Re Wilson Home Trust
Year:
1999
Date:
15 December 1999
Court:

High Court, Auckland
Judge:
Laurenson J
File no:

M132599IM
Reported:
[2000] 2 NZLR 222
Noted:
23 TCL 6/2; [2000] BCL 161; NZCLD, 5th Series, 3545
Case Summary - BriefCase
Trusts
Successful application under Part III Charitable Trusts Act 1957 to vary terms of a charitable trust; trust established by deed in July 1937; Mr W transferred family home to Auckland Hospital Board upon trust for benefit of crippled children; endowment fund provided income for maintenance of property; property described in two schedules; use for crippled and non crippled convalescent children; in 1949 Board changed use of land under s28 Local Legislation Act 1949; four proposals by Board to redefine and widen class of persons and nature of assistance
Held, changes over time have made it impossible to carry out original trust as it stands; amendments will not detract from charitable nature of trust; changes accord as closely as is possible to original terms of trust; will enable property to be held to best serve interest of those who benefit; proposed changes to qualifying area removed; Court able to consider application as changes relate to matters not affected by Legislation Act; intention of Legislature merely to augment powers of the Board where deed has left a hiatus; changes granted with modifications

Full Text
JUDGMENT OF LAURENSON J
[1]
This is an application pursuant to Part III of the Charitable Trusts Act 1957 to vary the terms of a charitable trust, the Wilson Home for Crippled Children which was established by deed dated the 20th day of July 1937.
[2]
The late Mr W R Wilson had transferred his family home at Takapuna to the Auckland Hospital Board upon trust for the benefit of crippled children in the Province of Auckland. At the same time an endowment fund was raised by public subscription for the purposes of the trust. Part of that fund, namely £10,200 was provided by members of the settlor's family on the condition that the income from this part of the fund was to be used for the maintenance of the property. The income on the balance of the fund was to be applied for the maintenance of crippled children in the home.
[3]
The property subject to the trust was separately described in two schedules. The land in the first schedule was to be used for the benefit of crippled children. If, however, it was not fully utilised for this purpose then the trust could accommodate convalescent non-crippled children. No part of the income from the endowment fund could be used for this purpose. The land in the second schedule was to be used for the benefit of convalescent non-crippled children. The deed provided, however, that there was no obligation on the trustees to carry out this option.
[4]
The trust was created at a time when the incidence of crippled children, as defined in the deed, was much greater because of the prevalence of poliomyelitis and when there was little or no government assistance available for the care of crippled children.

[5]
By 1949 it had become apparent that the Board did not wish to provide an institution on the land described in the second schedule, for convalescent non-crippled children, and the advent of the Social Security Act 1938 had diminished the need for assistance to be provided from the endowment fund.
[6]
For these reasons the Board obtained the assistance of Parliament which, by the passing of s 28 of the Local Legislation Act 1949, enabled the Board first, to use the whole of the land described in both schedules for the benefit of crippled children, with the proviso that if facilities were not fully utilised for this purpose then convalescent non-crippled children could be assisted. Secondly, the section amended the terms of the original deed in relation to the balance of the endowment fund both as to capital and income. Henceforth both were to be available for the purpose of the trust providing that no part of the capital could be expended on anything other than improvements of a capital nature.
[7]
During the period since 1949 other important changes have occurred. Significantly the scourge of poliomyelitis has been virtually eliminated. The need to provide for disabled persons has not, however, diminished. The incidence of serious motor injuries has been a major reason for this. The nature of treatment for disabled persons has changed from predominantly institutional care to home care. This has meant that the location of the trust facilities in Takapuna has made the provision of care to two major areas of Auckland, namely in the south and west, more difficult. There remains, however, a need for the present facilities, namely to provide a base for the provision of services and other

assistance not only to patients but also to their families. The provision of respite care to assist families by providing short-term relief is one example of this.

[8]

The Board has therefore formulated the present proposals to vary the trust. The major changes include:

[a]

The name of the trust is to be “The Wilson Home Trust”.

[b]

The redefinition of the class of persons to whom assistance is to be provided, namely the wider and now more appropriate definition of “children with disabilities and/or their families”.

[c]

To redefine the nature of the assistance to be provided on a far wider basis compared to the institutional care originally provided.

