



The Court's power to add powers to the terms of express trusts: two recent decisions of the Grand Court of the Cayman Islands

It is often the case that issues arising in trust litigation occur in clusters. In 2009, there were a number of significant applications seeking orders under section 57 of the English Trustee Act 1925 (or its statutory equivalent in other jurisdictions) to empower Trustees to partition funds held for the benefit of large families with multiple branches.

Flexibility and the ability to adapt to changed circumstances are integral to the efficacy of trust structures intended to last for generations. The consequences of an inability to do so when fiscal or other requirements dictate change can be damaging.

On two occasions in 2009 in the Cayman Islands, the Court's jurisdiction under section 63 of the Trusts Law (2009 Revision) ("the Trusts Law") was invoked. So far as the practitioners involved in the cases were aware, applications of this type had not been made in the jurisdiction before.¹ A number of interesting points emerged from the court's analysis of the limitations of the section, which in one case achieved a markedly different result than that in a recent English case.

Section 63 mirrors section 57 of the Trustee Act 1925. Like that section, it empowers the Court to authorize trustees to engage in certain administrative acts in the management or administration of trust property in circumstances where the trustee would not otherwise have power to do the acts in question, but it is expedient to allow it do so. Section 63 provides that '(1) Where, in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other

¹ The author was involved in the second of the two cases summarized further.

disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the Court may, by order, confer upon the Trustees... the necessary power for that purpose on such terms and subject to such provision and conditions as it thinks fit'.

The jurisdiction differs in significant respects from that conferred on the Court by section 72 of the Trusts Law (equivalent of section 1 of the Variation of Trusts Act) pursuant to which the Court may grant its approval on behalf of minor, unborn or otherwise incapacitated beneficiaries if satisfied that the proposed changes are for their benefit.² The variation jurisdiction is, in effect, a statutory extension of the principle in *Saunders v Vautier*³ and allows the changes to be made by virtue of that principle if the consent is given by the court on behalf of the specified classes.

Section 57 does not require consent. The section 57 jurisdiction can also be distinguished from the inherent jurisdiction of the Court to approve variations of trust by way of compromise (or in salvage or emergency cases) and from the Court's inherent jurisdiction to give its blessing to a proposed exercise of a trustee's existing powers. Under section 57, the Court is concerned with expediency in the best interests of the beneficiaries as a whole, rather than a distinct and particular benefit to a defined group. It can therefore be a useful way of achieving a partition if no express powers suitable for the purpose are built into the trust deed, in particular in light of the limitations on the inherent jurisdiction and the inevitable need for extensive negotiations in order to secure the necessary consents for a variation order.

However, the section extends only to the authorization of transactions in the management and administration of trust property and cannot be relied on to alter the beneficial provisions of the trust in question. It is this limitation that gave rise to the thorny issue considered in detail in two of the recent cases.

HSBC International Trustee Limited v Registrar of Trusts, Earl of Dalkeith and the Attorney General⁴

Before considering the extent of that limitation, however, it is useful to note the first reported Cayman case, which concerned an application made by HSBC as trustee of an

² Some jurisdictions, for example the BVI, have removed the requirement for positive benefit and allow variations to be approved so long as there is no detriment to the specified classes.

³ [1835] All ER 58.

⁴ [2008] CILR note 5.

exempted trust HSBC sought an order under section 63 (the Cayman equivalent of section 57) to vary the terms of the trust so that it included a power to appoint new trustees resident in the United Kingdom. The Cayman Islands Registrar of Trusts proposed an amendment to the power sought in order to include certain conditions that would facilitate the performance of his duties, including a condition that there would always be at least one trustee resident in the Cayman Islands and that any UK resident trustee would give an undertaking, before taking office, to submit to the jurisdiction of the Cayman courts.

Foster Ag J held that section 63 had the effect of 'empowering the court to confer on trustees any absent but, in its opinion, expedient powers, subject to any provisions and conditions it thought fit'. This was a neat summary of the provisions of the section. The changes sought, including those sought by the Registrar, were considered to be administrative in nature and intended to facilitate the better administration of the trust. On that basis, he accepted that it would be appropriate to make the order.

