

## CHAPTER 27

## DISTRIBUTION OF THE TRUST FUND WITH THE INTERVENTION OF THE COURT

### I. INTRODUCTION

#### Scope of chapter

**27-01** AFTER THE LAST SENTENCE INSERT: For that reason we also deal in this chapter with arbitration in connexion with trusts.<sup>2a</sup>

### 2. APPLICATION TO COURT

#### Administration questions and remedies

**27-05** NOTE 12. DELETE THE SECOND SENTENCE AND REPLACE BY: Assistance with practice and procedure is also to be found in *The Chancery Guide* (6th edn, 2009), paras.25.1 *et seq.*

#### *Particular administration remedies*

**27-12** NOTE 45. INSERT AT THE END: , and in particular, § 29–309.

#### Nature of relief which may be granted

#### *Benjamin orders*

**27-16** NOTE 53. INSERT AT THE END: where the trustees are faced with an adverse claim to the trust assets which the claimant will not pursue, they may be authorised to administer the trust on the footing that the assets are free of his claim: § 27–34 and *Representation of BNP Paribas Jersey Trust Corp. Ltd* [2010] JRC 199; (2010–11) 13 I.T.E.L.R 867 (where the claimant was given six months in which to issue proceedings before the order took effect). For lost trust instruments, see too § 26–54.

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<sup>2a</sup> See §§ 27–56 *et seq.*

## DISTRIBUTION WITH THE INTERVENTION OF THE COURT

NOTE 56. DELETE THE SECOND SENTENCE AND REPLACE BY: The court was not so satisfied in *Gonzales v Claridades* [2003] NSWSC 508; (2003) 58 N.S.W.L.R. 188 (affirmed [2003] NSWCA 227; (2003) 58 N.S.W.L.R. 211).

AFTER § 27–17 INSERT THE FOLLOWING NEW PARAGRAPH:

**27–17A** The court’s power to authorise trustees to distribute on a given footing extends not merely to questions of fact but also permits it to authorise them to act on a legal opinion that certain assets are or are not held on trust and, if so, what the beneficial interests are; and it will do so where the difficulty and expense of actually deciding the relevant questions are out of proportion to the value of the fund.<sup>60a</sup>

*Directions as to trustees’ powers*

**27–19** AT THE END OF THE LAST SENTENCE INSERT A NEW NOTE 66A: See § 29–299.

#### Future questions

**27–21** NOTE 71. AFTER THE REFERENCE TO *Re Staples* INSERT: *Re Earl of Strafford* [1980] Ch. 28 at 39, CA, *per Goff L.J. arguendo*.

#### Practice

**27–22** NOTE 73. FOR THE REFERENCE TO *The Chancery Guide* (5th edn, 2005), SEE NOW (6th edn, 2009), paras.25.1 *et seq.*

#### Parties

**27–23** NOTE 80. FOR THE REFERENCE TO *The Chancery Guide* (5th edn, 2005), SEE NOW (6th edn, 2009), para.25.4.

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<sup>60a</sup> *Re Equilift Ltd* [2009] EWHC 3104 (Ch); [2010] B.P.I.R. 116. (The authority to distribute was not to take effect until persons who might have been beneficiaries had been given an opportunity to contend that a distribution in a different way ought to be made.) The trustees may also be authorised to act on a legal opinion either by a suitable provision in the trust instrument or, on a discrete point, by a power conferred under Trustee Act 1925, s.57: see *Sutton v England* [2009] EWHC 3270 (Ch); [2010] W.T.L.R. 335 at [22] (reversed on appeal on other grounds *sub nom. Southgate v Sutton* [2011] EWCA Civ 637; [2011] W.T.L.R. 1235) and § 45–16(11).

## DISTRIBUTION WITH THE INTERVENTION OF THE COURT

DELETE THE SECOND AND THIRD SENTENCES AND N.81 AND REPLACE BY: The trustees do not need permission to issue such a claim form if they are seeking the approval of a sale, purchase, compromise or other transaction, including a case in which the approval is sought because of a conflict of interest or duties,<sup>81</sup> and since in such cases the application will typically be disposed of without a hearing,<sup>81a</sup> it will be cheaper to make and hence useful, especially when the trustees are inhibited by a conflict. An application under section 48 of the Administration of Justice Act 1985 not naming defendants may also be issued without the permission of the court.<sup>81b</sup> In the previous edition of *The Chancery Guide* it was said that the procedure of not naming defendant might enable trustees to obtain directions where the expense and delay associated with an application naming defendants might not be in the interests of beneficiaries.<sup>81c</sup> That somewhat general guidance suggests, if still applicable, that the procedure is primarily useful (cases of seeking approval and under section 48 apart) where the fund is small, or where the principal beneficiaries are adult and agreeable to the course proposed and the other beneficiaries are unborn, unascertained or cannot be found.

