IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M 5/02

UNDER	the Declaratory Judgments Act 1908
IN THE MATTER OF	An Application by ALLAN WAYNE ANDREWS and ORS, Plaintiffs

Hearing: 4 June 2002

Appearances: J G Fogarty QC and N R Hall for Plaintiffs
W J Palmer and R M Dunningham for Timaru District Council and Timaru District Holdings Limited
T C Weston QC for the consumers of Alpine Energy Limited

Judgment:

JUDGMENT OF PANCKHURST J

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Introduction:

[1] The plaintiffs are trustees of the South Canterbury Power Trust (the Trust). It was established by deed of trust in 1993 to take up a 40% shareholding in Alpine Energy Limited (Alpine). In this proceeding the trustees seek declarations confirming their power to extend the term of the trust from its present maximum of fifteen years to eighty years. A declaration is also sought confirming that certain preconditions to the exercise of the power to vary the trust deed have been met. Otherwise, it is common ground it is too late for the trustees to vary the trust deed and thereby achieve a successor trust of significant duration.

[2] The Timaru District Council (the Council) through its wholly owned subsidiary Timaru District Holdings Limited (Holdings) has a 47.5% shareholding in Alpine. It does not accept that the life of the Trust may be extended out to eighty years, nor that the preconditions to a variation of the trust deed have been met. The Council therefore opposes the declaratory relief sought by the trustees. Mr Weston QC, appointed to represent consumers of Alpine opposed to the extension of the life of the trust, likewise challenged the appropriateness of the relief sought by the trustees.

Factual Background:

[3] Alpine is a Timaru-based company which owns and operates the electricity distribution network in South Canterbury. It was formed pursuant to the Energy Companies Act 1992. Under that Act the undertakings of electric power boards or local authorities (typically municipal electrical departments/MEDs) were vested in energy companies of which Alpine is an example. In other words electricity distribution was corporatised and privatised in the hands of what might be called line companies.

[4] This was to be achieved in terms of Part III of the Act through the medium of *"establishment plans"*. Thereby each power board or local authority was required to prepare a plan which identified the extent of its undertaking, its value and described

the share allocation to prevail in relation to a newly formed energy company. Such plans required ministerial approval.

[5] Pursuant to Part IV of the Act energy companies were to be incorporated by a defined date, 1 April 1993. A power board and a local authority in a given area were able to continue to establish a single company into which would vest the undertakings of both bodies : s34. The South Canterbury Power Board and Timaru Electricity (owned by the Timaru District Council) prepared establishment plans which culminated in the vesting of their separate undertakings in a single company, Alpine. Thereby an amalgamation of South Canterbury's electricity distribution network was achieved.

[6] The shareholders in and the rationale for the share split in relation to Alpine is described in recital C. to the deed of trust dated 15 July 1993 by which the Trust was brought into being:

> *"The establishment plan provides inter alia for the allocation of 68.06 percent of the shares in Alpine to be issued consequent on the vesting of the Board's undertaking and allocated as to 40.00 percent to the Trustees and the remaining 28.06 percent to the Timaru District Council (15.56%), Waimate District Council (7.54%) and Mackenzie District Council (4.96%). The remaining 31.94 percent of the shares in the Company will be issued to the Timaru District Council pursuant to the establishment plan relating to its electricity undertaking, Timaru Electricity."*

The shares held by the Trust were issued to the trustees by the Energy Companies (Alpine Energy Limited) Vesting Order 1993 on 19 July of that year (the vesting date). The Council's shares are now held by Holdings.

[7] In the result the shares holdings of each entity and their percentage interests are as follows:

The Trust	16.53 million shares	40.00%
Holdings	19.63 million	47.50%
Waimate District Council	3.1 million	7.54%
Mackenzie District Council	2 million	4.96%
	41.32 million	100.00%

[8] The percentage interests are significant. Holdings has almost a controlling interest in Alpine. If the life of the Trust is extended out to eighty years its 40% interest will potentially be entrenched for that time. If, however, the trustees are unable to vary the Trust to substantially prolong its life their 40% shareholding will pass into the hands of the 27,000 (approximately) consumers who use Alpine's electricity supply network. In that event there will be obvious scope for Holdings to purchase a further 3% (approximately) of the total shareholding in order to acquire a controlling interest.

[9] Upon filing this proceeding the trustees sought directions as to service. In the result the proceeding was served upon Alpine itself, Holdings, and the Waimate and Mackenzie District Councils. In addition Mr Weston QC as counsel to represent consumers opposed to the variation was served. The trustees accepted responsibility to represent both themselves and the consumers who favour variation of the trust. Therefore such persons are not separately represented.

[10] Although Alpine's solicitors filed an appearance reserving rights, the company subsequently indicated its intention to neither oppose nor support the trustees' application, rather to abide the decision of the Court. Likewise, neither of the District Councils have played any active part in the proceeding.

[11] Subsequent to the order as to service the Timaru District Council applied to be joined as a party in its capacity as a consumer of Alpine. In the absence of opposition to such application the Master, on 6 May 2002, ordered the joinder of the Council.

[12] At the same time he heard an application by the trustees to strike out Holdings as a party. Curiously although the trustees secured the involvement of Holdings as a party in the first place, in March 2002, they also moved on 10 April 2002 to strike it out upon the grounds the company had been mistakenly joined, did not have a legitimate interest in the relief sought and was not a consumer of Alpine.

