

CHAPTER 32

POWERS OF ADVANCEMENT

3. THE STATUTORY POWER

Benefit

32–16 NOTE 58. *X v A* IS ALSO REPORTED AT [2006] 1 W.L.R. 741.

Resettlement

32–18 NOTE 65. DELETE THE SECOND SENTENCE AND REPLACE BY: Note that an advance into an off-shore trust may be attacked by HMRC on the ground that it does not come within the scope of the power (see §§ 29–216 *et seq.*), or on the ground of fraud on the power (see , §§ 29–255 *et seq.*) but not on the ground that it involves a failure to take relevant considerations into account, etc. under the principle in *Re Hastings-Bass* [1975] Ch. 25, CA as restated in *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 (see §§ 29–238 *et seq.*). Compare the inability of HMRC to attack an appointment of non-resident trustees. see §§ 14–40 to 14–44.

Non-objects as beneficiaries

32–19 NOTE 70. AFTER THE PENULTIMATE SENTENCE INSERT: *Kain v Hutton* was reversed on appeal ([2008] NZSC 61; (2008–09) 11 I.T.E.L.R. 130) on grounds which did not involve determination whether the inclusion of non-objects in a resettlement was justifiable, though reservations were expressed (at [42]) whether a resettlement conferring wide powers on the settlor rather than the advanced beneficiary to add and remove trustees and discretionary beneficiaries could be said to be for the benefit of the advanced beneficiary.

NOTE 73. *X v A* IS ALSO REPORTED AT [2006] 1 W.L.R. 741.

Discretionary trusts and dispositive powers

32–20 NOTE 78. FOR THE REFERENCE TO Hanbury and Martin, *Modern Equity*, SEE NOW (18th edn), § 20–042. FOR THE REFERENCE TO Parker and Mellows, *The Modern Law of Trusts*, SEE NOW (9th edn), §§ 18–032 to 18–036. FOR THE REFERENCE TO Underhill and Hayton, *Law of*

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Trusts and Trustees, SEE NOW (18th edn), § 80.17. FOR THE REFERENCE TO Thomas and Hudson, *The Law of Trusts*, SEE NOW (2nd edn), §§ 14.42 to 14.45.

Perpetuities

- 32–21** DELETE THE SECOND SENTENCE OF THE TEXT AND N.85 AND REPLACE BY: Where some, but not all, of the trusts of the resettlement are void for perpetuity in view of the above rule, the advance will nonetheless be valid as regards the trusts of the resettlement which are not void if the effect of the advancement can reasonably be regarded as beneficial to the advanced beneficiary.⁸⁵ We do not consider that potential invalidity of some of the trusts (or powers) under wait and see perpetuity provisions^{85a} would normally be sufficiently serious as to prevent the advancement from being reasonably regarded as beneficial to the advanced beneficiary.

AFTER § 32–21 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Resettlement varying part only of the trusts

- 32–21A** The statutory power may be exercised so as to vary the trusts applicable to part only of the beneficial interests in the trust property if that is for the benefit of the advanced beneficiary, for example by applying capital of the trust fund so that it is held on like trusts to the existing trusts save for a variation in respect of contingent interests arising under accruer provisions.^{86a}

AFTER § 32–22 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

The statutory power and powers of appointment in favour of a class

- 32–22A** The statutory power is different in character from a power of appointment exercisable by trustees in favour of all or any members of a class of beneficiaries. The statutory power

⁸⁵ *Re Hastings-Bass* [1975] Ch. 25, CA distinguishing *Re Abrahams' Will Trusts* [1969] 1 Ch. 463; considered in *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [39]–[67]. As to the circumstances in which an exercise of the power of advancement (or other power), though falling within the scope of the power, may be set aside on the ground of breach of duty in failing to take into account relevant consideration or taking into account irrelevant considerations, see §§ 29–238 *et seq.*

^{85a} Perpetuities and Accumulations Act 1964, s.3(1); Perpetuities and Accumulations Act 2009, s.7(1) and (2). See §§ 5–38 and 5–38A (including online supplement).

^{86a} *Southgate v Sutton* [2011] EWCA Civ 637; [2011] W.T.L.R. 1235 at [42]–[46].

