

## CHAPTER 45

**LAWFUL DEPARTURE FROM THE TRUSTS****2. THE INHERENT JURISDICTION****Emergency powers of administration**

- 45–05** AFTER THE THIRD SENTENCE ADD: The jurisdiction also extends to the conferral of powers for the convening of quorate meetings of beneficiaries where the absence of such powers will occasion a deadlock in trust administration.<sup>13a</sup>

**Compromises**

- 45–10** NOTE 34. FOR THE REFERENCE TO *Civil Procedure* (2007) Vol.1, 19.7.5, SUBSTITUTE *Civil Procedure* (2011) Vol.1, 19.7.5.

**4. MANAGEMENT AND ADMINISTRATION—SECTION 57 OF THE  
TRUSTEE ACT 1925**

**Expediency**

- 45–13** NOTE 37. TRANSPOSE THIS NOTE TO THE END OF THE FIRST SENTENCE AND AMEND IT TO READ: *Re Craven's Estate (No.2)* [1937] Ch. 431 at 436. The court therefore refused to permit under Trustee Act 1925, s.57 the purchase of a membership of Lloyd's for one of two life tenants.

DELETE THE SECOND SENTENCE OF THE TEXT AND REPLACE BY: This means the same as expedient in the interests of the beneficiaries under the trust.<sup>37a</sup> But, as has been decided in

<sup>13a</sup> *Grender v Dresden* [2009] EWHC 214 (Ch); [2009] W.T.L.R. 379 at [35].

<sup>37a</sup> *Re Earl of Strafford* [1980] Ch. 28 at 44–45, CA; and to a similar effect see Australian and New Zealand authority *Riddle v Riddle* (1952) 85 C.L.R. 202 at 214, 220–222, Aus. HC; *Re Dawson* [1959] N.Z.L.R. 1360; *Re Sykes* [1974] 1 N.S.W.L.R. 597 at 600; *Perpetual Trustee Co. Ltd v Godsall* [1979] 2 N.S.W.L.R. 785 at 790–791; *Banicevich v Gunson* [2006] 2 N.Z.L.R. 11 at [19], NZ CA (application for leave to appeal refused [2006] NZSC 24; [2006] 2 N.Z.L.R. 25); *Royal Melbourne Hospital v Equity Trustees Ltd* [2007] VSCA 162; (2007) 18 V.R. 469 at [155]–[161].

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New Zealand<sup>37b</sup> and in England,<sup>37c</sup> this does not mean that that the court needs to be satisfied that the transaction or power in question is expedient or advantageous in the interest of each and every beneficiary considered separately, but rather that taking into consideration the interests of all the beneficiaries the transaction or power in question can fairly be said to be expedient in the interests of the trust as a whole. And in Australia it has been held that a transaction or power, otherwise expedient in the management or administration of the trust and interests of the trusts and beneficiaries as a whole, may be authorised or conferred even if its impact may be relatively positive for some beneficiaries and relatively negative for other beneficiaries.<sup>37d</sup> In England too the conferral of a power has satisfied the test of expediency where it is in the interests of the trust as a whole in that it facilitates better administration against a background of beneficiaries in different jurisdictions, though it is of particular benefit to one group of beneficiaries who are adversely affected by the absence of the power in a way the others are not.<sup>37e</sup> The approach to expediency under section 57 of the Trustee Act 1957 is therefore different from the approach to benefit under the Variation of Trusts Act 1958. Under section 57 a broad approach is adopted so that an assessment can be made of the advantage to the beneficiaries as a whole, while under the 1958 Act each beneficiary or group of beneficiaries is considered separately and appropriate compensating adjustments will need to be made where some beneficiaries, considered separately, do not benefit or, normally, where other beneficiaries benefit disproportionately. But there must be an advantage under section 57 to the beneficiaries as a whole, not merely to the trustees. And so there is no justification under the section 57 jurisdiction for the conferral of a general power on trustees to pay tax liabilities when such liabilities are not enforceable against the trustees.<sup>37f</sup> The court

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<sup>37b</sup> *Re Dawson*, above, at 88.

<sup>37c</sup> *Alexander v Alexander* [2011] EWHC 2721 (Ch) at [23].

<sup>37d</sup> *Royal Melbourne Hospital v Equity Trustees Ltd.*, above, at [114]–[119] and [162]–[167].