**27–24** AFTER THE SECOND SENTENCE INSERT: It suffices if the representative has the same interest in a given answer to a question as those whom he is appointed to represent and it is not necessary that he should have a like beneficial interest.<sup>86a</sup>

AFTER THE THIRD SENTENCE INSERT: Conversely, the court has jurisdiction to make a representation order against the opposition of one or more of the persons to be represented, and to refuse an application by such a person to be joined in his own right, where that is necessary for effective case management.<sup>87a</sup> Ordinarily it is necessary to ensure that each separate interest is represented but where the separate interests are numerous and it would be unwieldy or disproportionately expensive to insist on such representation, as may happen with

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<sup>81</sup> ETC Direction, paras.1A.1, 1A.2; *The Chancery Guide* (6th edn, 2009), para.25.4. The procedural requirements are stated in the ETC Direction, para.1A.3. For trustees seeking approval of such administrative decisions, see §§ 29–296 *et seq.* It is unlikely that the ability to apply without naming defendants extends to an application under Trustee Act 1925, s.57 (for which see §§ 45–12 *et seq.*). Nor is it clear whether that ability extends to an application for a *Benjamin* order to permit a distribution on a given footing (for which see §§ 27–15 *et seq.*), since it is doubtful whether the distribution can count as a “transaction” within the ETC Direction.

<sup>81a</sup> See § 27–29 (including online supplement).

<sup>81b</sup> See § 27–37.

<sup>81c</sup> (5th edn, 2005), para. 26.7.

<sup>86a</sup> *Capita ATL Pension Trustees Ltd v Zurkinkas* [2010] EWHC 3365 (Ch); [2010] All E.R. (D) 285 (Dec) at [9]–[13].

<sup>87a</sup> *PNPF Trust Co. Ltd v Taylor* [2009] EWHC 1693 (Ch); [2009] All E.R. (D) 119 (Jul).

## DISTRIBUTION WITH THE INTERVENTION OF THE COURT

pension trusts in particular,<sup>87b</sup> the court will modify the procedure,<sup>87c</sup> as by permitting a single team of lawyers to present contentions on behalf of beneficiaries with conflicting interests.<sup>87d</sup>

NOTE 88. FOR THE REFERENCE TO *The Chancery Guide* (5th edn, 2005), SEE NOW (6th edn, 2009), para.25.7.

*Mode of commencing claim*

**27–26** NOTE 90. DELETE THE REFERENCE TO Practice Direction—Alternative Procedure for Claims.

IN THE SECOND SENTENCE AFTER brought by Part 8 claim form INSERT: as are certain other claims concerning trusts,<sup>92</sup>

NOTE 92. DELETE.

NOTE 95. DELETE THE REFERENCE TO Practice Direction—Alternative Procedure for Claims AND REPLACE BY: Practice Direction 8—Alternative Procedure for Claims, paras.3.4, 3.5.

**27–27** NOTE 99. DELETE THE REFERENCE TO Practice Direction—Alternative Procedure for Claims AND REPLACE BY: Practice Direction 8—Alternative Procedure for Claims, paras.3.4, 3.5.

*Management, hearing and order*

**27–29** NOTE 12. AT THE END ADD: *The Chancery Guide* (6th edn, 2009), para.25.5.

AFTER THE THIRD SENTENCE INSERT: Where a claim form not naming defendants seeking approval of a transaction is made without the permission of the court, as is now possible,<sup>13a</sup> the court will consider the claim on the papers and make the order sought if it thinks that no

<sup>87b</sup> In *NBPF Pension Trustees Ltd v Warnock-Smith* [2008] EWHC 455 (Ch), it was possible to identify over 200 categories of potential recipients of pension benefits.

<sup>87c</sup> *Bestrustees v Stuart* [2001] EWHC 549 (Ch); [2001] P.L.R. 283 at [27]; *NBPF Pension Trustees Ltd*, above; *Walker Morris Trustees Ltd v Masterson* [2009] EWHC 1955 (Ch); [2009] P.L.R. 307 at [11]–[12].

<sup>87d</sup> *NBPF Pension Trustees Ltd*, above, at [15].

