

# The Rule Against Perpetuities

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## 1. Introduction

1.1 Today I have been asked to talk about the rule against perpetuities. This topic has a reputation of being very complicated and having a lot of traps for practitioners.

1.2 So I propose to start by describing the rule as simply as I can.

1.3 I'll then look at some specific issues that you might be faced with:

- a. How to work out the perpetuity period.
- b. How a fixed perpetuity period should be specified in a trust deed.
- c. Whether you can vary a fixed perpetuity period.
- d. What happens on a resettlement.

## 2. Rule against remoteness of vesting

2.1 The rule against perpetuities really should be called the **rule against remoteness of vesting** (which it sometimes is). This is because the rule is aimed at restricting the time period during which a property interest has to vest.

2.2 The rule dates from 16821 and was developed because it was thought to be a bad thing for the dead to control the living too much and for property to be stopped from being able to move around the economy.

2.3 The rule doesn't apply to gifts between charities<sup>2</sup> or to gifts to superannuation funds<sup>3</sup>.

2.4 Over time a lot of problems emerged with the rule. This was mainly because of two things. First the common law rule was driven what might happen - no matter how unlikely!<sup>4</sup> This meant that in many cases some extremely unlikely possibilities shot down property interests.

2.5 A second serious problem was with the consequences of breaching the rule. The property interest was invalid from the outset. It couldn't be saved either by the interest actually vesting in time or by the courts cutting down the terms of the interest so it complied with the rule. So the rule didn't reflect real world events.

2.6 All this could be very unfair and wasn't what people wanted. So eventually the rule was modified in NZ under the Perpetuities Act 1964.

2.7 So there are now two regimes. There is the common law rule. This applies to trusts formed before 11 November 1964 when the Perpetuities Act came into force. I'll call this the common law rule.

2.8 Then there is the rule as modified by the Perpetuities Act. I'll call this the new rule.

2.9 The rule against remoteness of vesting also had some associated rules aimed at perpetuity type issues. The first was the rule against excessive accumulations. This rule was reformed by the Perpetuities Act 1964<sup>5</sup>. The situation now, for non charitable trusts<sup>6</sup>, is that income can't be accumulated beyond the perpetuity period.

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<sup>1</sup> Howard v Duke of Norfolk 22 ER 931. Up until this case there was a fairly ad hoc set of rules aimed at perpetuity issues but they didn't have a unifying principle behind them.

<sup>2</sup> Attorney General v Webster [(1875) LR 20 Eq 483. The rule will apply, however, where a person (who isn't a charity) makes a gift to a charity.

<sup>3</sup> S19 Perpetuities Act 1964. This is retrospective.

<sup>4</sup> For example under the common law a woman of any age (such as 80) was considered capable of giving birth (which lawyers called "the fertile octogenarian"). Children of any age were considered capable of having children as well (which lawyers called "the precocious toddler").

<sup>5</sup> S21 Perpetuities Act 1964.

- 2.10 The second is the rule against restrictions on alienation which stops perpetual non charitable purpose trusts.
- 2.11 I only mention these associated rules in passing as I'm talking about the rule against remoteness of vesting today.

### 3. What's the common law rule? - trusts before 11 November 1964

- 3.1 Whether an interest is void under the common law rule depends on **possible not actual** events.
- 3.2 The common law rule says:

***An interest in property<sup>7</sup> is void from the outset if there is any possibility it might vest<sup>8</sup> after the perpetuity period.***

***The perpetuity period is a lifetime<sup>9</sup> + 21 years.***

- 3.3 Example. If T's will said something like:  
 "...to those of A's children who survive me or are born after my death and reach 25..."  
 the clause would be bad<sup>10</sup> if A was alive at T's death.
- 3.4 This is because at the outset A would be the life in being giving a perpetuity period of A's life + 21 years. It would be possible for A to give birth to C and die in the process. If that happened C wouldn't satisfy the contingency of reaching 25 until after the remaining 21 years of the perpetuity period.

### 4. What's the new rule? - trusts from 11 November 1964

- 4.1 The Perpetuities Act reverses the common law rule by using a "wait and see" approach. Whether an interest is void depends on **actual not possible** events.
- 4.2 The new rule says:

***An interest in property is void from the time it becomes certain it cannot vest within the perpetuity period.***

***The perpetuity period is a lifetime<sup>11</sup> + 21 years, or, where selected, a fixed period of up to 80 years.***

- 4.3 In the example in T's will which said:  
 "...to those of A's children who survive me or are born after my death and reach 25..."  
 the clause could easily be saved by the wait and see approach.
- 4.4 This is because A could give birth to C who reached 25 well before A's death and therefore well within the perpetuity period.