MEP and another v Rothschild Trust Cayman Limited and others⁵

The second case to be heard by the Cayman Islands Grand Court in 2009, *MEP v Rothschild*, considered the question to what extent, if at all, it is permissible to encroach on the beneficial entitlements in conferring powers on trustees pursuant to section 63. The Chief Justice identified that there is an exception to the general rule if beneficial interests are only incidentally affected. In other words, if the predominant purpose of the transaction is administrative and there will be an unintended, incidental change to the practical, beneficial entitlements, the transaction can nonetheless be authorized without falling foul of the limits of the section.

In *MEP v Rothschild*, Mrs. L was the sole beneficiary of income and capital of the Z Trust during her lifetime. The Plaintiffs, who were two of the daughters of Mrs. L, all of whom would become primary beneficiaries of income and capital after her death, applied for orders giving the Trustee power to divide the trust fund into three equal shares and to appropriate one such share to each of three sub-funds nominated in the names of the three daughters of Mrs. L. Certain changes to the management and administrative provisions were proposed, but there were to be no changes to the beneficial interests beyond those which were necessarily incidental to the partition. The application was heard by the Chief Justice.

⁵ Not yet reported, 20 October 2009, Smellie CJ.

The Chief Justice noted the well-established limitations on the Court's inherent jurisdiction to vary the terms of express trusts, requiring as it does the existence of circumstances constituting an emergency or unforeseen event or the existence of a proposed compromise of a dispute. No such circumstances existed in this case. He also confirmed the important distinction between sections 63 and 72 (the 'variation' jurisdiction). He noted that an application to vary the trusts under section 72 would have been 'impractical and undesirable' because it would have required an exploration of the interests of certain very remote default beneficiaries, for whom some positive benefit would have to be provided. By contrast, it was enough under section 63 that their interests would be preserved intact.

The expediency test was satisfied in the circumstances of the case. The Chief Justice was persuaded that 'it was amply demonstrated... that the proposed division and partition of the Trust would be expedient for the better and more efficacious management and administration of the Trust'. The family, as with many modern families, wished the Trustee to be able to consider the 'divergent financial and practical needs of each branch of the family', living as they did in different jurisdictions and with different investment objectives and tax considerations. It was also felt that the partition would be crucial to preserving family harmony and avoiding disputes in the future. Indeed, it was the last step in the implementation of a peace agreement that had been negotiated between the various family members on the cessation of hostile litigation involving the family.

Having been satisfied about expediency, the Chief Justice then went on to consider in some detail the nature of the jurisdiction itself. He surveyed the range of cases dealing with the question which has vexed judges in considering the limits of the jurisdiction: to what extent, if at all, can the jurisdiction be invoked so as to vary or modify beneficial entitlements? He summarized the correct approach in the following terms: '...it would follow that the jurisdiction exists if what is proposed here by way of the transaction for the partition of the Trust into sub-funds is in essence to be regarded as administrative but not dispositive in nature, as being expedient in the interests of the administration or management of the Trust'.

The proposals before him expressly provided that each of the sub-funds would be held on the terms of the Z Trust, with modifications which were intended only to make refinements to certain provisions relating to the Management Committees and the appointment and removal of the Trustee. However, it was possible to contemplate a potential diminution in benefit, in the sense that a single, undivided fund would yield more than three equal sub-funds. As the Chief Justice put it, 'a one-third interest in the single fund could be worth more than the full interest in any of its sub-divisions'. Notwithstanding this possibility, he concluded that 'there is to be recognized an

acceptable exception to the extent that beneficial interests might be affected, but only incidentally affected, by the proper exercise of the powers which the section of the Law does in terms expressly confer'.

In reaching this conclusion, reliance was placed on the judgement of Evershed MR in *Re Downshires Settled Estates* [1953] Ch 218 and in particular the express qualification offered therein in reaffirming the general rule in the following terms: '[The legislature] ... did not even mention beneficial interests from the beginning of section 57 [the English equivalent of section 63] to the end or give the slightest indication that it was intending to give power to vary or interfere with such interests or intermeddle with them in any way — *except to the extent that they might incidentally be affected by the exercise of the powers which the section does in terms confer*' (emphasis added).

The decision in *Re Thomas* [1930] 1 Ch 194 was also referred to as a direct precedent for the exercise of the jurisdiction to authorize the partition of a fund, and the Chief Justice reiterated in doing so that it is now to be regarded as well settled that an express power to partition is to be regarded as administrative rather than dispositive in nature.⁶

A different approach in the English courts?

