



Neutral Citation Number: [2020] EWHC 2234 (Ch)

Case No: PT-2019-000853

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 17/08/2020

Before:

CHIEF MASTER MARSH

Between:

**(1) HENRY RICHARD GEERS COTTERELL
OBE**

**(2) WILLIAM HENRY VAN CUTSEM
- and -**

Claimants

**(1) THE RIGHT HONOURABLE
WENTWORTH PETER ISMAY FOURTH
VISCOUNT ALLENDALE**

**(2) THE HONOURABLE WENTWORTH
AMBROSE ISMAY BEAUMONT**

Defendants

Richard Dew (instructed by **Withers LLP**) for the **Claimants**

Hearing dates: 16 December 2019 and 17 July 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
CHIEF MASTER MARSH

Chief Master Marsh:

1. The claimants are the trustees of the Allendale 1949 Settlement (“the Settlement”). The first defendant is the fourth (and current) Viscount Allendale and the second defendant is his son. I will describe the first defendant as “Lord Allendale” and his son (in the manner adopted in later deeds of appointment) as “Wenty”. They are both beneficiaries under the Settlement.
2. The trustees apply to the court for orders under section 57(1) of the Trustee Act 1925 (“section 57”), and under the court’s inherent jurisdiction, to extend their powers. I am indebted to Mr Dew, who appeared for the trustees, for his full and helpful submissions.
3. Section 57(1) of the Trustee Act 1925 provides:

“Power of court to authorise dealings with trust property.

Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other 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, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.”

4. Section 57 enables the court to grant powers to trustees in connection with the management and administration of trust property. The principal considerations are that the court must be satisfied (a) the trustees lack the power they seek and (b) it is “expedient” to exercise the jurisdiction to make such an order. The court must also be satisfied that it should exercise its discretion to make the order.
5. The scope of section 57 has historically given rise to differing judicial views. On one view, the power could only be exercised where a specific “disposition” or “transaction” was contemplated that could not be undertaken due to the absence of the requisite power. The contrary view is that section 57 is not restricted in this way. I will first describe the Settlement and then deal with the issues that have arisen for determination.

The Settlement

6. The Settlement was created on 31 March 1949 by the second Viscount Allendale. It:
 - (1) Provided that the trust fund should be held upon trust for the person who at the termination of the appointed period would be the Viscount Allendale or (if the settlor were alive at that time) would be the Viscount Allendale if the settlor were dead, and so that an adult would take an absolute interest but an infant would take an entailed interest in tail male.

- (2) Defined the appointed period as being the period beginning at the date of the settlement and expiring at the end of 70 years from that date or 21 years from the death of the survivor of the settlor's family then living, whichever should be the shorter. This period expired on 31 March 2019. The trust period therefore has more than 68 years remaining.
 - (3) Provided that during the appointed period the trustees should hold the income for the benefit of any one or more of the persons having contingent interests in the trust or being members of the settlor's family.
 - (4) Provided further that the trustees should also have the power during the appointed period to apply the whole or any part of the capital of the trust fund in their discretion for the benefit of all or any one or more of the persons having contingent interests in the trust fund.
7. By an Order made on the 15 February 1977 the Settlement was varied, pursuant to the Variation of Trusts Act 1958, so as to include various provisions, including a power to accumulate income and an extended power of appointment in favour of the male line of The Right Honourable Wentworth Canning First Viscount Allendale.
8. Clause 12 of the Settlement conferred various powers in the 'management of real and leasehold and immovable property'. There are other powers at Clause 13. In addition, the Order referred to above inserted a new Clause 12A and 13A. Clause 13A is in the following terms:

“The Trustees shall have power to appropriate partition or apportion any property for the time being forming part of the Trust Fund in or towards satisfaction of any share or interest in the Trust Fund or for any purpose in connection therewith in such manner as the Trustees shall in their absolute discretion (and without the necessity of obtaining any consent) consider just”.
9. The Settlement also included a clause permitting remuneration, in the following terms:

“ANY trustee for the time being hereof being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done by him or his firm in relation to the trusts hereof and also his reasonable charges in addition to disbursements for all other work and business done and all time spent by him or his firm in connection with matters arising in relation to the trusts hereof including matters to which a trustee not being a solicitor or other professional person might have personally attended but to which such trustee might reasonably instruct a solicitor or other professional person to attend”.
10. The substantial assets now comprised in the Settlement are held in four funds: The W Fund, The I Fund, the D Fund and the U Fund. The appointments (or in the case of the I Fund the surrenders and releases) can be briefly summarised.