### 5. What else happened under the 1964 reforms?

- 5.1 The introduction of the "wait and see" approach was a major step forward. But the Perpetuities Act brought in a number of other reforms as well:

<sup>6</sup> The old rule still applies to charitable trusts Re Armstrong, Perpetual Trust Ltd v Roman Catholic Bishop of the Diocese of Christchurch High Court, Christchurch CIV 2005-409-465, 23 August 2005, Chisholm J).

<sup>7</sup> Property here means property of any kind so land, goods, and intangibles are included.

<sup>8</sup> Vest here means "vested in interest" not "vested in possession". So an interest is vested when a specified person is certain to get it even though they might not be able to enjoy it yet (for example where a life tenant could use the property in the meantime).

<sup>9</sup> Which lifetime includes, where applicable, a gestation period.

<sup>10</sup> This is a gift to a class. The common law rule was so severe that if just one member's gift could vest after the perpetuity period then the gifts to the whole class would fail, even if some had already vested Leake v Robinson (1817) 2 Mer. 363.

<sup>11</sup> Which lifetime includes, where applicable, a gestation period.

- a. It tidied up some well known traps. For example it allowed age contingencies to be cut down to size<sup>12</sup>.
  - b. It made some rebuttable presumptions about fertility. A woman is now presumed to be able to give birth until 55. A child under 12 is now presumed to be unable to have a child<sup>13</sup>.
  - c. It helped clarify the perpetuity period by spelling out relevant lives in being<sup>14</sup>.
  - d. It allowed an alternative fixed perpetuity period of up to 80 years to be selected<sup>15</sup>.
  - e. It gave the court a general cy-pres jurisdiction to modify property interests so they wouldn't fail<sup>16</sup>. Under this, trustees have a duty to apply to the court to have the interests modified if they become aware of a breach of the rule. This cy-pres jurisdiction is important as it means trusts shouldn't now fail solely because they breach the rule against remoteness of vesting. They should be modified instead.
- 5.2 In day to day practise I think the fixed 80 year perpetuity period and the wait and see rule are the most significant.
- 5.3 Now we'll look at some specific issues you might strike.

## 6. How do you calculate the perpetuity period?

- 6.1 The first thing to do is look at the date of the trust. If it is a pre 11 November 1964 trust you will have more work to do.

### *Trusts before 11 November 1964*

- 6.2 First, if the trust deed contains a clause saying the perpetuity period is calculated from the life of a specified person then you will need to check they were alive when the trust was formed and whether they have died. When they have died add 21 years and that is your answer.
- 6.3 Second, if the trust deed does not contain a clause like that you will need to determine who the relevant lives in being are. The lives in being must be relevant to the vesting and there can be debate about this. Usually they will be beneficiaries or parents of beneficiaries. Check whether they were alive when the trust was formed and whether they have died. When the last of them has died add 21 years and that is your answer.

### *Trusts from 11 November 1964*

- 6.4 If you're dealing with a trust formed on or after 11 November 1964 the situation should be easier. This is because either s6 (fixed perpetuity period) or s8 (statutory lives in being) of the Perpetuities Act should apply.
- 6.5 First, if the trust deed contains a clause saying the perpetuity period is a fixed period then that is your answer.
- 6.6 Second, if the trust deed, expressly says the perpetuity period is a named or expressly described person's lifetime plus 21 years then check they were alive when the trust was formed, when the last of them died, and add 21 years. That is your answer.
- 6.7 Third, look at section 8(5) of the Perpetuities Act and identify the lives in being listed there who are expressly or impliedly referred to in the trust deed. These are the beneficiaries, their parents, and prior interest holders. Check they were alive when the trust was formed, when the last of them died, and add 21 years. That is your answer.

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<sup>12</sup> For example a gift by T in a will to A for life then to A's children who reach 30 could breach the rule. A could give birth to C a day after T's death. A (the life in being) could die the next day. The perpetuity period would then be 21 years and 2 days but C's interest wouldn't vest for 30 years and 1 day. This can now be cut down to size under s9 Perpetuities Act 1964 (which is not retrospective) or s10 (which is retrospective).

<sup>13</sup> S7 Perpetuities Act 1964.

<sup>14</sup> S8(4) and (5) Perpetuities Act 1964. This is not retrospective.

<sup>15</sup> S6 Perpetuities Act 1964. This is not retrospective.

<sup>16</sup> S10 Perpetuities Act 1964. This is retrospective so applies to trusts formed before and after the Perpetuities Act came into force.