[13] This application was originally argued before the Master and, on review, before William Young J. In their judgments dated 7 May 2002 and 24 May 2002,

respectively, the application to remove Holdings was declined. However, the Judge added the caveat that the issue of Holdings' standing as a party to the proceeding should remain *"available for argument at the substantive hearing"*. This reflected his opinion *"that in all but simple cases issues of standing should not be dealt with in isolation from the substantive issues in the case"*. Accordingly I too heard submissions in relation to this question.

[14] In the event I propose to consider this aspect at the end of the judgment. Mr Palmer and Ms Dunningham appeared for the Council and Holdings. A single set of submissions were advanced for both. Hence in terms of the argument whether Holdings remained a party made no difference. The real significance of its standing, or status, is I think in relation to appeal rights. Mr Fogarty QC at least considered that (assuming the plaintiff trustees succeeded) Holdings as a commercial entity was more likely to prosecute an appeal against the decision, than the Council. This it was suggested was because the Council as an elected body would not wish to be seen as acting contrary to the view of a majority of its ratepayers who voted in favour of the variation of trust.

The Pleadings:

[15] In order to appreciate the respective position of the parties it is necessary to mention certain features of the deed which in turn give rise to the essential issues in the case. I shall do so in a cursory manner at this point, but it will be necessary to return to the actual terms of the deed later.

[16] The trust deed was signed on 15 July 1993. The shares in Alpine vested in the trustees on 19 July (see para [6]). The *"termination date"* of the Trust is defined as the earlier of nine years from the vesting date or the date upon which the Trust is wound up in accordance with clause 15. The *"perpetuity period"* is also defined for the purposes of the Perpetuities Act 1964, being fifteen years from the vesting date.

[17] Clause 4 of the trust deed under the heading *"Review"* requires the trustees to consider the available options for the future ownership of the shares on a triennial basis. The directors of Alpine are to be involved in the process, the performance of

the company is to be analysed, a report is to be prepared and made available to the public. If it is considered that the shares or any portion of them should be distributed then a *"share allocation plan"* shall be prepared and tested by a postal vote of consumers, being those who are connected to the distribution network at that time.

[18] But if, despite such triennial reviews no share allocation is finalised and given effect to within eight years of the vesting date then the shares are to be distributed equally to all consumers connected to the network on the ninth anniversary of the testing date, or the shares are to be vested in a *"successor trust"*. Importantly such successor trust must be established on the same terms or conditions as are contained in the parent trust deed, and the term of the successor trust shall not exceed fifteen years from the vesting date (with two reviews of ownership during that six year term). Whether the requirements of clause 4 comprise an entrenched code as to the life of the trust and the manner in which its shares are to devolve, is a central issue in this proceeding.

[19] The other clause of the deed which is of pivotal importance is clause 14 headed *"Variation to Trust Deed"*. Thereby it is provided that by resolution of not less than four of the five trustees the trust deed may be varied, provided such variation is approved by 75% of consumers in a postal vote. Moreover, clause 14.2 limits the ability to vary the trust deed, in that the obligations or powers of the trustees to review the ownership of the shares, or to sell, transfer or dispose of them in accordance with clause 4, may not be limited or restricted. Whether, thereby, there is a fetter upon the ability of the trustees to vary the trust by the establishment of a new trust with a lifetime up to 80 years (from the vesting date) is also at the heart of the argument.

[20] On 22 November 2001 the trustees passed a resolution the effect of which was to enable them to resettle the shares on a successor trust having a term not to exceed eighty years from the vesting date with a similar perpetuity period. A postal vote was conducted between 30 November and 24 December 2001. Of the approximately 27,000 consumers 52.79% voted. Of these 81.79% were in favour of the variation and 18.12% opposed (with some informal votes recorded as well).

[21] The trustees' resolution of 22 November 2001 was expressed to be effective only if 75% of consumers approved of it and this Court by declaratory order did likewise. Hence the trustees in this proceeding seek a declaration that:

> *(a) Clause 14 of the Deed entitles (them) to vary the Deed as provided in the Resolution thereby extending the terms of the Successor Trust; and*
>
> *(b) Clauses 14.1 and 14.2 of the Deed entitle (them) to resettle the Shares and the Trust Fund in the Successor Trust as set out in the draft Successor Deed annexed hereto and that the (trustees) are now entitled to proceed to do so.*

[22] The Council by its statement of defence challenged the actions of the trustees essentially on three fronts. In the final result it alleged:

(a) that the trustees did not pass a valid resettlement resolution by the last available date being 19 January 2002,

(b) that the postal vote of consumers was invalidly conducted in that the notice provided to consumers was ambiguous and the minimum period of 21 days in which to vote was not provided; and

(c) the variation was in any event contrary to and beyond the powers of the trustees in terms of the trust deed.

[23] Mr Weston also filed a statement of defence. In it he challenged the actions of the trustees on similar grounds, although his arguments were framed and advanced in subtly different terms. However the above outline is sufficient for present purposes.

[24] For completeness I record that in an amended statement of defence the Council also sought to raise a counterclaim. This was based on an estoppel arising from an alleged representation in the course of negotiations namely that the term of the Trust Deed would be limited to 15 years. The Council maintains that it relied upon this representation as underlying its agreement to a share allocation whereby it acquired less than a controlling interest. Leave was required to bring the counterclaim because the case was already set down for the present hearing. In the event William Young J declined leave for reasons set out in his judgment of 24 May 2002.

[25] Although counsel presented argument directed first to the form of the trustees' resolutions, then to whether the postal vote was conducted as required and, finally, to whether there was power to vary the trust deed in the manner sought, I propose to consider the third issue first. To my mind it is logical to first decide if there is power to vary the trust to establish a successor of up to 80 years duration before turning to the more procedural issues concerning the validity of the resolutions and the postal vote.