The W Fund

11. By a deed dated the 28 March 1977 (the “1977 Appointment”) the then trustees of the Settlement appointed a fund, described as “Wentworth's Fund” (and now known as the 'W Fund') upon trust for Lord Allendale for his life, with powers to enlarge his interest into an absolute interest and subject thereto for such all or such one or more exclusively of Lord Allendale's male issue and in such shares and with such trusts and powers and so on as Lord Allendale should by deed or deeds revocable or irrevocable or by will or codicil appoint.
12. There have been various appointments exercising the power referred to above. However, the governing appointment is now that contained in the deed dated 27 November 2012 made by the trustees and by which the trustees resolved, in exercise of the powers conferred by section 32 of the Trustee Act 1925 (as extended by the 1977 Appointment), that Lord Allendale is absolutely entitled to the W Fund provided always that the trustees might at any time or times during Lord Allendale's lifetime by deed wholly or partially revoke Lord Allendale's absolute entitlement or wholly or partially release the future exercise of that power.

The I Fund

13. The I Fund was created not by a single appointment, but by a series of surrenders and releases by which Lord Allendale gave up his life interest, and the trustees revoked their ability to appoint in his favour, in respect of various property at different times.
14. The governing appointment for those funds is the deed of release, revocation and advancement dated 19 October 2012. Under that deed:
 - (1) Wenty is entitled to the income of that fund until his death or the expiration of the Perpetuity Period.
 - (2) The trustees have power exercisable before his death or during the Perpetuity Period to appoint that the capital or income of the I Fund should be held on such trusts for the benefit of all or any one or more of the Beneficiaries in such manner as the trustees think fit.
 - (3) The trustees have power to pay or apply the whole or any part of the I Fund in which Wenty has an interest in possession for the time being to Wenty for his advancement or otherwise for his benefit in such manner as they shall in their discretion think fit.

The D Fund

15. By a deed dated 29 February 1984, the third Viscount Allendale, Lord Allendale's father, appointed the Dukesfield Estate onto trusts for Wenty in tail male. Further property was added to the D Fund by the Third Viscount of Allendale by deeds dated 31 March 1992 and 15 December 1997. Further assets from another fund (not relevant to this application) passed into the D Fund upon the death of the Third Viscount Allendale in 2002.
16. Income is payable to Wenty during his lifetime. Subject to Wenty's life interest, the D Fund will pass into Wenty's free estate on his death to be held in accordance with his will.

The U Fund

17. By a deed dated 19 October 2012, funds were appointed to the U Fund (prior to this the Fund had been known as the 'Unappointed Fund').
18. Pursuant to an appointment dated 19 October 2012, the Perpetuity Period applicable to this fund is now defined as 21 years from the death of the last survivor of all descendants of either the 2nd Viscount Allendale living in 1949 or members of the royal family living in 1949.
19. If the U Fund has not been completely distributed before the expiration of the Perpetuity Period then the U Fund shall be held in tail male for the person who is then holder of the Viscounty.

Disposal

20. When the claim came before the court on 16 December 2019, the primary concern of the trustees was to obtain a power to re-appropriate assets held in one sub-fund to another sub-fund, in exchange for assets of equivalent value from the other sub-fund. It was not considered that the power to appropriate under clause 13A could be construed to include a power to re-appropriate.
21. There were two reasons for this aspect of the application being pursued. First, the trustees wished to transfer assets that are non-exempt for the purposes of IHT held in the W Fund (of which Lord Allendale is the beneficiary) to the I Fund (of which Wendy is the beneficiary) in return for the transfer of exempt assets of equivalent value to the W Fund. The objective is to avoid or reduce the incidence of IHT on the death of Lord Allendale. Secondly, it was thought generally desirable to have flexibility about the assets held in the separate sub-funds. A general power to re-appropriate is clearly a sensible addition to the power of appropriation because as times change there may be good reasons to make suitable adjustments that are in the interests of the beneficiaries. The first reason for making the application provides a good example of this.
22. The trustees sought, in addition to the power to re-appropriate, other powers that were unrelated to any transaction or disposition that is currently contemplated. The trustees ask the court to confer the following powers upon the trustees:
 - (1) Powers to establish, manage and wind up entities for the purpose of conducting trust business and a provision removing the requirement to interfere in the management of such entities.
 - (2) Powers to permit the payment or transfer of assets in which a minor is entitled to their parent or guardian. Beneficiaries of some funds are minors (for example, the remoter descendants). The power would allow the trustees to transfer trust capital or income for the minor's benefit by making a payment to their parent or guardian and getting a valid receipt.
 - (3) Powers to appoint investment advisers and powers to permit the delegating of the management of investment and other assets.