<sup>37e</sup> *Southgate v Sutton* [2011] EWCA Civ 637; [2011] W.T.L.R. 1235 at [22]–[24] and see at first instance (not reversed on this point) *sub nom. Sutton v England* [2009] EWHC 3270 (Ch); [2010] W.T.L.R. 335 at [23] and [28]; and see too the observations in *Re Downshire Settled Estates* [1953] Ch. 218 at 250, CA (no appeal on this part of the case, see *sub nom. Chapman v Chapman* [1954] A.C. 429 at 465, HL) on *Re Mair* [1935] Ch 562 where the interests of remote unascertained beneficiaries were not taken into account.

<sup>37f</sup> *Sutton v England*, above, at [52]–[55] (reversed on appeal on other grounds *sub nom. Southgate v Sutton*, above).

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can take into account the wishes of the settlor in considering an exercise of its powers under section 57.<sup>37g</sup>

**Management or administration****45–16** DELETE § 45–16(1) AND N.43 AND REPLACE BY:

- (1) in a case where there is no other power, (i) partition or appropriation of trust property between absolute and settled shares under the trust,<sup>43</sup> partition or appropriation between settled shares under the trust,<sup>43a</sup> (ii) distribution of trust property *in specie* in satisfaction of an absolute interest<sup>43b</sup> and (iii) appropriation of a similar nature to appropriation under the statutory power conferred on executors by section 41 of the Administration of Estates Act 1925,<sup>43c</sup>

NOTE 45. DELETE AND REPLACE BY: *Re Salting* [1932] Ch. 57; on which see *Re Forster's Settlement* [1954] 1 W.L.R. 1450 at 1456–1457 where the court in special circumstances authorised trustees under s.57 to buy the life interests under their own trusts so as to stop wastage of the trust fund resulting from the creation of charges previously authorised by the court. *Re Forster* was cited with approval in *Royal Melbourne Hospital v Equity Trustees Ltd* [2007] VSCA 162; (2007) 18 V.R. 469 at [159]–[160], though on the question of expediency rather than the question of management or administration. *Re Forster* should not be taken as authority for any wide proposition that trustees can buy or sell beneficial interests under their own trusts since, apart from special circumstances such as arose in that case, such a transaction would amount to a variation, see § 45–15.

NOTE 47. AT THE END OF THE FIRST SENTENCE ADD: *Re Fell* [1940] N.Z.L.R. 552 (sale prohibited by terms of trust); *Royal Melbourne Hospital v Equity Trustees Ltd*, above, at [168]–[187] (power of sale excluded by terms of trust); *Alexander v Alexander* [2011] EWHC

<sup>37g</sup> *Alexander v Alexander*, above, at [33]. Compare § 45–85 on relevance of wishes of the settlor in variation of trust cases.

<sup>43</sup> *Re Thomas* [1930] 1 Ch. 194.

<sup>43a</sup> *Re Z Trust* (2010–11) 13 I.T.E.L.R. 843; [2009] C.I.L.R. 593, Cayman GC; *Southgate v Sutton* [2011] EWCA Civ 637; [2011] W.T.L.R. 1235 at [28]–[41], distinguishing *Re Freeston's Charity* [1978] 1 W.L.R. 741 at 752, CA.

<sup>43b</sup> *Hornsby v Playoust* [2005] VSC 107; (2005) 11 V.R. 522.

<sup>43c</sup> Compare *Russell v I.R.C.* [1988] 1 W.L.R. 834 at 842 where such an appropriation was classified as administrative.

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2721 (Ch) at [13]–[22] (power of sale excluded by terms of trust); *cf. Re Smith* [1975] 1 N.Z.L.R. 495 (application for sale refused because testator intended land to remain settled and so sale would be a variation of the trusts, *sed quaere*).

NOTE 49. ADD: *Page v West* [2010] EWHC 504 (Ch); [2010] W.T.L.R. 1811 at [22]–[23].

AFTER § 45–16(8) INSERT THE FOLLOWING NEW SUB-PARAGRAPHS:

- (9) variation of the mechanics for making payments to beneficiaries without disturbing the underlying interests;<sup>50a</sup>
- (10) extension of powers of appointment of new trustees;<sup>50b</sup>
- (11) conferral of powers on trustees to convene meetings of beneficiaries in the event that quorate meetings cannot be convened in accordance with the provisions of the trust instrument;<sup>50c</sup>
- (12) authorisation for the trustees to act in accordance with the opinion of senior chancery counsel, subject to notice being given to adult beneficiaries, on questions of incidence of future inheritance tax liabilities.<sup>50d</sup>

**Land**

**45–18** NOTE 65. AT THE END ADD: But in a Victorian case it was agreed by all parties that the Victorian equivalent of s.57 applied to Victorian settled land: *Royal Melbourne Hospital v Equity Trustees Ltd* [2007] VSCA 162; (2007) 18 V.R. 469.