<sup>92</sup> See Practice Direction 8—Alternative Procedure for Claims, paras.3.2(1), 9.1 and Table to Sec. B, mentioning applications under Trustee Act 1925 and Public Trustee Act 1906 (and see paras.12.1, 12.2).

<sup>13a</sup> See § 27–23 (online supplement).

## DISTRIBUTION WITH THE INTERVENTION OF THE COURT

oral hearing is needed but if it thinks that a hearing is needed it will give appropriate directions.<sup>13b</sup>

- 27–30** DELETE AND REPLACE BY: The order, unless it was made in public, will not be open to inspection by a non-party without the court’s permission; and the same applies to the other documents on the court file in a Part 8 claim other than the claim form.<sup>24</sup> The court may further restrict a non-party’s right of inspection.<sup>24a</sup>

**Distribution**

- 27–31** NOTE 25. DELETE THE REFERENCE TO DIRECTIONS RELATING TO PART 48 AND REPLACE BY: CPR, Practice Direction Pts 43 to 48, para. 50A1—50A.3.

*Upsetting the trust—generally*

- 27–34** NOTE 34. ADD AT THE END OF THE FIRST SENTENCE: *Representation of BNP Paribas Jersey Trust Corp. Ltd* [2010] JRC 199; (2010–11) 13 I.T.E.L.R 867 (where the claimant was given six months in which to issue proceedings before the order took effect).

*Ordinary personal liabilities*

- 27–36** NOTE 46. FOR THE REFERENCE TO *The Chancery Guide* (5th edn, 2005), SEE NOW (6th edn, 2009), paras.25.6, 25.26 *et seq.*

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<sup>13b</sup> ETC Direction, paras.1A.4, 1A.5, 1A.6.

<sup>24</sup> Practice Direction 5A—Court Documents, para.5.4C(1), allowing access without the court’s permission to a statement of case (of which the claim form in a Part 8 claim will be the sole instance) and a judgment or order given or made in public. Certain other restrictions apply: see *ibid.*, para.5.4C(3). Different rules govern access to statements of case filed before October 2, 2006: see *ibid.*, para.5.4C(1A).

<sup>24a</sup> Practice Direction 5A—Court Documents, para.5.4C(4).

## DISTRIBUTION WITH THE INTERVENTION OF THE COURT

**3. APPROVAL OF LEGAL OPINION****The statutory power**

**27–39** NOTE 55. AT THE END INSERT: *The Chancery Guide* (6th edn, 2009), para.25.15 now provides (though without explanation) that the claim form “should not seek a decision of the court on the construction of any instrument”.

**Practice**

**27–41** NOTE 57. DELETE AND REPLACE BY: See *The Chancery Guide* (6th edn, 2009), paras.25.15 *et seq.*

**27–41(2)** DELETE AND REPLACE BY: The witness statement or affidavit (or the exhibits) should state:

- (a) the reason for the application;
- (b) the names of all persons who are, or may be, affected by the order sought;
- (c) all surrounding circumstances admissible and relevant in construing the document;<sup>58</sup>
- (d) the date of qualification of the qualified person and his or her experience in the construction of trust documents;
- (e) the approximate value of the fund or property in question;
- (f) whether it is known to the applicant that a dispute exists and, if so, details of the dispute; and
- (g) what steps are proposed to be taken in reliance on the opinion.

**4. PAYMENT INTO COURT****Power to pay in**

**27–42** NOTE 63. DELETE AND REPLACE BY: For the procedure, see Court Funds Rules (SI 1987/821), rr.15–19 (as variously amended); CPR, Pt 37, r.37.4; Practice Direction 37—Miscellaneous Provisions about Payments into Court (supplementing CPR, Pt 37),

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<sup>58</sup> As to which, see §§ 6–03 *et seq.*

## DISTRIBUTION WITH THE INTERVENTION OF THE COURT

para.6. For mortgagees wishing to pay into court surplus proceeds of sale, see in addition *The Chancery Guide* (6th edn, 2009), para.25.25.

**When payment into court is justifiable**

- 27–46** DELETE THE LAST SENTENCE AND NN.81–82.
- 27–47** DELETE AND REPLACE BY: It may sometimes be more convenient to apply to the court for a *Benjamin* order<sup>81</sup> or alternatively an order for payment in under Part 64 of the Civil Procedure Rules,<sup>82</sup> for then the payment in has the approval of the court.

**Payment out of court**

- 27–49** NOTE 84. DELETE AND REPLACE BY: The procedure upon application for payment out is not within the scope of this work: see Court Funds Rules (SI 1987/821), rr.40 *et seq.* (as amended by Court Funds (Amendment No.2) Rules 2007 (SI 2007/2617)); CPR, Pt 37, r.37.4; Practice Direction 37—Miscellaneous Provisions about Payments into Court (supplementing CPR, Pt 37), para.7.