Was There Power to Amend?:

[26] This question is obviously one to be answered by reference to the terms of the trust deed itself. In that regard it was common ground that the principles applicable to the interpretation of a contract applied equally in relation to a trust deed. Hence the principles of interpretation discussed in ***Boat Park Limited v Hutchison*** [1999] 2 NZLR 74 (CA) at 81 – 2 apply. I have also gained assistance from an article by Professor Maxton entitled *"Equity"* in [1999] New Zealand Law Review 319, in which she discusses the use of trusts *"in the modern commercial world"* including energy trusts. The essential theme to emerge is that the commercial setting of the particular trust, be it a superannuation trust, a debenture trust or an energy trust, is relevant to the interpretation of the trust documents : ***Re UEB Industries Pension Plan*** [1992] 1 NZLR 294 (CA) and more recently ***Fletcher Challenge Nominees v Wrightsons*** [1999] 1 NZSC 40,468 (CA).

[27] I have already noted the importance of several of the definitions in the trust deed. To recap, the vesting date is 19 July 1993. The termination date is the earlier of nine years from the vesting date or alternatively the date upon which the trust is wound up in accordance with clause 15. The perpetuity period is 15 years from the vesting date. Consumers are those connected to Alpine's distribution network at the relevant date, save that persons with more than one connection remain a single consumer.

[28] The objections of the Trust are described in clause 3:

> *"This Trust has been established to enable the Trustees:*

3.1 On Vesting Date, to receive shares in the Company vested in the Trustees by Order in Council made in accordance with section 47 of the Act.

3.2 If the Trustees so elect to subscribe for, purchase or otherwise acquire additional shares in the capital of the Company or subsidiary of the Company provided however that the Consumers agree to such acquisition in accordance with Clause 10.2

3.3 To retain and hold such shares until such time as the shares or a portion of them are sold, transferred or disposed of in accordance with Clause 4.

3.4 In the event of any sale, transfer or other disposition of shares, to hold the proceeds of any such sale, transfer or other disposition upon the trust for capital in accordance with Clause 6.1.

3.5 To receive the Dividends and to distribute, pay, apply and appropriate the Dividends in the manner provided in Clause 5 of this Deed.

3.6 Following the Termination Date to pay, apply and appropriate the capital of the Trust in the manner provided in Clause 6.2.

3.7 To encourage and facilitate the Company in meeting its objective of being a successful business by optimising the Company's return on its assets, and to maximise the benefits for Consumers by distributing to Consumers in their capacity as owners, the benefits of ownership of the shares in the Company."

[29] As already noted clause 4 is of pivotal importance. I shall summarise it in part and set out some sub-clauses in full. The first requirement is for a review within three years by the directors of Alpine upon the available options for the future ownership of the company : clause 4.1. The trustees are required to review the director's report and make it available to the public : clause 4.2. Such report is then to be subject to the *"Special Consultative Procedure"*, whereby consumers are to be notified of the proposals in the report and afforded the opportunity to make written submissions upon them, including a reasonable opportunity to be heard at a public meeting : clause 4.3.

[30] Within a prescribed time the trustees, after taking due account of all views expressed on the proposals in the report, shall decide whether to retain the shares, dispose of them in part or in full, including resettlement of the shares on trust : clause 4.4. If the shares are to be retained notice thereof shall be given (clause 4.5), while if any portion of the shares are to be distributed the trustees shall prepare *"a*

Share Allocation Plan" which must be referred to the directors of Alpine and be the subject of a postal vote of consumers : clause 4.6.

[31] Clauses 4.7 and 4.8 deal with default by the trustees in producing a review report (responsibility passes to the directors of Alpine) and with Alpine's entitlement to reimbursement of the costs incurred by it in relation to any ownership review. By Clause 4.9 it is provided that the *"initial review"* (after three years) is to be followed by at least three triennial reviews during the term of the Trust, although the trustees may *"hold a review at any time"* and shall do so *"whenever requested by the* (Alpine) *directors"*.

[32] The balance of the clause provides:

> *"4.10 If no Share Allocation Plan is finalised and given effect to by the expiration of 96 months from the Vesting Date, the shares in the capital of the Company and any other assets constituting the Trust Fund shall be either:*
>
> *(a) distributed by the Trustees in equal amounts to Consumers as at the ninth anniversary of the Vesting Date; or*
>
> *(b) vested in a successor trust in accordance with Clause 4.11*
>
> *provided however that if no decision as to the manner of distribution of the shares and assets of the Trust Fund, is made by the expiration of 102 months from the Vesting Date, the shares in the capital of the Company and any other assets constituting the Trust Fund shall be distributed in equal amounts to Consumers as at the ninth anniversary of the Vesting Date.*
>
> *4.11 The powers of the Trustees under this Deed shall, without in any way limiting or restricting those powers, include the power for the Trustees to settle or resettle upon trust for the benefit of the Consumers the whole or any portion or portions of the shares or assets constituting the Trust Fund. Any such successor trust shall be on the same terms and conditions, with all necessary modifications, as this Deed provided however that:*
>
> *(a) there shall be no power for the trustees of such trust to resettle upon trust the assets of that trust;*
>
> *(b) the term of such trust together with the term of this Trust shall not exceed fifteen years from the Vesting Date; and*
>
> *(c) any such trust shall provide for the holding of at least two reviews of ownership during its term.*

> *4.12 Except in accordance with Clause 4.10 the Trustees shall not sell, transfer or otherwise dispose of the shares or assets constituting the Trust Fund or agree to the sale, transfer or other disposition of such shares or assets unless the proposal to dispose of the shares or assets is discussed as part of the consultation with the Directors and the public carried out in accordance with this clause."*

[33] The succeeding clauses provide for the distribution of income to consumers during the life of the Trust (clause 5), the distribution of capital to consumers prior to and after the termination date (clause 6), and regulate the appointment, powers and duties of the trustees (clauses 7 – 13 inclusive).