**Procedure**

**45–19** NOTE 66. DELETE AND REPLACE BY: CPR, Pt 8, r.8.1(2)(b) and (6); Practice Direction, Pt 8, Section B.

NOTE 67. DELETE AND REPLACE BY: *ibid*.

<sup>50a</sup> *NBPF Pension Trustees Ltd v Warnock-Smith* [2008] EWHC 455 (Ch); [2008] 2 All E.R. (Comm.) 740.

<sup>50b</sup> *HSBC International Trustee Ltd v Registrar of Trusts* [2008] C.I.L.R. N5.

<sup>50c</sup> *Greider v Dresden* [2009] EWHC 214 (Ch); [2009] W.T.L.R. 379 at [33] and [34].

<sup>50d</sup> *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).

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**6. THE VARIATION OF TRUSTS ACT 1958****Jurisdiction to vary trusts**

- 45–31** AT THE END ADD: In the context of the 1958 Act property held on trusts includes property in an unadministered estate, and so the court has jurisdiction to vary dispositions taking effect during the administration period, though not trusts in the strict sense, for instance a contingent legacy given to a minor not carrying the intermediate income.<sup>3a</sup>

**Incapacity—adult beneficiaries lacking mental capacity**

*All other beneficiaries capable of assenting—enduring or lasting power of attorney in existence*

- 45–39** AT THE BEGINNING OF THE LAST SENTENCE INSERT: Notwithstanding a contrary view expressed in a Canadian case,<sup>28a</sup>

**Persons who may become entitled to an interest—section 1(1)(b)**

- 45–45** AFTER THE PENULTIMATE SENTENCE INSERT: In Jersey (where the provision concerning unascertained beneficiaries is materially different from section 1(1)(b) of the 1958 Act) the view has been taken that it is unnecessary for the court to approve an arrangement on behalf of potential beneficiaries under a wide power of addition of beneficiaries conferred on the trustees after the death of the settlor.<sup>47a</sup>
- 45–46** NOTE 50. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), § 43.44.

**Scope of court's powers**

*Variation or revocation not resettlement*

- 45–54** NOTE 75. ADD: For a wide view in Jersey of the jurisdiction see *Re IMK Family Trust* [2008] JCA 196; 2008 J.L.R. 430 at [62]–[83].

<sup>3a</sup> *Bernstein v Jacobson* [2008] EWHC 3454 (Ch); [2010] W.T.L.R. 559; contrast *Re Davies* (1967) 66 D.L.R. (2d) 412, cited in, but not referred to in the judgment in, *Bernstein*.

<sup>28a</sup> *Drescher v Drescher's Estate* [2007] NSSC 352; (2007–08) 10 I.T.E.L.R. 352.

<sup>47a</sup> *Re IMK Family Trust* [2008] JCA 196; 2008 J.L.R. 430 at [99]–[115].

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AFTER THE TEXT TO N.75 INSERT: An arrangement does not constitute a resettlement merely because a new perpetuity period is adopted.<sup>75a</sup>

**Purposes of application under the 1958 Act**

**45–56** NOTE 81. AT THE END ADD: *Re DDD Settlements* [2011] JRC 243 at [25]–[32].

**Public policy**

**45–57** DELETE THE LAST SENTENCE AND NOTE 91 AND REPLACE BY: For that purpose, however, the perpetuity period runs afresh from the date of the court order approving the variation, so that before April 6, 2010 the benefits of the Perpetuities and Accumulations Act 1964 could be made available in relation to settlements constituted before July 16, 1964,<sup>91</sup> or alternatively a new common law period using a life in being at the order date could be adopted.<sup>91a</sup> In relation to a variation approved by the court on or after April 6, 2010, when the Perpetuities and Accumulations Act 2009 came into force,<sup>91b</sup> the 125-year perpetuity period under the 2009 Act<sup>91c</sup> will apply to beneficial interests varied by the arrangement, since the arrangement counts as an instrument for the purposes of section 15(1) of the 2009 Act.<sup>91d</sup> Likewise, in relation to a variation approved by the court on or after April 6, 2010, advantage can be taken of the abolition of the statutory restrictions on accumulations by the 2009 Act.<sup>91e</sup>

<sup>75a</sup> *Wyndham v Egremont* [2009] EWHC 2076 (Ch); (2009–10) 12 I.T.E.L.R. 461; and on perpetuity periods see § 45–57.