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involves no selection of the beneficiary in whose favour the power is exercised. The power is exercisable by the trustees in favour of a beneficiary who has a vested, defeasible or contingent interest in capital and permits that capital in whole or in part to be applied for his benefit before the time when the capital becomes payable to him under the trusts in any way that the trustees properly consider is for his benefit including by way a resettlement for his benefit. A power of appointment exercisable by trustees in favour of one or more members of a class of beneficiaries involves selection of the beneficiary or beneficiaries to be benefited by an exercise of the power who will not necessarily have any interest or eligibility to benefit under the trusts save under the power of appointment, and even if the objects of the power are also interested in capital under the trusts in default of appointment, the power is not exercised because they have those interests but because they are objects of the power. Accordingly, if trustees purport to exercise the statutory power by way of resettlement, and it appears from the terms of the purported exercise and the surrounding circumstances that the trustees have in mind only the statutory power, the purported exercise of the statutory power, if invalid as an exercise of that power, will not be taken as being a valid exercise of a power of appointment which could have been exercised if the trustees had decided to do so.^{88a} Nevertheless, the distinction between statutory power and a power of appointment, though important, should not be exaggerated in circumstances where both powers are capable of being exercised to create the same trusts for the benefit of the same beneficiary. If the trustees purport to create a resettlement in exercise of the statutory power and all other powers enabling them to do so, and the resettlement comes within the scope of a power of appointment conferred on them but not the statutory power, and the trustees take into consideration matters material to the exercise of both powers, we do not consider that the resettlement, expressed to be in exercising of all other enabling powers, should fail by reason of the reference to the statutory power.^{88b}

^{88a} *Kain v Hutton* [2008] NZSC 61; (2008–09) 11 I.T.E.L.R. 130 at [27]–[38]. See further § 29–176 (including online supplement).

^{88b} For the exercise of powers so expressed, see § 29–173.

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Interest of a beneficiary

- 32–23** AFTER THE FIRST SENTENCE INSERT: It is not enough that the beneficiary is an object of a power of appointment over capital which could be exercised to entitle him to capital but has not been exercised when an advancement under the statutory power is purportedly made.^{89a}

Consent from beneficiaries with prior interests

- 32–25** AT THE END OF THE FIRST PARAGRAPH ADD: A person entitled to a prior interest has no fiduciary obligations in giving or withholding consent. Such a person is entitled to give or withhold consent whether his reasons are good, bad or indifferent, and even if they are or appear to be based on whim or prejudice, like or dislike.^{1a}

Extent of power—its exhaustion

- 32–27** AT THE END ADD: The Law Commission has proposed the reform of section 32 so that the power to pay or apply capital to or for the benefit of a trust beneficiary extends to the whole rather than one-half of the beneficiary's share in the trust fund, in relation to all trusts howsoever established, excluding existing trusts, but including trusts in wills made before the proposed reform by testators who die after the reform, and including trusts in advancements or appointments made after the proposed reform under powers conferred by existing trusts.^{9a}

4. EXERCISE OF THE POWER**Subject matter of advance**

- 32–32** NOTE 19. AT THE END ADD: The Law Commission has proposed the clarification of section 32 so that it is made clear that trustees may, as well as paying or applying capital money under section 32, also transfer or apply any other property subject to the trust, see Law Commission Report on *Intestacy and Family Provision Claims on Death* (Law Com. No. 331, December 14, 2011), paras 4.74 to 4.76 and clause 9 of draft Inheritance and Trustees' Powers Bill in Appendix A to the Report. This proposal is intended to apply to all trusts

^{89a} *Kain v Hutton* [2008] NZSC 61; (2008–09) 11 I.T.E.L.R. 130 at [39].

^{1a} *PJC v ADC* [2009] EWHC 1491 (Fam); [2009] W.T.L.R. 1419 at [15], *per* Munby J.

^{9a} Law Commission Report on *Intestacy and Family Provision Claims on Death* (Law Com. No. 331, December 14, 2011), paras 4.61 to 4.73 and clauses 9 and 10 of draft Inheritance and Trustees' Powers Bill in Appendix A to the Report.

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whenever created or arising, see clause 10 of the draft Bill. Since the proposal is intended to clarify rather than reform the law, it is thought that the reference to property subject to the trust is intended to be limited to property forming capital as distinct from income of the trust.

AT THE END OF THE TEXT ADD: While the trustees can advance to a beneficiary property comprised in the trust fund, even though not cash, they cannot advance to a beneficiary (that is make himself entitled to) a beneficial interest in the trust fund created by the trusts of the settlement, such as an interest under accruer provisions in the settlement.^{20a} This principle does not, of course, prevent the trustees from applying capital for the benefit of a beneficiary by way of resettlement, if that is for his benefit, giving him an interest freed from provisions that would have applied under the settlement conferring the power had the resettlement not been made.^{20b} Nor, in our view, does this principle prevent a reversionary interest in one settlement which has been settled by its owner on the trusts of another settlement from being the subject matter of an advance in the other settlement, since the reversionary interest is the trust fund or part of the trust fund of the other settlement, not an interest in that trust fund.

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^{20a} *Sutton v England* [2009] EWHC 3270 (Ch); [2010] W.T.L.R. 335 at [44]–[50] (reversed on appeal *sub nom. Southgate v Sutton* [2011] EWCA Civ 637; [2011] W.T.L.R. 1235 but not on this point, see at [43]).

^{20b} See § 32–21A (online supplement).