6.8 Fourth, if none of these work the period is 21 years<sup>17</sup>.

## 7. What if an 80 year wind up date is chosen but no perpetuity period specified?

7.1 Under the Perpetuities Act 1964 it is now very common for a fixed perpetuity period of up to 80 years to be selected under the Perpetuities Act. Usually the full 80 year period is selected.

7.2 Sometimes you'll see trust deeds that have an 80 year termination date but the deed doesn't have a clause expressly saying the perpetuity period is 80 years.

7.3 Does this mean (a) the perpetuity period is implied by the 80 year termination date or (b) you have to look at the lives in being at the date of the trust deed plus 21 years?

7.4 The answer to this lies in the express words of section 6 of the Perpetuities Act. It says:

*"6. Power to specify perpetuity period (1) ... where the instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being any other duration, shall be such period not exceeding 80 years as is specified in the instrument as the perpetuity period applicable to that disposition."*

7.5 In other words, the trust deed needs to expressly say that the 80 year period is the perpetuity period. It's not enough to just have an 80 year termination date.

7.6 I think it is fair to say that this sort of thing is usually a drafting error. It's something to watch out for because the perpetuity period based on lives in being plus 21 years may fall short of the 80 year termination date so you might have a perpetuities problem on your hands.

## 8. Can you use a power of variation to change a fixed perpetuity period?

8.1 Here I'm talking about variation clauses which allow the trustees to vary the terms of a trust deed without transferring or creating a new beneficial interest in property. So I'm not talking about powers of appointment, advancement, or "resettlement" here. Can trustees use a variation clause to change a fixed perpetuity period spelled out in the trust deed?

8.2 I have only been able to find two NZ cases where a fixed perpetuity period has been varied by trustees using a variation clause. I don't think either of them provides a strong precedent to say that a fixed perpetuity period can be varied.

8.3 The first case is *Taranaki Electricity Trust*<sup>18</sup>. This case arose out of the reforms to the electricity supply industry in the 1990s. The Taranaki Electricity Trust was created to hold shares in an electricity lines company. The trust deed contained a fixed 80 year perpetuity period and an 80 year wind up date. It also had a variation clause saying the trustees could vary the terms of the trust if they obtained the Court's approval.

8.4 The trustees sought approval to a number of variations. One variation was intended to put it beyond doubt that the trust would always be charitable. Another variation was to get rid of the wind up date and the perpetuity period (which could be done if the trust was charitable).

8.5 The court approved the variations. The case is therefore authority that a variation can remove a perpetuity period where the perpetuity period is no longer relevant because a trust is charitable. I don't think it goes any further than that.

8.6 The second case is *Andrews and Others*<sup>19</sup>. Again, the case arose out of the electricity industry reforms. Shares in an electricity lines company were held by a trust for electricity consumers. The trust deed said the perpetuity period was 15 years and the wind up date was nine years after the trust was formed. Again the trust deed had a variation clause saying the trustees could vary the terms of the trust.

8.7 The trustees purposed resettling the trust assets onto a new trust with a fixed perpetuity period equal to 80 years from the date of the original trust.

<sup>17</sup> S8(4)(b) Perpetuities Act 1964.

<sup>18</sup> *Taranaki Electricity Trust* (2002) 1 NZTR 12-005.

<sup>19</sup> *Andrews and Others* (2002) 1 NZTR 12-003.

- 8.8 The trust deed contained a power of resettlement which expressly said that the term of the new trust couldn't exceed 15 years (the original perpetuity period). Because the trustees were proposing to resettle onto a new trust with a much longer wind up date and much longer perpetuity period, it was necessary to use the power of variation first to extend those things for the maximum 80 year period.
- 8.9 Some consumers challenged the resettlement and said that the trust asset should be distributed to them instead. The trustees sought a declaration under the Declaratory Judgments Act 1908 that what they were proposing to do was lawful.
- 8.10 This case was argued by Counsel opposing the variation on the basis that the trust's "*sub stratum*" was that it was to only run for a 15 year term. The Judge did not accept this and said that he did not find the argument helpful. In any event he thought the sub stratum of the trust was more about holding the shares on behalf of the consumers and reviewing ownership of them periodically. He therefore found that the trustees power of variation was sufficiently wide enough for them to vary the trust by extending the perpetuity period to the maximum 80 year term and allowing the resettlement.
- 8.11 Unfortunately there is nothing in the case report to say whether section 6 of the Perpetuities Act, which allows a fixed perpetuity period to be specified in the trust deed, was considered. On the face of it, it was not. Had it been considered properly, the result could well have been different. The reason for this is that the words of section 6 say that the fixed perpetuity period has to be specified in the instrument by which the disposition is made. The original disposition was made when the shares were first put into the trust. The perpetuity period could only be declared at that time so was the 15 year period.
- 8.12 A variation of trust isn't retrospective. It can't change the past. So under section 6 a change to a fixed perpetuity period can only operate in respect of new assets put into the trust. This must be right, because, after all, section 6 is a statutory exception to the common law perpetuity period. Either you're within the section or you're not. If you're not then you can't use it.
- 8.13 Therefore I don't think that *Andrews* is particularly good authority for saying that a fixed perpetuity period can be varied under a variation clause. I also think the trustees were very lucky to be allowed to vary the trust in the way they did. The trust deed had a lot of provisions making it pretty clear that only a maximum 15 year period was contemplated. So, I think the "*sub stratum*" argument put up by Counsel opposing the variation was a good one as well.