[34] Then is clause 14 headed *"Variation to Trust Deed"*:

> *"14.1 This Deed may be altered or amended only by the resolution of not less than four Trustees in writing provided however that no amendment shall be effective unless it has been approved by not less than seventy-five per cent of Consumers who vote in a postal vote carried out in accordance with Clause 4 of Schedule 3.*
>
> *14.2 Notwithstanding Clause 14.1 no alteration or amendment may be made to this Deed that has the effect of limiting or restricting the obligations or powers of the Trustees under this Deed to:*
>
> *(a) review proposals and available options for the ownership of shares held by the Trustees in the Company in accordance with Clause 4: or*
>
> *(b) sell, transfer or dispose of the shares following an ownership review held in accordance with Clause 4."*

[35] By clause 15 the trustees are required to wind up the Trust if the shareholding has fallen to less than 5 per cent or a *"resolution to wind up the Trust has not been passed by the ninth anniversary of the Vesting Date"*. The final three clauses proscribe interests which trustees may not hold, and define their liability and right of indemnity (clauses 16, 17 and 18 respectively).

[36] The rival arguments were quite shortly expressed. Mr Fogarty focused upon clause 14. He argued that the power of amendment was extremely broad, subject only to the requirements of a majority resolution of the trustees and a 75% vote of consumers. However, he of course acknowledged that the power in clause 14.1 was subject to the specific limitations in clause 14.2. These, he said, were *"plainly a careful delineation of the qualification on the general power* (but were) *themselves*

limited to the two topics thereafter set out". That is that the variation may not limit or restrict the trustees' obligations or powers in relation to ownership reviews or their implementation by sale, transfer or disposal of shares.

[37] But, counsel submitted, the amendment did not limit or restrict the requirements for periodic ownership reviews. The code whereby ongoing ownership of the shares was to be reviewed at least triennially remained intact. Likewise the trustees' obligations or powers in relation to the sale, transfer or disposal of shares following an ownership review were not diminished. The relevant terms of clause 4 remained unchanged. And Mr Fogarty argued, clause 14.2 did not prevent a variation to clause 4.11(b) to extend the life of the successor trust. That topic was simply not covered by clause 14.2(a) or (b).

[38] Messrs Palmer and Weston in arguments which varied in emphasis but not in substance, submitted that clause 4 was a code by which there was an absolute obligation to distribute the trust fund at the expiration of nine years from the vesting date, or at the very most after fifteen years if there was a resettlement of the trust fund upon a successor trust. The trustees' proposed variation, involving a successor trust with a potential life expectancy of up to 80 years from the vesting date, purported to remove that fundamental obligation to bring the Trust to an end within a relatively short time frame.

[39] Moreover, both counsel submitted, the variations were prevented by clause 14.2. In particular the proposed amendment to effect a long-term successor trust ran foul of clause 14.2(b), because disposition of the shares within the time frame of the code provided by clause 4 was postponed. Mr Palmer put it on the basis that the proposal set out to subvert the very scheme of the trust deed.

[40] Mr Weston expressed the matter in these terms:

> *"… the package of definitions in clause 1, the 15 year perpetuity period in clause 1.3, the careful* (review of ownership) *scheme devised in clause 4, the limitation in clause 14.2, and the sunset provision in clause 15.1* (indicated) *a clear intention that the trusts will not survive beyond 15 years. If the situation were to be otherwise it could have been simply accomplished by having an 80 year deed with triennial reviews. Why* (rhetorically) *otherwise*

go to all the trouble of setting up the complex structures in clause 4 if it could be simply undone as the trustees now propose?"

[41] Before I discuss and endeavour to resolve the issue I think it advisable to shortly state the history of the variation process followed by the trustees. In anticipation of the Trust's eighth anniversary on 19 July 2001 the trustees in April – May of that year conducted a postal vote of consumers. Three options for the future ownership of the Trust's assets were posed, being resettlement in a successor trust until 2008, resettlement in a long-term successor trust, or distribution to the consumers by way of a share allocation plan. In the result a clear majority of consumers favoured resettlement upon a long-term successor trust. Accordingly on 17 May 2001 the trustees resolved to instruct a solicitor to proceed immediately with the preparation of a trust deed for a successor trust.

[42] In these circumstances a share allocation plan was not finalised and given effect to by 19 July 2001. Therefore clause 4.10 of the trust deed automatically came into play.

[43] On 27 September 2001 the trustees passed a further resolution the import of which is not so obvious. It concerned the successor trust and the decision was to follow the advice of solicitors, Simpson Grierson, *"to try and achieve a longer life for the existing trust"*.

[44] Then on 22 November 2001 the trustees passed the actual resolution intended to vary the terms of the trust deed to enable a long-term successor trust to be established. The key aspect of the resolution was to substitute 80 years (instead of 15 years) in clause 4.11(b) with consequential amendments required to the definitions of the termination date and the perpetuity period. The resolution also recorded that the variations were subject to the 75% approval of consumers and a favourable declaratory order of this Court. Mr Fogarty observed that the requirement for the imprimatur of the Court was *"self imposed"* and intended to provide *"a level of comfort"* to the trustees.

