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Modernising Trusts: Section 57 Trustee Act 1925

Cotterell v Beaumont [2020] EWHC 2234 Ch

Well-drafted modern trust deeds will contain a comprehensive set of broad administrative powers for trustees: older documents may not give the same scope to trustees facing changing circumstances.

Section 57 of the Trustee Act 1925 (“section 57”) allows the court to confer power on trustees to undertake a wide range of dispositions and transactions where they would otherwise not have power to do so either because the trust instrument does not include the necessary power at all or because the power is given in restricted terms.

Before it makes an order under section 57, the court must be satisfied that:

- (a) the trustees lack the proposed power;
- (b) the proposed power

relates to the management or administration of the trust assets (section 57 cannot be used to alter the beneficial interests under the trusts);

- (c) the proposed power will authorise the trustees to enter into a disposition or other transaction of the type contemplated by the section;
- (d) it is “expedient” that the trustees should be able to enter into the proposed disposition or transaction; and
- (e) the court should exercise its discretion in favour of conferring the power.

The statutory requirement that the proposed transaction be “expedient” means that it must be necessary and beneficial for the trust as a whole. It does not need to be beneficial for all beneficiaries. A proposed transaction could be disadvantageous to



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some beneficiaries and still be “expedient” provided that, overall, the advantages or benefits outweigh the disadvantages or lack of benefit.

Normally where the proposed transaction is expedient, the court will be likely to exercise its discretion to confer the power. However, at the stage of deciding whether to exercise its discretion, the court can take the wishes of the settlor or testator into account.

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The classic use of section 57 is to empower trustees to enter into a specific transaction e.g. to sell a property held on a life interest trust under a will. The statutory words “disposition...

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"or other transaction" have been given a wide interpretation by the courts as illustrated by *Gelber v Sunderland Foundation* [2019] WTLR 29 where the court approved the addition of a power permitting a single corporate trustee to be appointed on the basis that the transfer of title that would be involved in the appointment of a new trustee constituted a "disposition".

However, more recently, applications have been made under section 57 asking the court to confer general powers on the trustees not connected with any particular contemplated transaction or disposition but by way of expanding and updating the administrative provision of the trusts so that trustees to adapt to changing circumstances and avoid the need for further applications under the section. In the *Portman Estate* case [2015] WLTR 871 the court conferred a range of general powers including powers to trade, give guarantees,

employ an investment adviser, hold property through nominees, accept good receipt for payment to minor beneficiaries.

The recent decision of Chief Master Marsh in *Cotterell v Beaumont* [2020] EWHC 2234 (Ch) contains a valuable review of the court's jurisdiction to "modernise" trust deeds. The key points are:

- It is unnecessary for an application to be based on a transaction that is under contemplation.
- The new power or powers to be granted must either enable the trustees to implement or undertake transactions or be a necessary ancillary provision relating to that additional power, such as a power to exercise powers notwithstanding a conflict of interest or the self-dealing rule.
- The court can only add ancillary powers where the transactional power is lacking and there is a need to add ancillary powers to facilitate the operation of the transactional power.
- Where the court is asked to make a series of extensions to the trustees' powers, it must be satisfied that each extension is expedient. If the trustees' powers were granted many years ago, the court is likely to accept that it is expedient that they are modernised to reflect current practice and needs in trustee administration, but the court will not necessarily sanction wholesale rewriting of trustee powers just under the label of "modernisation". In the *Cotterell* case the court granted powers to re-appropriate, establish companies, pay assets to minors, appoint investment advisers, give

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indemnities, and delegate the management of assets, but refused to grant a general power to delegate because it had not been shown to be expedient.

The application in *Cotterell* did not seek a power for the trustees themselves to add further administrative powers to the trust instrument. The court in the *Portman Estate* case had indicated that it was unwilling to confer such a power. However, in *Somerset v Fitzgerald* [2019] WTLR 726, the court did grant such a power. Although that was an application under the Variation of Trusts Act 1958, the court expressed the view that there was no reason for the court to take a different approach when exercising the section 57 jurisdiction.

Although the issue was not before him, Chief Master Marsh's judgment (at paragraphs 48 and 49) indicates that he accepts that the section 57 jurisdiction does extend, in an appropriate case, to conferring a power on trustees themselves to add

new administrative powers to a trust instrument.

In the light of this decision, are there any limitations to the section 57 jurisdiction?

The major one is, as noted above, that the section cannot be used to vary beneficial interests under the trusts: that can only be done under the Variation of Trusts Act 1958.

It is also unclear whether the jurisdiction extends to conferring a power to release or restrict an existing administrative power since that does not involve the enlarging of administrative powers.

It also seems that section 57 cannot be used to expand an existing trustee remuneration clause (because the transactional power is not lacking). However, in an appropriate case, the court will modify a trustee remuneration clause under its inherent jurisdiction on the principles set out in the case of *Re Duke of Norfolk's Settlement* [1982] Ch 61.

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