assets of the trust and jurisdiction of assets
- A lot of misunderstandings relating to trusts:
 - 'Can't have sole trustee be the sole primary beneficiary' *[even though the beneficiary class includes other persons]*
 - Asset protection myths
 - Family law myths



Using online provider?

- Review the deed yourself
 - Issues with 'new upcoming' provider
 - Linking Child to 'child of the Appointor'
 - Grandchild defined as 'Child of a Child'
 - Beneficiaries include: Primary Beneficiaries, Child of Primary Beneficiaries
 - Settlor overview stating '*Settlor's intention the trust be for the benefit of the Primary Beneficiaries*'
 - Usual issues to consider (see other trust deed gremlin presentations)
- Consider if appropriate
- Happy to act as settlor?
- Legal advice?
 - Creation of legal obligations on trustee/appointor
 - Creation of rights on beneficiaries
- Insurance



As for us

- Rise of online providers mean more work correcting errors
 - Clients DIY
 - Online provider precedent deficient
- Banks scrutiny means need for lawyers who understand trust law and making trust changes

Contact details

Darius Hii

Tax and estate planning lawyer; Chartered Tax Advisor; and Director at
Chat Legal Pty Ltd

darius@chatlegal.com.au

0403923374