[45] Between 30 November and 24 December 2001 the necessary postal vote was conducted and resulted in an 81.79% vote in favour (refer para [20]). Finally on 12

December 2001, after consideration of concerns expressed by the Council, the trustees resolved to reconfirm their resolution of 17 May 2001 to resettle the whole of the trust fund into a successor trust. Of course whether the resolutions constitute a decision in terms of clause 4.10 and the efficacy of the postal vote are each the subject of challenge, to which I will turn shortly.

[46] What is apparent from this review of the process is that the trustees intended to invoke clause 4.10(b) of the trust deed, that is their power to vest the trust fund in a successor trust in accordance with clause 4.11. However, the twist is that they seek also at the same time to invoke their power to vary the trust deed by extending the maximum life of the successor trust from 15 years to 80 years from the vesting date. That extension aside, the intended successor trust is one in terms of clause 4.11.

[47] Turning to the fundamental issue I think it is necessary to first focus upon clause 14. I accept Mr Fogarty's submission that the power of amendment in clause 14.1 is unencumbered except for the resolution and voting requirements. However, clause 14.2 is equally definite in relation to the limits upon a power of amendment. I note first the width of the words used in restricting the ability to vary the deed. It is *"the obligations or powers"* of the trustees which are protected. And it is any variation that *"has the effect of limiting or restricting"* them which must be scrutinised. But despite this expansive language I accept Mr Fogarty's further submission that such limit upon variation is expressly restricted to the two topics identified in (a) and (b).

[48] As to that the subject-matter of (a) is the obligation/power of the trustees to *review* the ownership of shares in accordance with clause 4. In (b) the subject-matter is the obligation/power to *sell, transfer or dispose* of the shares again in accordance with clause 4. The additional words in (a) and (b) are I think descriptive of the essential obligation or power of review or disposal, as the case may be. Nonetheless they must of course be brought to account.

[49] Now, does the proposed variation (extension of the potential life of the successor trust up to 80 years) run foul of the limitation imposed by clause 14.2? I accept it does not in relation to (a). The obligation of the trustees to review the

ownership of the shares in accordance with clause 4 is not affected by the variation. The processes of triennial review and consultation remain intact. I accept Mr Weston's point that one of the *"available options for the ownership of shares"* will be recaste to the extent that a long term successor trust will be involved. But otherwise the obligation of periodic review, which is the essence of the obligation, will remain unchanged.

[50] But the principal argument was directed to (b). Is the proposed variation a fetter upon the obligation/power of the trustees to deal with the shares following an ownership review held in accordance with clause 4? In particular does the proposed variation have the effect of limiting or restricting the power of the trustees to vest the shares in a successor trust in accordance with clause 4.11? I think the answer to that question is also no. The only change affected by the proposed amendment is in relation to the maximum term of the successor trust. The actual obligation or power to sell, transfer or dispose of the shares remains. Put another way the impact of the variation is upon the potential duration of ongoing ownership of the shares following their transfer to or vesting in a successor trust.

[51] But is the very nature of the transfer or vesting changed because of the much increased potential life expectancy of the successor trust? This to my mind was the essential basis of counsels' challenge to the proposed amendment. I do not accept it. So long as the requirements of ownership review and consultation remain the potential longevity of the successor trust is not of such major consequence. The essential nature of the obligation or power, to vest the shares in a successor trust, emerges unscathed.

[52] I think there is support for this conclusion in another submission made by Mr Fogarty. He argued that the limit set by (b) was only in relation to disposition of the shares *"following an ownership review"*. By reference to clause 4 he contended that an ownership review was either the initial review or the triennial review required by clauses 4.1 and 4.9, respectively. Each entailed the multi-step process of a report by the directors, comment upon it by the trustees, consultation with the consumers and (potentially) a share allocation plan. By contrast, he argued, the process entailed in clause 4.10 did not involve an ownership review. By then, post 19 July 2001, the

trustees were faced with two stark options. They could either distribute to the consumers as at 19 July 2002 or vest the assets in a successor trust. Neither option was attended by the process of consideration, report and consultation required in terms of clause 4 both initially and on a triennial basis.

[53] Clause 4.12 is also relevant in this regard. Although it does not use the description ownership review, it requires that any proposal of the trustees to dispose of the assets *"is discussed as part of the consultation with the directors and the public carried out in accordance with this clause"*. That must be, I think, a longhand reference to the process of ownership review. Significantly clause 4.12 is expressed not to apply to a distribution or vesting in accordance with clause 4.10. This lends further support to Mr Fogarty's submission.

[54] It follows in my view that clause 14.2(b) prevents an amendment to the trust deed which limits or restricts the trustees in relation to their obligation to deal with the shares in accordance with the views of the consumers following the process of consultation. Paragraphs (a) and (b) therefore complement one another. The deed may not be amended so as to interfere with the requirement for periodic ownership reviews, nor may the requirement to dispose of the shares following any such review be limited or restricted. Otherwise, however, the power of amendment is untrammelled.

[55] For all these reasons I conclude that the proposed variation is not one caught by the limitation imposed by clause 14.2.

Two Related Arguments:

[56] Mr Palmer assumed the main burden of an argument that the proposed variation concerned a core obligation of the Trust and, as such, would change its substratum, which indicated it was not a variation within the power of the trustees. Such submission was advanced with reference to a number of authorities including : ***In Re Dyer*** [1935] VLR 273, ***Re Holts Settlement*** [1968] 1 All ER 470, ***Re Balls Settlement*** [1968] 2 All ER 438, ***Kearns v Hill*** (1990) 21 NSWLR 107, ***Re Cavill***

Hotels Pty Ltd (1997) 1 QdR 396 and ***Society of Lloyds v Robinson*** [1999] 1 Comm 545 (HL).