[d]

To enable some defined areas of land to be sold for the purpose of providing funds to enable the provision of outlying facilities in other parts of the designated area.

[9]

The applicant has provided comprehensive affidavits setting out the background to this application and the reasons for the proposed changes.

[10]

Subject to a question relating to the jurisdiction of this Court to consider the matter, which I will refer to in detail shortly, the Attorney General in his statutory report, has fully supported the proposals. So have the New Zealand Crippled Children's Society Auckland Incorporated, and the descendants of the settlor who were directed to be served with this application and both of whom appeared by counsel.

[11]

No objections have been received following advertising of the application.

[12]

Having heard all counsel I am, subject to the question of jurisdiction and one other matter relating to the area to be served by the trust, quite satisfied that this application should be approved by this Court.

[13]

In particular, for the purposes of s 32(1) of the Charitable Trusts Act 1957, I am satisfied —

[a]

That the changes in the nature of the relief to be provided and the modern means by which those needs are now met, has meant that it is now realistically impossible, impracticable and inexpedient to carry out the original charitable purpose of the trust as it now stands;

[b]

That the proposed amendments will not in any way detract from the charitable nature of the trust in the future;

[c]

That the major changes as to the designation of the class of beneficiaries and the manner in which assistance is to be provided to them, accords as closely as is reasonably possible in the changed circumstances, to the terms of the original trust. In this regard I note that the proposals will enable what was the settlor's home to continue to have a meaningful and indeed central part to play in the affairs of the trust;

[d]

That the proposal now before the Court will mean that the property subject to the trust, will now be held in such a way as will best serve the interests of those who are to benefit. Whilst the description of the nature of the beneficiaries who will benefit in the future is wider than that originally specified in the trust deed, this expansion is both realistic and necessary in the light of changed events. In this regard I view it as being significant that both the Auckland branch of the Crippled Children's Society and the family of the testator fully support the proposals.

[14]

At this point it is necessary to consider the two matters which I have referred to earlier.

THE AREA ISSUE

[15]

In the original deed the qualifying area from within which beneficiaries could come was described as the province of Auckland. At the time the deed was signed in 1937 this area covered the northern half of the North Island bounded by the provincial boundaries of Taranaki, Wellington and Hawkes Bay.

[16]

The application now before the Court included a proposal that henceforth this area should be reduced by the exclusion of an area described as the Ureweras, East Cape and Gisborne.

[17]

The justification for this change was that the amended area still provided for a significant part of the New Zealand population, the available resources of the trust would all be taken up by the provision of services in the reduced area and that the areas in question tended to look more to Wellington for those services.

[18]

Notwithstanding these reasons I indicated to counsel that I was concerned at the proposal to reduce the qualifying area. My concerns were:

[a]

That persons in the severed area would, in effect, be deprived of the ability to seek assistance whereas to date they were eligible to do so;

[b]

There was no information before the Court indicating the extent to which the trust had assisted persons in the area in the past;

[c]

That even if the proposals were approved, I could see no reason why persons in the area could not benefit from at least some of the modified services for which approval was being sought;

[d]

The advertising of the application had not made it clear that there was a proposed reduction in the qualifying area;

[e]

There was nothing before the Court to indicate whether any consultation had taken place with the relevant health authorities in the area;

[f]

When preparing his report the Attorney General had been unwittingly misled into thinking that in fact the qualifying area was to be enlarged.

[19]

At this point I wish to make it quite clear that I am completely satisfied that the matter which I have referred to did not arise as a result of any intention on the part of the applicant to gloss over the issue. Indeed, once the matter was raised counsel for the

Auckland Crippled Children's Society and the applicant were able to assure me that there had been a great deal of consultation on this issue.

[20]

In the event, once I had indicated my concerns, counsel for the applicant was able to obtain instructions immediately, to the effect that the proposed change as to the qualifying area would be removed. There was no objection to this from any other counsel.

JURISDICTION QUESTION

[21]

As I have noted, counsel for the Attorney General raised the matter of whether it was open to this Court to consider the application in view of the provisions of s 28 of the Local Legislation Act 1949. In order to consider this issue it is necessary to set out in some detail the provisions of the original deed and the Act.

[a]

The Trust was created by a deed dated 20 July 1937.