<sup>91</sup> *Re Holt's Settlement* [1969] 1 Ch. 100 at 120.

<sup>91a</sup> *Wyndham v Egremont* [2009] EWHC 2076 (Ch); (2009–10) 12 I.T.E.L.R. 461.

<sup>91b</sup> Perpetuities and Accumulations Act 2009, s.5. See § 5–37F.

<sup>91c</sup> Perpetuities and Accumulations Act 2009, s.22; Perpetuities and Accumulations Act 2009 (Commencement) Order 2010 (SI 2010/37).

<sup>91d</sup> Compare *Re Holt's Settlement*, above, a decision on a similar provision in the 1964 Act.

<sup>91e</sup> Perpetuities and Accumulations Act 2009, s.13, s.21 and Sch. See §§ 5–100A to 5–100D.

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**Benefit and discretion**

AFTER § 45–66 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*Postponement by creation of transitional serial interest or immediate post-death interest in favour of surviving spouse*

**45–66A** Normally it will not be for the benefit of beneficiaries with a reversionary interest in capital for their interest to be postponed by the creation of a reversionary life interest which takes priority over their interest. The creation of a life interest for the surviving spouse of a life tenant which qualifies as a transitional serial interest within section 49D of the Inheritance Tax Act 1984<sup>16a</sup> will prospectively postpone a charge to inheritance tax until the death of the surviving spouse. That in itself is unlikely to be beneficial to the reversionary capital beneficiaries since they will still suffer inheritance tax before their interest falls into possession. But where the creation of the transitional serial interest facilitates mitigation of inheritance tax and capital gains tax through advances to the reversionary beneficiaries after the life tenant's death, and through cheaper life insurance against the inheritance tax risk under a joint lives policy, the disadvantage of postponement of the reversionary interest may well be outweighed by considerable prospective inheritance tax savings.<sup>16b</sup> There may be similar, and indeed more obvious, benefits for minor beneficiaries under a will trust by the creation within two years of the testator's death of an immediate post-death interest within sections 49A<sup>16c</sup> and 142<sup>16d</sup> of the Inheritance Tax Act 1984 in favour of the surviving spouse for an appropriate period, and the tax saving may be split between the minor beneficiaries and the adults involved in the variation.<sup>16e</sup>

**Non-financial considerations**

**45–80** NOTE 48. ADD: See too *Re H Trust* 2007–08 G.L.R. 118 (disabled young adult); *Wright v Gater* [2011] EWHC 2881 (Ch); [2011] All E.R. (D) 153 (Nov) (vesting of capital in young

<sup>16a</sup> As added by Finance Act 2006, s.156 and Sch.20, para.5 and amended by Finance Act 2008, s.141(1).

<sup>16b</sup> *Re RGST Settlement* [2007] EWHC 2666 (Ch); (2007–08) 10 I.T.E.L.R. 754.

<sup>16c</sup> As added by Finance Act 2006, s.156 and Sch.20, para.5.

<sup>16d</sup> As amended by Finance Act 1986, s.101(3) and Sch. 19, para. 24, and Finance Act 2002, s.120(1), (4).

<sup>16e</sup> *Bernstein v Jacobson* [2008] EWHC 3454 (Ch); [2010] W.T.L.R. 559.

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child under intestacy trusts postponed until age 21 as regards 10% of fund and age 25 as regards remaining fund, but not until age 30 as regards whole of fund with accumulation and maintenance trusts in meantime as initially proposed).

*No financial advantage*

- 45–82** NOTE 57. AT THE END ADD: contrast *Re DDD Settlements* [2011] JRC 243 at [20]–[24] (where an application to remove the settlor from an excluded class was held to be beneficial to unborn beneficiaries for tax reasons but not on the ground of an alleged moral obligation).

**Practice and procedure***Parties to be joined*

- 45–89** AT THE END OF THE TEXT ADD: Normally an adult beneficiary can decline to give consent or withdraw consent at any time before the court order is made. In a case where there is a doubt whether an adult consent will be forthcoming, particularly where the variation is made in the context of a family or matrimonial dispute, it is prudent to ensure that adults are bound before the application to the court is commenced by contract between the adults and the trustees, or by an irrevocable direction to the trustees.<sup>85a</sup>

*Persons who need not be joined*

- 45–90** NOTE 92. DELETE AND REPLACE BY: As to the relevant CPR rules, see n.85.

*The defendants' response and evidence*

- 45–97** IN THE SECOND SENTENCE, DELETE THE REFERENCE TO patients AND REPLACE BY protected parties.