[57] I have considered these cases but in the event I find it necessary to refer briefly to only four of them. First I note in passing a comment of Martin J ***In Re Dyer*** commented towards the end of his judgment that the limits upon the power for trustees to vary a trust deed was *"a very difficult question"*, albeit not in that case. In ***Re Ball's Settlement*** Megarry J at 442 observed:

> *"If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed."*

Hence in that case the Court exercised its power to approve on behalf of infant and unborn beneficiaries a variation of trust where the changes were said to *"lie in detail rather than in substance"*.

[58] ***Kearns v Hill*** is helpful for the observation of Meagher JA at 109 concerning powers of variation in trust deeds generally, that the *"cardinal duty* (of the court is) *to construe each provision according to its natural meaning, & in such a way to give it its most ample operation"*. Further, at 111 in relation to a substratum argument he characterised it as *"not really helpful in the present context, where either it is impossible to locate any substratum at all …"* or, alternatively, because the variation actively promoted rather than diminished the relevant substratum if there was one. Finally, ***Society of Lloyds v Robinson*** is significant for the observations in the speech of Lord Steyn that it is well-established that a power of amendment reserved in a trust must be exercised only for the purpose for which it was granted, and, for his conclusion that the amendments in that instance were when properly analysed *"within the commercial purpose"* of the trust and therefore validly made.

[59] Against the background of these cases Mr Palmer developed an argument to the effect that the substratum or commercial purpose of the present trust deed was to provide for ownership of an asset (shares having a present value of over $36m) over

a defined period of no more than 15 years coupled with regular reviews of ownership. So much was plain from the terms of the deed. Yet, the proposed variation contemplated the antithesis of this, namely a trust which may continue for up to 80 years from the vesting date. It was also pointed out that thereby the beneficiaries, the consumers, would be entirely different people although of the same class.

[60] Needless to say Mr Fogarty resisted this argument. After reference to the cases, in particular to observations in them which stressed the need to have regard to context and to construe powers of variation liberally, he made two main points. First, that there was no magic in the extension in the life of the Trust to potentially 80 years, since the same review of ownership obligations rested upon the trustees of the successor trust. It followed that in the long run a decision-making process, attended by full consultation with consumers would determine the life of the Trust, not the arbitrary maximum life expectancy fixed by the trust deed. Second, he argued that the identity of consumer beneficiaries was always necessarily fluid. As counsel put it no consumer had a *"vested interest"* because the life of the Trust was dependent upon regular reviews and users of the distribution network would undoubtedly change from time to time.

[61] I am not persuaded that the substratum argument is either appropriate, or helpful, in this case. In this regard I am influenced by the terms of clause 14 by which the power of variation is conferred. It is not a general and unlimited power. Although initially expressed as such, the power is subject to the closely defined limitations contained in clause 14.2(a) and (b). Thereby, in a sense, the substratum of the Trust is identified and protected against the power of variation. Second, I am not persuaded that the potential for prolonged extension in the life of the Trust is at odds with a core concept of the trust deed. To my mind if there is a discernible substratum it is one more centred upon the concept of review and consultation, whereby the ultimate life of the Trust will be determined as circumstances and ultimately the will of the consumer dictates.

[62] A further argument concerned whether it was appropriate for me to read affidavits sworn by Messrs E O'Sullivan and S R Bennett which were filed on behalf

of the Council. Mr Fogarty objected to my reading them in relation to the argument concerning interpretation of the deed, save as was necessary to rule upon their admissibility. In the event I need say little about this aspect. The affidavits contain a description of the negotiation process which culminated in the shareholding in Alpine, described earlier (para [7]). The essential point made by the deponents was that the Council agreed to accept its 47.5% stake (now vested in Holdings) in consequence of an understanding that the Trust would have a limited life expectancy of no more than 15 years. My impression is that the affidavits are of most relevance to the Council's intended counterclaim, which is not of present concern.

[63] In any event, I do not consider that the affidavits are relevant to the question of construction. They contain statements as to the subjective intentions of the Council's representatives in relation to negotiation of the terms of the trust deed. Such intentions are not relevant. Otherwise I do not regard the affidavits as material. They have not influenced my decision.

A Timely Decision to Resettle?:

[64] Since the proposed variation is directed to a successor trust in terms of clause 4.11 it is essential that prior to the expiration of 102 months from the vesting date, that is before 19 January 2002, the trustees reached a decision to vest the trust fund in a successor trust. Otherwise, the proviso to clause 4.10 applies and in the absence of a timely decision the trust fund must be distributed equally to consumers as at the ninth anniversary of the vesting date. Whether a decision was taken by the trustees is challenged.

[65] It was common ground that a decision of this kind was to be found, if at all, in formal resolutions passed by the trustees in meeting. Mr Fogarty relied upon no less than three resolutions. The first was passed on 17 May 2001 in the immediate aftermath of the postal vote whereby a majority of consumers favoured the concept of a long term successor trust. The resolution was expressed in these terms:

> *"**CONSUMER POLL***
>
> *It was RESOLVED that the Secretary should instruct the Trust Solicitor, Bruce Timpany, to begin immediate work on the preparation of the Trust*

Deed for the Successor Trust to ensure that this is done in terms of the existing Trust Deed."