[b]

The preamble to the deed included the following clause:

"W H E R E A S the said William Robert Wilson did sometime since place his residence at Takapuna being the lands and premises described in the First and Second Schedules hereto at the disposal of the Mayor of the City of Auckland for the purposes of a Home for Crippled Children in the Province of Auckland upon condition that such home should be endowed by a fund to be provided by public subscription."

[22]

Clause 1 provided:

"T H A T the said William Robert Wilson shall transfer to the Board the lands described in the First and Second Schedules hereto."

[a]

Clause 2 provided:

"T H A T the Board shall stand possessed of the lands described in the First Schedule hereto for the establishment of an Institution within the meaning of 'The Hospitals and Charitable Institutions Act 1926' for the reception relief convalescence and post operative care and treatment and otherwise for the benefit and advancement of crippled children resident within the Auckland Provincial District."

[b]

Clause 6 provided:

"I F at any time there shall be unoccupied beds in the Home which are not required for crippled children then the Board may while such beds are not so required receive into the Home non-crippled convalescent children but no pulmonary tuberculosis or other infectious case shall in any circumstance be received into the Home."

[c]

Clause 9 provided:

"T H E Mayor of Auckland shall pay and transfer the Endowment Fund to the Board to be held by the Board UPON TRUST to use so much as shall be necessary of the nett income arising from the said sum of Ten thousand two hundred pounds for the maintenance and upkeep of the grounds of the Home which the Board shall at all times maintain in a condition comparable with the condition thereof at the date of these Presents AND UPON TRUST to use the balance of the income arising from the investment thereof for the maintenance of crippled children in the said Home."

[d]

Clause 10 provided:

“N O part of the income arising from the Endowment Fund shall be applied for the benefit of non-crippled children (if any) received into the Home and for the purpose of rendering to crippled children the maximum benefit of the trusts hereby declared the Board in fixing and collecting charges payable by or on behalf of crippled children who may be received into the Home shall so adjust such charges as to give to all crippled children the benefit of the income from the Endowment Fund and the value of the Home property the intention being that the nett annual income from the Endowment Fund and the present annual value of the Home (which is agreed as being Five hundred and fifty pounds) shall after payment of upkeep and maintenance of the gardens and grounds of the Home be treated as a Fund to enable crippled children to receive treatment and care in the Home at a charge lower than that fixed by the Board for non-crippled children received therein.”

[e]

Clause 11 provided:

“T H E Board shall stand possessed of the lands described in the Second Schedule hereto as a site for the establishment of an Institution under ‘The Hospitals and Charitable Institutions Act 1926’ for the reception relief convalescence care and treatment of convalescent children who are not crippled but such site shall not be used for the treatment of pulmonary tuberculosis or other infectious disease. But the Board shall be under no obligation to establish any such Institution until in its opinion such an Institution upon the said lands is necessary.”

[23]

By way of summary.

[a]

The land in the first schedule was to be used for the benefit of crippled children. But, if beds were not required for this purpose, then they could be used for non-crippled convalescent children.

[b]

The land in the second schedule was to be used for the benefit of non-crippled convalescent children. But the Board was not obliged to establish an institution for this purpose unless it considered such an institution was necessary.

[c]

The income from £10,200 was to be used for the maintenance of the premises and the income from the balance of the fund was to be used for the benefit of crippled children. No part of that balance was to be used for the benefit of non-crippled children.

[24]

It seems that the Board found that it was not necessary to provide an institution for non-crippled children and that the whole of the land included in both schedules could be better utilised for the benefit of crippled children subject to the proviso that if any facilities were not required for that purpose then non-crippled children could be catered for.

[25]

For reasons, which are not immediately apparent, the Board determined that this change should be attended to by a local act of Parliament rather than an application under the precursor to the Charitable Trusts Act 1957. Why this was the case does not now matter.