AFTER § 27–56 ADD THE FOLLOWING NEW SECTION:

**5. ARBITRATION****Arbitration generally**

- 27–57** When a question has arisen between those interested in the trust they may submit the question to arbitration. A determination by that method may resolve a difficulty in the way of a distribution, which is the primary concern of this chapter, such as a question of construction, but it is equally suited to resolving a dispute about, say, an alleged breach of trust.
- 27–58** The usefulness of arbitration in trust matters is limited by practical considerations. If arbitration is undertaken by agreement made once a question has arisen, it is only if all those concerned in the question to be determined are of full age and capacity that there can be an effective decision. Minor, unborn and incapable beneficiaries cannot join in by contract and

<sup>81</sup> See §§ 27–15 *et seq.*

<sup>82</sup> Read with the ETC Direction, para.1(2)(a)(ii); see § 27–10.

## DISTRIBUTION WITH THE INTERVENTION OF THE COURT

there is no means of binding them. Hence if relief is sought which requires all those interested in the trust to be bound, such as the determination of a question of construction or reconstitution of a trust fund in consequence of a breach of trust, an agreement to arbitrate cannot be made if such beneficiaries are interested. Moreover, an arbitrator lacks the powers conferred on the court by statute, such as the power to make a vesting order and similarly lacks the court's jurisdiction to give directions to trustees.

**Arbitration clauses**

**27–59** On occasion, however, trust instruments include a provision designed to compel arbitration of questions arising between those interested in the trust. Arbitration offers advantages of privacy and confidentiality, often matters significant in family trusts, and a choice of arbitrator.

**27–60** There seems no doubt that a provision for arbitration is valid as between the original parties to the trust instrument (when there is more than one, *i.e.* when it does not take the form of a unilateral declaration of trust). Under the Arbitration Act 1996 if proceedings in court are brought against a party to an arbitration agreement in respect of a matter which, under the agreement, is to be referred to arbitration, the court is bound to stay the proceedings on the application of that party unless the arbitration agreement is null and void, inoperative or incapable of being performed.<sup>1</sup> The arbitration agreement must be in writing.<sup>2</sup> A trust instrument is not primarily a contract but a suitable provision in it would undoubtedly constitute an arbitration agreement between the parties within the 1996 Act.<sup>3</sup> Hence the settlor and the original trustees, if different, could bind themselves to arbitrate. Such an obligation would extend, for example, to a covenant on the part of the settlor to settle additional property, though such covenants are now uncommon, and even to a challenge to the validity of the settlement itself based on, say, duress, if the provision for arbitration is wide enough to embrace such a challenge, since the rule is that an arbitration agreement has to be treated as a distinct agreement<sup>4</sup> and so is vitiated only by factors which directly concern

<sup>1</sup> Arbitration Act 1996, s.9(1), (4). A statutory exception for “domestic” arbitration agreements, giving the court instead a discretion to stay, has not been brought into force; see *ibid.*, ss.85–87.

<sup>2</sup> *ibid.*, s.5.

<sup>3</sup> For the definition of “arbitration agreement”, see *ibid.*, s.9.

<sup>4</sup> *ibid.*, s.7.

## DISTRIBUTION WITH THE INTERVENTION OF THE COURT

the arbitration agreement itself and is not automatically brought into question by a challenge to the transaction of which it forms a part.<sup>5</sup>

**27–61** It is less obvious that an obligation to arbitrate or an entitlement to arbitrate can be imposed or conferred on successor trustees or on beneficiaries, as neither will ordinarily be parties to the trust instrument. Under the 1996 Act, however, it is a party to the arbitration agreement who can demand a stay of proceedings in court; and the term “party to an arbitration agreement” extends to persons “claiming under or through” an actual party to the agreement.<sup>6</sup> Though the 1996 Act is not in terms confined to cases in which the *claimant* is also a party to the arbitration agreement, such a restriction is implied, so that a stay is available only against such a party;<sup>7</sup> but it is likely that the statutory extension of the term applies also to a claimant.<sup>8</sup> It is therefore material to know whether successor trustees or beneficiaries claim under or through a party to the arbitration agreement, so that, for example, when a beneficiary sues successor trustees for breach of trust, either side can insist on arbitration. The claim in question is not the claim being asserted in the proceedings, since it is the defendant who invokes the provision for a stay, but seems rather to be the entitlement to which the arbitration agreement is ancillary. Arbitration agreements are primarily found in contracts and the entitlements of successor trustees and beneficiaries are proprietary, not contractual. Nonetheless, while the expression “claiming under or through a party” is certainly apt to refer to a contractual entitlement, so that an assignee of contractual rights is entitled or bound to arbitrate, there appears to be no reason why a proprietary entitlement should not suffice. Beneficiaries may rationally be regarded as claiming under the settlor, since they take their beneficial interests by way of grant from him, and successor trustees may similarly be regarded as claiming under him, as their legal title to the trust assets ultimately derives from him. If so, and if the obligation to arbitrate extends to a claimant who claims under or through a party to the arbitration agreement, then the statutory regime will extend to trust disputes between such persons.