[66] Next, the date of 19 July 2001 represented a watershed, being the expiration of 96 months or eight years from the vesting date, which passed without a share allocation plan having been finalised and given effect to. Thereafter it was too late to proceed by that means. Clause 4.10 applied. The trustees were faced with two options being distribution of the trust fund to consumers as at 19 July 2002 or vesting it in a successor trust, for which a decision was required by 19 January 2002.

[67] On 27 September 2001 a further resolution was passed:

*"**SUCCESSOR TRUST – THREE YEAR REVIEW***

Detailed correspondence was received from Simpson Grierson outlining a suggested course of action to try and achieve a longer life for the existing Trust.

After discussion it was RESOLVED to proceed along the lines suggested by Simpson Grierson along the time line as drawn up by the Chairman."

Messrs Palmer and Weston pointed to the obvious difficulty in interpreting this resolution, the more so since the correspondence from the solicitors was the subject of a claim to legal professional privilege.

[68] Finally there was a further resolution passed during the course of the postal vote in November – December 2001. That vote was commenced by a mail-out of polling papers to consumers on 30 November which were originally to be returned by noon on 13 December, but the time limit was extended to noon on 24 December. In the meantime on 12 December 2001 the trustees passed a resolution:

*"**SUCCESSOR TRUST***

Concerns expressed by the Timaru District Council were considered in some detail.

IT was RESOLVED to re-confirm the resolution of 17 May 2001 to resettle the whole of the trust fund into a Successor Trust, as provided for in the Trust Deed."

[69] The gist of the challenge was that the May resolution was unintelligible or at least ambiguous, and premature in that a share allocation remained possible until 19

July 2001; that the September resolution was meaningless in the absence of the solicitors' correspondence; and that the December resolution being in its terms a reconfirmation of the May one was also ineffective.

[70] Mr Fogarty responded that the resolutions were not to be construed in a vacuum, but against the background of the postal votes and other events which accompanied them, and that in any event the three resolutions unmistakably conveyed a decision by the trustees to establish a successor trust. In reality it was too late in even May 2001 to finalise and implement a share allocation plan by 19 July. Hence the resolution of 17 May evidenced a decision to form a successor trust in terms of clauses 4.10 and 4.11. If there was any ambiguity such was removed by the December resolution which made it plain that the *"whole of the trust fund"* was to be resettled into a successor trust.

[71] I can express my conclusions on this aspect quite briefly. Whilst the resolutions are not happily worded, I am in no doubt they evidence a decision to vest the trust fund in a successor trust in accordance with clause 4.11. That decision had to be taken no later than 19 January 2002. It would have been preferable if there was a single unambiguous resolution. However, the resolutions as a whole, read in context, plainly indicate that a decision was taken by the trustees prior to the final available date. In that regard I see the further resolution of 22 November 2001 as also material. Thereby the trustees identified the actual changes required to the trust deed in order to achieve a long term successor trust. It follows, I think, that there is ample evidence of a decision by the trustees such as to negate the operation of the default proviso to clause 4.10.

The Postal Vote:

[72] There are two main aspects to the challenge to the validity of the postal vote. First is an argument that clause 14.1 of the trust deed required no less than 75% of consumers to approve the relevant amendment, whereas the polling paper supplied to consumers asked them to vote in support or against a *"proposal"*, namely to extend the life of the Trust beyond 15 years. Hence, counsel argued, the vote was not one upon the amendments but upon a so-called proposal.

[73] Second, was an argument that the trustees were required to allow 21 days within which consumers may vote, and this was not done. There were several aspects to this argument since attempt was made to extend the time originally allowed. The validity of the purported extension, the way it was notified and the calculation of 21 days are all in issue.

[74] Clause 14.1 provides that *"no amendment shall be effective unless …"* approved by 75% of consumers *"who vote in a postal vote carried out in accordance with clause 4 of Schedule 3"*. That clause relevantly provides:

> *"4. The Trustees may in their discretion determine the method and procedure for carrying out the postal vote provided that:*
>
> *(a) the Trustees shall give written notice to all the Consumers of the postal vote and of the method or procedure adopted by the Trustees for carrying out the postal vote:*
>
> *(b) a period of not less than 21 days shall be allowed between the date the Consumers are notified of the postal vote and the date by which the votes of the Consumers will be disallowed if not received by the Trustees;*
>
> *(c) each Consumer shall be entitled to one vote;*
>
> *(d) the Trustees shall give notice of the vote to Consumers through the post directed to the address of each Consumer in the records of the Trust, or if there are no records, then the records of the company; and*
>
> *(e) the notice referred to in (d) shall be deemed to have been received two days after the date of posting of the notice by the Trustees."*

[75] On 30 November 2001 polling papers and an explanatory pamphlet were posted to consumers. They were deemed to have received these documents by 2 December 2001. The closure time for postal votes was advised to consumers as noon on 13 December 2001. However, the inadequacy of the period allowed was recognised and on 10 December 2001 an extension of the voting period was notified to consumers by a mail drop and by advertisements placed in local newspapers. The extension was to noon on 24 December 2001.

[76] To recap I note that of approximately 27,000 consumers over 52% voted in the poll. Of these over 81% supported the concept of a long term trust and over 18% were opposed.

[77] It is common ground that the polling paper did not refer to the terms of the resolution of the trustees of 22 November 2001 by which the actual amendments to the trust deed were identified. Instead the polling paper stated that *"the South Canterbury Power Trust proposes to extend the life of the Trust beyond its present life of 15 years"*. Consumers were asked to tick one of two options. These were *"I support the proposal"* and *"I do not support the proposal"*.