[26]

To enable this change to be made s 28 of the Local Legislation Act 1949 was passed. This provided:

“28. WHEREAS by a certain deed of trust dated the twentieth day of July, nineteen hundred and thirty-seven, made between William Robert Wilson, of the City of Auckland, company director, Ernest Hyam Davis, of the City of Auckland, company director, and the Auckland Hospital Board (in this section referred to as the Board), certain land

described in the First Schedule to the said deed was vested in the Board for the establishment of an institution, to be known as the Wilson Home for Crippled Children, for the reception, relief, and treatment, and otherwise for the benefit of crippled children resident within the Auckland Provincial District AND WHEREAS certain other land described in the Second Schedule to the said deed was vested in the Board as a site for the establishment of an institution for the reception, relief, and treatment of certain other children AND WHEREAS, by virtue of the said deed, the Board stands possessed of an Endowment Fund amounting to the sum of twenty-five thousand eight hundred and forty-three pounds four shillings and five pence upon trust with power to use so much as shall be necessary of the net income arising from the investment thereof for the maintenance of crippled children in the said home AND WHEREAS the said deed further provided that if at any time there were unoccupied beds in the said home which should not be required for crippled children, the Board could, while any such beds were not so required, receive into the said home non-crippled convalescent children not suffering from pulmonary tuberculosis or other infectious diseases AND WHEREAS the said deed further provided that no part of the income arising from the said Endowment Fund should be applied for the benefit of non-crippled children (if any) received into the said home, but that the net annual income from the said Endowment Fund and the annual value of the said home (which was agreed as being five hundred and fifty pounds) should, after payment of upkeep and maintenance of the gardens and grounds of the said home, be treated as a fund to enable crippled children to receive treatment and care in the said home at a charge lower than that fixed by the Board for non-crippled children received therein AND WHEREAS the lands described in the First and Second Schedules of the said deed could be used to better advantage for the benefit of crippled children if the whole of the said land were available for the building and developing of one institution AND WHEREAS by virtue of the provisions of the Social Security Act, 1933, no charges or fees are now payable by crippled or non-crippled children maintained or treated in the institutions controlled by the Board, and it is therefore not now practicable to assist crippled children in the manner prescribed by the said deed Be it therefore enacted as follows -

(1) Notwithstanding anything to the contrary in the said deed, the Board may use the whole of the lands described in the First and Second Schedules of the said deed for the building and establishment thereon of an institution or institutions within the meaning of the Hospitals Act 1926, for the reception, relief, convalescence, and postoperative care and treatment, and otherwise for the benefit and advancement of crippled children resident within the Auckland Provincial District:

Provided that if at any time there are in any such institution or institutions beds which are not required for crippled children, the Board may, while any such beds are not so required, receive into the said institution or institutions non-crippled convalescent children:

Provided also that children suffering from pulmonary tuberculosis or other infectious diseases shall not be received into the said institution or institutions.

(2) Notwithstanding anything to the contrary in the said deed, the Board shall hold the said Endowment Fund upon the following trusts, that is to say -

(a)

As to the income from a sum of ten thousand two hundred pounds thereof, for the maintenance and upkeep of the gardens and grounds of the said institution or institutions;

(b)

As to the balance of the Fund, to expend the capital and income thereof for the purposes of the said institution or institutions

Provided that no part of the capital shall be expended except upon improvements of a permanent character.”

[27]
In summary, the act thereafter:
[a]
Enabled the Board to use all the land in both schedules for "the reception, relief, convalescence, and post-operative care and treatment and otherwise for the benefit and advancement of crippled children", and
[b]
Changed the terms of the deed in relation to the endowment fund and the allocation of income from it.
[28]
The Attorney General submitted that by reason of the passing of the Act there was an argument for saying that the terms of s 28 effectively made the trust a creature of statute and hence if there was to be any amendment to the trust then this could only be provided by statute. Specifically the submission was —
"9 It would appear that the settlor intended that the land should be used for the charitable purposes set out in the deed. Arguably the provisions of section 1 of the statute are merely permissive in the sense that they enable the use of the land in both Schedules, but are mandatory as to the carrying out of the charitable purpose.
10 If that be the case, then the statute has varied the charitable purpose set out in the deed and, as accepted by the applicant in its memorandum, it cannot be amended by the Courts."
[29]
The Deed of variation of trust includes the following changes:
[a]
The name of the trust from "The Wilson Home for Crippled Children" to "The Wilson Home Trust";
[b]
The description of the class of beneficiaries from that contained in the deed, i e "Persons under twenty-one years of age who not being mentally defective have a defect which causes or tends to deformity or interference with normal functions of the bones muscles or joints such defective condition being either congenital or acquired but not being a defect of the vital organs", to "Children 21 years of age or younger suffering disabilities living within the Qualifying Area (essentially the northern half of the North Island). Families of disabled children are to be included as beneficiaries also";
[c]
Amendments to the nature of services to be provided and how these are to be provided;
[d]
The inclusion of a power to sell some specified parts of the total area for the purposes of the trust;
[e]
A decrease in the area within which persons could seek assistance.
[30]
The issue is whether all or any of the proposed changes run counter to the provisions of s 28.
[31]
The parties were agreed that if the legal effect of s 28 was only to grant a further permissive discretion to the Board, i e by granting it the discretion to use the total area for the benefit of crippled children, then it would not be the case that the section had also statutorily defined the purpose of the trust.
[32]