However, in *Sutton v England* (11 December 2009) in the Chancery Division, which was decided after *MEP v Rothschild* and considered the decision in that case, Mann J declined to confer on the Trustee a power to partition and appropriate assets of a trust fund so as to allow the constitution of a separate sub-fund for US resident beneficiaries. Very compelling tax reasons were put forward in support of the application, as well as the need to preserve family harmony.

Expediency was not the problem. Mann J was satisfied that appropriation would be expedient, not least because it would remove an unduly onerous tax burden. In his view, the problem was one of principle. The starting point was his conclusion that the trust with which he was concerned was a Freeston style trust, namely a trust in which beneficiaries do not have a share in the income of a specified part of a fund but rather have a specified share in the income of the whole of the fund.

This was a reference to the distinction drawn in the decision of Goff U in *Re Freeston's Charity* [1979] 1 All ER 51, in which he said: 'it is manifest that an interest in half the income of an undivided fund is quite different from the whole income of a divided part of that fund'. Mann J appeared to conclude that one cannot appropriate separate shares

⁶ Citing *Russell v IRC* [1988] STC 195.

to beneficiaries or classes of beneficiaries in this kind of trust without altering the beneficial interests in a way which is not just incidental to the management or administration of the trust property. The substitution of an entitlement to the income of a severed part of a fund instead of a trust for a specified part of the income of the whole fund was therefore, in his view, a variation of the beneficial interests that could not be allowed under section 57.

Mann J distinguished *Re Thomas* on the basis that the judge there was not concerned with a Freeston style trust. As he put it: 'Appropriating in that case would not be varying the beneficial interests in the way which ... Goff LJ apparently had in mind. It seems to me to be clear that what Goff LJ was expressing was the view that to apportion the corpus of the fund in a Freeston style trust was varying the beneficial interest and that a power to introduce such a power was beyond the scope of section 57 which did not extend to permitting such variations.'

Mann J bolstered his conclusions by stating that, in his view, there was no inconsistency between the judgment in *Re Freeston* and the other cases (including *Re Downshires*). Where the effect on the interests of the beneficiaries is purely incidental to the managerial or administrative purpose of the scheme, the proposed transaction cannot be said to be outside the scope of section 57. This was the case in *Re Thomas*, which he characterized as 'allowing for the partition of a fund already held in moieties'. In his view, this was also true of *MEP v Rothschild* (which was cited to him) because the trusts of the proposed sub funds were to be precisely the same as the original trusts.

It appears from Mann J's conclusions that, in his view, section 57 cannot be relied on so as to effect an otherwise impermissible appropriation of beneficial interests in an undivided share. The implied proviso to section 57, in so far as there can be a permissible effect on beneficial interests, is that this is acceptable so long as the interests themselves are not affected, but only how they are enjoyed, and only so far as that effect is incidental to the 'higher purpose of the management and administration of the fund'.

In the light of this reasoning, because the purpose of the proposed partition before him was to effect trusts of divided shares in place of trusts of income over a whole undivided fund, Mann J did not feel able to grant the order sought. He commented in passing that he was not convinced that it would have been impracticable for the variation to be effected under section 72, notwithstanding contentions advanced before him that inter family relations prevented this.

It seems that Mann J's judgement offered a distinction without a difference. It is right, as Mann J pointed out, that in *MEP v Rothschild* a very important factor was that the terms

of the resulting sub-trusts would be precisely the same as the original trusts. However, the very same change would occur in relation to the beneficial entitlements: beneficiaries who started with a specified share of the income of the whole fund would be left with a share in the income of a specified part of the fund. It may still be an open question whether a power to partition can be conferred pursuant to the terms of section 57 (or its equivalents) for purely administrative reasons, even if this is the unintended effect on the beneficial entitlements. Resolution of this question may now have to wait for a decision of an appellate court.⁷

It was precisely because the change would come about only as a necessary incident to the partition which was desired for expedient reasons having to do with the administration of the trust that the Cayman Court was able to conclude in *MEP v Rothschild* that the transaction came within the ambit of section 63. It is respectfully submitted that this is an approach which is helpful in ensuring flexibility in the modern context.



Sara Collins

Partner

+1 (345) 814 7380

sara.collins@conyersdill.com

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For more information please contact:

Naomi Little

+1 (441) 298 7828

naomi.little@conyersdill.com

www.conyersdill.com

⁷ It is understood that leave to appeal has been granted in *Sutton v England*.