[78] The pamphlet which accompanied the polling paper said:

> *"In May 2001 73% of voters in a postal poll supported extending the life of the South Canterbury Trust. Since then the Trustees have followed the requirements of the original Trust Deed, dated 15 July 1993, to make that happen. A complex legal process must be followed and this poll is part of that process.*
>
> *On 22 November 2001 the Trustees formally resolved to extend the life of the Trust Deed. The formal Resolution is printed in full over the page.*
>
> *The life of the Trust can only be extended if the Resolution gets the support of 75% of electricity consumers who vote in Timaru, Waimate and MacKenzie districts. This is detailed in Paragraph 2(a) of the Resolution.*
>
> *These polling papers give you the opportunity to have your say. You are being asked if you support or do not support the Resolution of the South Canterbury Power Trust Board.*
>
> *Please vote."*

[79] The terms of the 22 November 2001 resolution were:

> *"1. Subject to paragraph 2 below, the South Canterbury Power Trust dated 15 July 1993 ('Trust Deed') be varied as follows:*
>
> *(a) Clause 1.1(p) will be deleted and replaced with the following:*
>
> ***"Termination Date" means the earlier of that date being 1 year prior to the Perpetuity Period and the date upon which the Trust is wound up in accordance with clause 15."***
>
> *(b) Clause 1.3 will be deleted and replaced with the following:*

"Perpetuity Period" for the purposes of the Perpetuity Act 1964 the perpetuity period applicable to this Deed shall be the period of 80 years from the Vesting Date."

(c) Clause 4.11(b) will be deleted and replaced with the following:

"(b) the term of such Trust together with the term of the Trust shall not exceed 80 years from the Vesting Date; and".

2. The variations to the Trust Deed in paragraph 1 above would only be effective if such variations are:

(a) Approved by a postal vote carried out in accordance with clause 14.1 of the Trust Deed; and

(b) Confirmed by declaratory order by the High Court."

[80] While I accept that the wording of the polling paper itself was ill-advised, I do not agree that thereby the consumers could not validly vote upon the amendments to the trust deed. Mr Weston criticised the framing of the question upon which consumers were asked to vote. It spoke of a proposal, rather than a variation or amendment of the trust deed, and of extending the life of the Trust beyond its present 15 years. There was no reference to resettlement upon a successor trust, nor to the fact that the extension was up to 80 years. If the polling paper stood alone the present challenge would have had considerable merit.

[81] However, I do not think the polling paper can be read divorced from the pamphlet which accompanied it. That document better explained the position and, importantly, set out the resolution of 22 November 2001 which defined the actual amendments to the trust deed. To my mind the papers as a whole were adequate to enable consumers to vote meaningfully upon the proposed variation.

[82] Clause 4 of the Third Schedule to the trust deed enabled the trustees in their discretion to generally determine the method and procedure appropriate for the vote, subject to the enumerated requirements. The format of the polling paper and the pamphlet which accompany it were, I think, within the ambit of that discretion. Moreover, in my view it was essential for the trustees to adopt a pragmatic approach whereby they explained the substance and effect of the amendments, rather than simply providing the terms of the 22 November resolution alone. Its terms, to a lay person, and without a copy of the trust deed itself, would have been meaningless. In

the end result I consider the polling paper, despite its imperfections, accompanied by the pamphlet was adequate.

[83] I turn to the question of the time allowed for consumers to vote. Whether the trustees were able to extend time and whether they validly did so, are the pivotal questions. For if the extension is brought to account a total period of not less than 21 days was provided for consumers to vote.

[84] In my view the terms of clause 4 in Schedule 3 are determinative of the questions which arise. The trustees enjoy a general discretion to determine the method or process for carrying out a postal vote, provided the minimum requirements described in paragraphs (a) to (e) are met. It follows I think that there was power for the trustees to extend time. That decision fell squarely within their area of discretion. Likewise, the method by which they notified consumers of the extension was also a matter for their discretionary decision.

[85] Of course it does not follow that any decision taken by the trustees as to the method and procedure for carrying out a vote is immune from challenge. The decision must be a reasonable one. The exercise of discretion in the context of clause 4 is, I think, subject to that implied obligation. Here, I see nothing unreasonable about the manner in which time was extended and consumers were notified of such extension. There is no evidence of dissatisfaction with the process. Moreover, a sizeable percentage of consumers participated in the postal vote. For these reasons this aspect of the challenge also fails.

Standing of Holdings:

[86] As noted earlier William Young J left this question open for further argument in the context of the substantive hearing. Mr Fogarty made short written submissions on the point. Mr Palmer's argument was oral, and referenced back to the written arguments he advanced before the Master and in the review context.

[87] To my mind nothing new of substance emerged in the course of the substantive hearing. I have considered the earlier judgments, in particular that of

William Young J. I am content to conclude and for the reasons already given that Holdings is a person legitimately interested in the construction of the present trust deed.

Relief:

[88] For the above reasons the trustees are entitled to a declaration in the terms sought.

[89] Costs are reserved. The plaintiffs may file a memorandum in support, to which the Council and Holdings will have ten days within which to reply. I am unaware of the arrangements in relation to Mr Weston's costs, but I will receive a memorandum if required.

Signed at: 3.45 pm on: 21 June 2002.

Solicitors:
Simpson Grierson, Auckland for Plaintiffs
Buddle Findlay, Christchurch for Timaru District Council and Timaru District Holdings Limited
T C Weston QC, Christchurch for the consumers of Alpine Energy Limited