The essence of the Attorney General's argument was, however, that notwithstanding that s 28 is expressed in permissive terms, there was an argument for saying that the intention of the Legislature was that the effect of the discretion was mandatory in the sense that all the land could only be used “for the building and establishment thereon of an institution or institutions within the meaning of the Hospitals Act 1926, for the reception, relief, convalescence, and post-operative care and treatment, and otherwise for the benefit and advancement of crippled children resident within the Auckland Provincial District”.
[33]
In other words the statute had created a situation where, absent further statutory amendment, the lands in question could not be used for any other purpose, e g for sale of part or that the class of beneficiaries could be anything other than “crippled children”.
[34]
The applicant submitted that the section was clearly only permissive and that none of the proposed amendments prevented the trustees utilising all the lands for the purpose referred to in, and permitted by the Act, if that was the trustee's wish.
[35]
The issue to be determined is, therefore, whether the terms of s 28 are indeed only permissive or whether, in their particular context, they must be regarded as mandatory so that any change can only be effected by statute.
[36]
Counsel for the Attorney General referred to a number of authorities where Courts have considered instances where it has been argued that the use of permissive words such as “may” should be interpreted as imposing some mandatory duty.
[37]
The authority most often quoted in this regard is Jubus v Lord Bishop of Oxford [1880] 5 AC 214 In this case the House of Lords was required to determine the effect of the words “it shall be lawful” in the context of the Church Discipline Act where they were used in relation to a bishop's power to commence a disciplinary enquiry Lord Cairns stated the issue in this way at p 222.
“And the question is, under the words ‘it shall be lawful’ is the bishop bound, on the application of any party, to issue a commission, or has he a discretion as to whether he will issue it or not?
The question has been argued and has been spoken of by some of the learned Judges to the Courts below as if the words ‘it shall be lawful’ might have a different meaning, and might be differently interpreted in different statutes, or in different parts of the same statute. I cannot think that this is correct. The words ‘it shall be lawful’ are not equivocal. They are plain and unambiguous They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something to the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a mandamus. And the words ‘it shall be lawful’ being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in

the circumstances of the case something which, according to the principles I have mentioned, creates this obligation.
I think that if these principles are kept in mind it will be found that all the cases on this subject are easily understood and reconciled, and I will refer shortly to the most important of those which were mentioned to your Lordships before examining farther the circumstances connected with the present case."
[38]
He summarised the principle involved at p 225 where he said:
"My Lords, the cases to which I have referred appear to decide nothing more than this that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."
[39]
Further authorities mentioned were Halsbury 4th Ed Vol 44(1) para 1337 where it is suggested that when determining whether a statutory power is to be seen as permissive or mandatory depends on the intention of the Legislature in enacting the relevant statute.
[40]
The dictum in Julius has been applied in New Zealand in Re Thames Borough Council [1932] NZLR 1323 and in Gibson Manukau City [1968] NZLR 400. From the latter case it is clear from the decision of Richmond J that in the final analysis the resolution of the question whether the Legislature intended a particular statutory power to be purely discretionary or imperative came down to an examination of whether the particular statute indicated a policy or purpose on the part of the Legislature one way or the other (see p 408).
[41]
Accepting, therefore, that the issue in the present case falls to be determined on the same basis, I note the following:
[a]
The word "may" arises in the context of a preamble which is, in itself, stated in non-mandatory terms, i.e.
"And whereas the lands described in the First and Second Schedules of the said deed could be used to better advantage for the benefit of crippled children if the whole of the said land were available for the building and developing of one institution." (my emphasis).
[b]
There is nothing in the section which imposes conditions as to the exercise of the power or anything which defines the situation in which it may fall to be exercised.
[42]
By reference to these two factors I do not see anything akin to the position which arose in Finance Facilities Pty Ltd v Commissioner of Taxation of the Commonwealth [1971] ALJR 615 where the High Court of Australia was asked to consider the words "may allow" in the context of s 46(3) of the Income Tax Assessment Act 1936-68 which stated:
"Subject to the succeeding provisions of this section, the Commissioner may allow ' … a private company … a further rebate in its assessment' calculated as provided in the subsection 'if the Commissioner is satisfied that - (a) the shareholder has not paid, and will not pay, a dividend during the period commencing at the beginning of the year of income of the shareholder and ending at the expiration of ten months after that year of income to another private company, (b) … , or (c) having regard to all the circumstances, it would be reasonable to allow the rebate.'"