<sup>5</sup> *El Nasharty v J Sainsbury plc* [2007] EWHC 2618 (Comm); [2007] All E.R. (D) 200 (Nov) (duress), relying on *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] UKHL 40; [2007] 4 All ER 951 (bribery or want of authority of agent to enter into main transaction does not vitiate arbitration agreement; forgery does so).

<sup>6</sup> Arbitration Act 1996, s.82(2).

<sup>7</sup> *City of London v Sancheti* [2008] EWCA Civ 1283; [2009] Bus. L.R. 996.

<sup>8</sup> Cf. *ibid.* at [29].

## DISTRIBUTION WITH THE INTERVENTION OF THE COURT

**27–62** It must be acknowledged, however, that that conclusion entails difficulties similar to those which arise where the trust instrument has no arbitration clause. First, neither the 1996 Act nor the general law of arbitration contains provision for representation orders or for permitting the representation of minor beneficiaries. The court appears to have no jurisdiction to assist an arbitration by appointing a person to represent such interests in the arbitration.<sup>9</sup> Hence, as before, if relief is sought which requires all those interested in the trust to be bound, it may be necessary to treat the arbitration as incapable of being performed within the terms of the 1996 Act, so that a stay is not available.<sup>10</sup> Secondly, an arbitrator again lacks the powers conferred on the court by statute, such as the power to approve a variation of the trusts<sup>11</sup> or to appoint a new trustee,<sup>12</sup> and lacks the court’s jurisdiction to give directions to trustees.<sup>13</sup> Claims for such relief cannot fall within an arbitration agreement. Thirdly, the application of the 1996 Act depends on the existence of an arbitration agreement, which can be found only in a trust instrument to which more than one person is a party, so that an attempt to provide for arbitration in a unilateral declaration of trust would necessarily fall outside the Act.

**27–63** We consider that those difficulties can be overcome by suitable provisions in the trust instrument. The settlor is free to frame the beneficial interests as he sees fit. It is open to him to confer suitable powers and impose suitable duties on the trustees, or on a third party, such as a protector, to re-mould them in accordance with the decision of an arbitrator and to provide within the trust instrument for the appointment of persons to represent the interests of those not of full age and capacity in the course of arbitral proceedings. If the provision for arbitration constitutes an arbitration agreement within the 1996 Act, proceedings in court brought by any of those bound by it can be stayed under that Act;<sup>14</sup> and if it is not (as when it is included in a unilateral declaration of trust) or if the claimant in the proceedings in court is not contractually bound by it, the defendants may invoke the inherent jurisdiction of the court.<sup>15</sup> Moreover the fact that an arbitrator cannot grant particular relief does not of itself

<sup>9</sup> Arbitration Act 1996, s.44 (court powers exercisable in support of arbitral proceedings) confers no relevant power.

<sup>10</sup> Arbitration Act 1996, s.9.

<sup>11</sup> Under Variation of Trusts Act 1958; see §§ 45–31 *et seq.*

<sup>12</sup> Under Trustee Act 1925, s.41; see §§ 15–01 *et seq.*

<sup>13</sup> See §§ 29–291 *et seq.*

<sup>14</sup> See § 26–61.

<sup>15</sup> Recognised in *Al-Naimi v Islamic Press Agency Inc.* [2000] EWCA Civ 17; [2000] 1 Lloyd’s Rep. 522 and now to be found in CPR, Pt 3, r.3.1(2)(e).

DISTRIBUTION WITH THE INTERVENTION OF THE COURT

preclude a reference of the underlying dispute to arbitration and court proceedings for suitable relief may follow after an arbitrator has determined the dispute.<sup>16</sup>

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<sup>16</sup> *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, staying a petition for relief from unfair prejudice under Companies Act 2006, s. 994 in favour of arbitration; see especially [83].