## 9. What's the perpetuity period when trustees make a new trust using a power of appointment, advancement, or "resettlement"?

- 9.1 At first blush the position seems to be that when trustees use a power of appointment, advancement, or resettlement to create a new trust, the perpetuity period from the head trust deed applies to the new one. That's a reasonably good rule of thumb but there are exceptions.

### *Trusts before 11 November 1964*

- 9.2 The perpetuity period for a new trust created under a special power of appointment<sup>20</sup> is the same as the perpetuity period for the head trust deed containing the special power of appointment<sup>21</sup>. This is because it must be clear from the outset of the head trust that the interests under the trust deed will vest within its perpetuity period.
- 9.3 However there might be an exception to this. There appears to be some uncertainty where the head trust deed names certain lives in being and the instrument exercising the special power of appointment creates new trusts and refers to alternative lives in being. There is an argument that the alternative lives in being govern the perpetuity period for the new trusts<sup>22</sup>.

<sup>20</sup> A special power of appointment is an authority for the power holder to select anyone within a defined class (which can include the power holder) as the recipient of the property.

<sup>21</sup> *Muir v Muir* [1943] AC 468.

<sup>22</sup> UK Law Commission Report The Rules Against Perpetuities and Excessive Accumulations Para 4.30.

However, this point does not appear to have been decided by the court and appears illogical.

- 9.4 The perpetuity period under a power of advancement<sup>23</sup> runs from the date of the head trust deed creating the power of advancement<sup>24</sup>.
- 9.5 A general power of appointment<sup>25</sup> on the other hand is treated differently. It is treated as if the power holder was already the absolute owner of the property. Therefore, the perpetuity period runs from the date the power holder exercises the general power of appointment. This means, when exercising a general power of appointment to create new trusts, it is possible to specify a completely different perpetuity period to the period applying to the head trust.
- 9.6 So for trusts formed before 11 November 1964, there is at least one exception (general powers of appointment) and possibly another one (different specified lives in being in the instrument exercising a special power) to the general rule of thumb that the perpetuity period from a head trust deed applies to a new trust created under a power of appointment or advancement.

*Trusts on or after 11 November 1964*

- 9.7 Things are slightly different for trusts formed on or after 11 November 1964<sup>26</sup>. In the Perpetuities Act, powers of appointment, advancement, and resettlement<sup>27</sup> are lumped together and defined as powers of appointment<sup>28</sup> (even though they're different things). So from now on I'll use the term "power of appointment" to describe all three.
- 9.8 Where the head trust specifies a fixed perpetuity period, that perpetuity period will be the perpetuity period applying to any new trust formed under a special power of appointment.
- 9.9 However where the head trust doesn't specify a fixed perpetuity period, the instrument under which the special power is exercised can specify a fixed perpetuity period applying to the new trust. The fixed perpetuity period will then run from the date of the head trust.
- 9.10 Therefore if you are dealing with a head trust formed on or after 11 November 1964 which doesn't specify a fixed perpetuity period (and therefore the perpetuity period is a life in being plus 21 years), you can change the perpetuity period by specifying a fixed perpetuity period when exercising the special power of appointment to create a new trust.

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<sup>23</sup> A power of advancement is an authority for the trustee to pay or apply the property early to the person absolutely or contingently entitled to it.

<sup>24</sup> Pilkington v. IRC [1962] 3 All ER 622.

<sup>25</sup> A general power of appointment is an authority for the power holder, acting alone, to select anyone in the world, including himself or herself, as the recipient of the property.

<sup>26</sup> S5 Perpetuities Act 1964. Although ambiguous this section applies to trusts formed after the act came into force see Re Earl of Coventry's Indentures [1974] Ch 77.

<sup>27</sup> "Resettlement" is a wide term that can refer to a new trust formed under a power of appointment or advancement or a trust formed under an express "resettlement power" you sometimes see in trust deeds.

<sup>28</sup> S2 Perpetuities Act 1964.