[43]
Windeyer J said at p 617:
“The question, which comes back to the words ‘may allow’, is not to be solved by concentrating on the word ‘may’ apart from its context. Still less is the question answered by saying that ‘may’ here means ‘shall’. While Parliament uses the English language the word ‘may’ in a statute means may. Used of a person having an official position, it is a word of permission, an authority to do something which otherwise he could not lawfully do. If the scope of the permission be not circumscribed by context or circumstances it enables the doing, or abstaining form doing, at discretion, of the thing so authorised. But the discretion must be exercised bona fide, having regard to the policy and purpose of the statute conferring the authority and the duties of the officer to whom it was given it may not be exercised for the promotion of some end foreign to that policy and purpose or those duties. However, that general proposition is irrelevant in this case. Here the scope of the permission or power given is circumscribed. Conditions precedent for its exercise are specified as alternatives. The question then is, must the permitted power be exercised if one of those conditions be fulfilled?
This does not depend on the abstract meaning of the word ‘may’ but of whether the particular context of words and circumstance make it not only an empowering word but indicate circumstances in which the power is to be exercised - so that in those events the ‘may’ becomes a ‘must’.”
[44]
Viewed in this light I can see no basis for holding that the use of the word “may” in the present case can be indicative of anything other than the conferment of a full discretion.
[45]
There is, however, another way of testing this conclusion, namely by considering the reason for s 28(1) by reference to the terms of the original deed.
[46]
This had specified that the land in the first schedule was:
[a]
Primarily for the benefit of crippled children, and
[b]
Only available for the benefit of convalescent children if facilities were not required for crippled children.
[47]
Land in the second schedule was to be used for the benefit of convalescent children, but with the rider that the Board did not have to use the land for this purpose.
[48]
This immediately left a hiatus in respect to this land, namely what was to happen if the Board did not exercise its option in relation to it.
[49]
The result, absent any correction, was that the Board had an area, which it could not put to any other use because the deed had not covered the possibility that the Board may exercise its right not to exercise the option.
[50]
Section 28(1), in so far as it related to the use of land, did cover that eventuality. Thus, in my view, s 28(1) can be seen as being solely directed to augmenting the Board's powers in order to cater for an omission in the original trust deed. Viewed in this light I do not see that it can be said that the Act intended to go beyond granting this additional power which was, in every respect, consistent with the other existing powers under the deed. Conversely it did not, in my view, seek to impose any restriction on those powers.