- (4) Power to delegate generally.
 - (5) Power to give indemnities and enter into other commitments in favour of former trustees and other persons.
 - (6) A power to permit trustees who are trust corporations or companies to charge for their work.
 - (7) A power to permit the trustees to exercise dispositive or other powers notwithstanding a conflict of interest provided that there is at least one trustee who does not have such an interest.
 - (8) Power to exercise powers notwithstanding the rule against self-dealing.
23. At the hearing on 16 December 2019 the court was satisfied that it was appropriate to make an order granting the trustees a power of re-appropriation in the following terms:
- “Where the Trustees have appointed, appropriated or allocated any part of the Trust Fund or any assets comprised within the Trust Fund to be held upon trusts distinct from any other part of the Trust Fund, the Trustees may at any time or times transfer any assets comprised in, or any part of the capital of, any such fund to any other fund which forms part of the Trust Fund in exchange for assets which have a value equal to the open market value of the assets or part so transferred”.*
24. The trustees were proposing to re-appropriate assets as between some of the funds and plainly these actions could be seen as either dispositions or transactions that were expedient in the interests of the beneficiaries. The court had concerns, however, about its jurisdiction to make the additional orders extending the powers of the trustees in circumstances where (a) the proposed extensions of the trustees’ powers were not connected with a particular contemplated disposition or transaction and (b) the new power was of a general nature and not in its nature directly transactional. In *Sutton v England* [2012] 1 WLR 326 at [36] Mummery LJ drew attention to the need to adopt a cautious approach to the jurisdiction under Section 57, although his remark was made in the context of concern whether the order sought might amount to a variation of a beneficial interests under the trust.
25. Having made the order that appeared to me to be uncontroversial, Mr Dew was invited to provide further submissions in writing. The claim came back before the court for further review on 17 July 2020 when further orders were made. This judgment provides the reasons for making the orders on that occasion and on 16 December 2019.

Section 57

26. The jurisdiction was introduced because the court's inherent jurisdiction was limited to cases of "salvage", not "expediency". Lord Simonds in *Chapman v Chapman* [1954] AC 429 at 445 explained the effect of the pre-1925 cases on the inherent jurisdiction:

"... the court had power in the administration of trust property to direct that by way of salvage some transaction unauthorised by the trust instrument should be carried out. Nothing is more significant than the repeated assertions by the court that mere expediency was not enough to found the jurisdiction."

27. The scope of section 57(1) was considered by the Court of Appeal in *Re Downshire Settled Estates* [1953] 1 Ch 216 in the judgment of Lord Evershed MR and Romer LJ at page 248:

"In our judgment, the object of section 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual "emergency" had arisen or because the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction." [emphasis added]

28. Two points arise from the words that are emphasised:

- (1) The first passage appears to suggest that the Court of Appeal considered the power under section 57 is limited to specific dealings with the trust property which would give the section a narrow ambit. If this is right, the power granted by the court must relate to a dealing with the trust property that was under contemplation and the court does not have power to extend general powers of management and administration. A review of the authorities since 1953 would suggest that the power is in fact rather wider than that.
- (2) The second passage again suggests that re-writing the trust by adding general powers of management and administration using Section 57 is not permitted. It is clear, however, that Section 57 cannot be used to alter the dispositive provisions of a trust, other than to the extent they are incidentally affected by the grant of powers of management and administration. This is explained in *Lewin on Trusts* 20th ed. at 52-09 in the following way: "Section 57 of the 1925 Act is concerned with the authorisation of transactions and of powers to effect transactions concerning the trust property, whereas the 1958 Act is concerned with the variation of the beneficial interests in the trust property."

29. The text of section 57 appears at first sight to limit its scope to the authorisation of "dispositions" and "transactions" (for convenience I will use "transactions" to cover both) where the trustees lack the power "for that purpose" provided the court considers the transaction to be "expedient". The section goes on to say that "...the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose ...". There is therefore some tension within section 57 between, on the one hand, the trustees lacking power "for that purpose" and the court providing power for "the purpose", and on the other hand, the court having the ability to confer upon the trustees power "generally".