NOTES 25 TO 28. ADD: see too *The Chancery Guide* (6th edn, 2009), paras.25.12 and 25.13.

*Interlocutory procedure*

- 45–98** NOTE 32. DELETE AND REPLACE BY: *The Chancery Guide* (6th edn, 2009), para.6.27.

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<sup>85a</sup> *Re IMK Family Trust* [2008] JCA 196; 2008 J.L.R. 430 at [116]–[124].

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*Substantive hearing*

- 45–99** DELETE THE LAST SENTENCE AND NN. 38 AND 39 AND REPLACE BY: Before the introduction of the Civil Procedure Rules the substantive hearing was generally in open court.<sup>38</sup> When the Civil Procedure Rules were first introduced, specific provision was made for hearings under the 1958 Act to be listed for hearing in private, but that provision has been dropped, and now the hearing will be in open court in accordance with the general rule unless the judge decides that the hearing is to be in private.<sup>39</sup>

*Order*

- 45–101** NOTE 43. AFTER THE SECOND SENTENCE INSERT: *The Chancery Guide* (6th edn, 2009), paras.25.11 to 25.14, gives no guidance on these matters, but it is not thought that the practice has changed.

NOTE 44. FOR THE REFERENCE TO *The Chancery Guide* (2005), SEE NOW *The Chancery Guide* (6th edn, 2009), paras.25.11 to 25.14.

*Costs*

- 45–103** NOTE 45. DELETE THE REFERENCE TO PRACTICE DIRECTION 44 AND REPLACE BY: Practice Direction Pts 43 to 48, para.13.2(2). DELETE THE REFERENCE TO PARA.4.11 AND REPLACE BY: para. 13.11. AT THE END ADD: See too *The Chancery Guide* (6th edn, 2009), para.25.14 which provides that where the parties are represented by the same solicitors and counsel from the same chambers the court is unlikely to assess costs summarily unless either the case is a

<sup>38</sup> *Re Chapman's Settlement Trusts (No.2)* [1959] 1 W.L.R. 372; *Re Rouse's Will Trusts*, *ibid.*; *Re Byng's Will Trusts* [1959] 1 W.L.R. 375.

<sup>39</sup> For the general rule that a hearing is to be in public, see CPR, Pt 39, r.39.2(1). The circumstances in which a hearing may be in private are listed in CPR, Pt 39, r.39.2(3). The decision whether the hearing is to be in public or in private is made by the judge conducting the hearing, having regard to article 6(1) of the European Convention on Human Rights, see Practice Direction, Pt 39A, para.1.4 and 1.4A. Practice Direction, Pt 39A, para.1.5 specifies a number of hearings which should in the first instance be listed as hearings in private, and applications under the 1958 Act were specified in para.1.5(11), but that is not so now. Private hearings can be justified only on the basis that they involve confidential information (CPR, Pt 39, r.39.2(3)(c)), or are necessary to protect the interests of a child (CPR, Pt 39, r.39.2(3)(d)), or perhaps on the basis that they involve non-contentious matters arising in the administration of a trust (CPR, Pt 39, r.39.2(3)(f)). A contentious issue of fact or law would provide a reason for a hearing (or giving of judgment) in open court, as would the absence of any real prejudice to the protection of confidential information or the interests of a child.

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clear one or the value of the trust fund is such that a detailed assessment of costs would be disproportionate.

NOTE 45. DELETE AND REPLACE BY: See CPR, Practice Direction, Pts 43 to 48, para. 13.5.

**45–104** DELETE THE FOURTH SENTENCE AND REPLACE BY: Normally it cannot come from a beneficiary of full age and capacity because, if the proposed variation is dependent on his consent, it cannot succeed if his consent is withheld; and if it is not so dependent, then his opposition is irrelevant and he should not be a party. However, in a Jersey case an adult beneficiary contested a variation on grounds that he had not given a binding consent and on jurisdictional and other grounds.<sup>48a</sup> We would expect costs of hostile intervention of this kind by an adult beneficiary to follow the event.

NOTE 49. FOR THE REFERENCE TO *Halsbury's Laws of England*, SEE NOW (4th edn), Vol.5(4) (2008 Reissue), § 1429. FOR THE REFERENCE TO *Civil Procedure* (2007) Vol.1, 21.5.1, SUBSTITUTE *Civil Procedure* (2011) Vol.1, 21.5.1.

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<sup>48a</sup> *Re IMK Family Trust* [2008] JCA 196; 2008 J.L.R. 430.