[51]
This conclusion is, I consider, also consistent with the other matter addressed by the Act, namely the change in respect to the basis upon which the endowment fund was to be used.
[52]
Under the deed this fund fell into two parts:
[a]
The income from £10,200 specifically for the upkeep of the grounds,
[b]
The income from the balance to assist crippled children.
[53]
By 1949 there was no need for the trust to provide financial assistance to crippled children following the advent of social security.
[54]
Hence, in view of this change, the Act provided that the portion of the fund previously available for this purpose, was to change. That change is expressed in entirely mandatory terms. It would, presumably, have been possible to express this change in terms of a discretion in the hands of the Board. It did not do so. In my view, the fact that one element of the section is expressed in mandatory terms is, at the very least, an indication that the legislation, when expressing the other power in permissive terms, recognised the distinction. If the Legislature had intended that the power in relation to the use of land was to be mandatory in nature, then one could reasonably have expected that it would have said so. It should be noted in this respect that the proposed variations do not, in any way, seek to change the position in relation to the endowment fund, as these are expressed in the Act.
[55]
For these reasons I conclude that the intention of the Legislature was merely to augment the powers of the Board in one respect, namely where the deed had left a hiatus. Specifically I find that s 28(1) did not go beyond this purpose to the point of mandatorily determining the purpose of the trust Furthermore the proposed amendments do not run counter to the discretion contained in s 28(1), i e by interfering with that discretion.
[56]
I therefore conclude that it is open to this Court to consider the application because it relates only to matters not affected by the Act The changes sought are quite consistent with s 28(l).
FURTHER MATTERS
[57]
During the course of preparing this decision two further matters arose:
[a]
Whether the description of the qualifying area was correct, and
[b]
Whether there should be any limitation on the use of the proceeds of sale in the event of the sale of all or any of parts of Lots 1 and 3 referred to in clause 4.2 of the Deed of Variation.
It seemed to me to be appropriate that any such proceeds should be limited to the providing for the acquisition of further capital assets and, in particular, capital resources to assist the objects of the trust in South and West Auckland.
[58]
In order to consider these matters I requested Mr Schnauer, counsel for the applicant, to file a memorandum regarding same.
[59]

He has now done so and I express my thanks to him for his assistance.
[60]
As to the description of the qualifying area, I am now advised that following enquiries to the Geography Department at Auckland University it is clear that the plan attached to the Deed of Variation does correctly show the area of the Auckland Provincial District in 1937, that being the year when the trust was created.
[61]
As to the second matter, the trustee has agreed that the limitation I have referred to should be accepted and that clause 4.2 of the Deed of Variation, and paragraph (v) in the Schedule of Trustees' powers, be varied accordingly.
[62]
I understand that these amendments have been discussed with Mr W J Wilson and the same are acceptable to him.
CONCLUSION
[63]
For the reasons referred to, I conclude that this application should be granted subject to the following modifications, pursuant to s 53(c) of the Charitable Trusts Act 1957, of:
[a]
Clause 2 of the Deed of Declaration of Variation of trust is to be deleted and replaced by:
“The authorised beneficiaries under the trust shall henceforth be children with disabilities and/or their families living anywhere in the area which was, in 1937, described as the Auckland Provincial District (‘the Qualifying Area’)”, and
[b]
Clause 4.2 of the same Deed is to be deleted and replaced by:
“4.2 The Trust shall be free to subdivide, sell lease (on any terms it shall see fit), develop, exploit or otherwise turn to account (hereinafter referred to as ‘Development’) any of its site in Lake Road/St Leonards Road shown as Lot I and/or shown as Lot 3 on the attached plan ‘B’. The Trustee shall be under no legal duty to consult with descendants of the Settlor WILLIAM ROBERT WILSON before deciding upon or carrying out any Development, (but has expressed an intention without creating a binding legal obligation to keep such descendants informed in such circumstances.) The proceeds from any such Development (including all funds realised by the Trustee in accordance with paragraph (b) of the attached Schedule C of Trustee Powers) shall be held by the Trustees in a separate capital account and applied to the Trustees only for investments of a capital nature.”
[c]
Clause (v) of the Schedule of Trustees' Powers attached to the same Deed, is to be deleted and replaced by:
“(v) To start and subscribe to depreciation funds or other reserve funds for any purpose the Trustee may deem advisable PROVIDED the Trustee shall not (except to comply with an obligation imposed on it by clause 4.2 of the Deed) be obliged to account for the assets and funds of the Trust in separate capital and/or income accounts, but (subject to clause 4.2 of the Deed) instead may account for all such assets and funds in the most convenient and efficient manner from time to time. In particular but not in limitation (and subject to any capital fund maintained to comply with clause 4.2 of the Deed) the Trustee may apply all of the assets and funds of the Trust from time to time for any purpose authorised to it under the Deed of Declaration of Variation of Trust, whether of the nature of a capital expenditure and/or of the nature of a current operating expenditure in accordance with the within Schedule of Trustee Powers.”
[64]
There will be an order accordingly.

[65]
As to costs the Attorney General is entitled to an order in the sum of $500.00 being the amount normally awarded for the preparation of his statutory report.
[66]
The parties agree, as do I, that in all other respects costs should lie as they fall.