30. It is not immediately apparent that section 57(1) contemplates the court granting general powers in relation to the management or administration of trust property without there being an identifiable transaction that triggers the jurisdiction. The essence of the jurisdiction appears to be that the trustees wish to do something in relation to the management or administration of trust assets that they cannot do; and the lack of power relates to transactions that are by their nature generally a single or a series of single events. On the other hand, it is not obvious why the court should be given jurisdiction to confer power “generally”, unless the draftsman had in mind that a contemplated disposition or transaction might fall through and the trustees should be entitled to carry out a related but different transaction. Or it might have been intended that once the court’s jurisdiction was triggered by the need for a specific transaction to be undertaken, the court could extend the trustees’ powers concerning transactions of that type against a future need.
31. Mr Dew’s submitted that the critical phrase in section 57(1) is “the necessary power for the purpose”. If “the purpose” is limited to a contemplated transaction, then there is no jurisdiction to grant general powers. He further submitted that this is not the only necessary reading of the section. The section talks in terms of “any” transaction which is expedient and which cannot be effected by reason of the absence of a power. The “purpose” can therefore relate to the absence of power to carry out “any” transaction rather than the absence of a power to carry out a particular transaction. He submits it is not necessary, as a matter of linguistics, to confine the power only to contemplated transactions.
32. Mr Dew provided the court with a very helpful review of reported cases in which section 57(1) was considered. The starting point is what he described as the investment cases and I gratefully adopt his summary with only minor adaptations.

The investment cases

33. In the 1950’s and then again in the 1980’s there were a number of cases where trustees found their trustee investment powers to be inadequate and so made applications to court to widen them. Later, the Trustee Act 2000 rendered such applications unnecessary. The decisions are of assistance because they involved instances where the trustees contemplated investing generally rather than having in mind specific investment decisions.
34. In the 1950’s, judicial opinion appeared to be split regarding the applicability of section 57 to the conferring of investment powers.
35. On the one side, Vaisey J. was of the opinion that there was doubt as to the applicability of section 57 because it could not confer a general power without a particular transaction in mind. In *Royal Society’s Charitable Trusts* [1956] Ch 87 the order sought was made pursuant to the charity’s jurisdiction and the headnote (curiously not the report itself) states that Vaisey J. said that the jurisdiction did not arise under section 57. In *Re Byng’s Will Trusts* (which is reported along with *Re Coate’s*) Vaisey J. struck out the application under section 57 in favour of one under the *Variation of Trusts Act 1958*. Similarly, in *Re Coate’s* [1959] 1 WLR 375 Harman J. invited the trustees to amend their application to seek such powers by the *Variation of Trusts Act 1958*, saying:

“There has, however, always been a doubt whether the like could be done under section 57 of the Trustee Act 1925 although there is no doubt that the court can authorise under that Act the sale of existing securities and investment in specified new ones”.

36. On the other side, Danckwerts J. considered that there was power in section 57. In *re Brassey's Settlement* [1955] 1 WLR 192 he conferred a power to make investment in Canada pursuant to that section and in *Re Shipwrecked Fishermen* [1959] Ch 220 he conferred a general investment power, saying:

“I am aware, of course, that in *In re Royal Society's Charitable Trusts* Vaisey J. expressed the view that section 57 did not apply, but he did not go into the matter fully, because he found himself able to make a scheme which would produce, in the case of the trusts that were before him, exactly the same results as were asked for under the provisions of the Trustee Act. It seems to me that the provisions of section 57 do permit the court to allow a wider range of investment to be made and to express it in a general order. [His Lordship read section 57(1) and continued:] The word “investment” is plainly there, so that there seems to me no doubt that the court can authorize the investment by the corporation in a particular fund on a particular occasion. I also find in the subsection that the court may confer upon the trustees the power generally, and therefore I cannot see why the court may not under this power conferred upon the Court by the Act give a general power to invest. It seems to me that that could be done in the present case. It really comes to the same thing as the method of a scheme. In either case the situation is one where the court is being asked to do something purely in the administration of the trust. It is not altering the substantive trusts in any way whatever; it is simply giving the trustees power, in the administration of the funds which they have under their control, to administer them in a more satisfactory and more effective way which the changed circumstances of a hundred years show to be necessary for the proper administration of a charity. Accordingly, I am prepared to allow the summons to be amended so as to be entitled “In the matter of the Trustee Act, 1925”.

37. In the 1980's the principal concern of the court was whether it should widen investment powers beyond those conferred by the *Trustee Investment Act 1961*. In two cases (*Trustees of the British Museum v HM Attorney General* [1984] 1 WLR 418 and *Steel v Wellcome Trustees Ltd* [1988] 1 WLR 167) no doubts were expressed about the ability of the court to widen investment powers, although it is unclear from the reports what jurisdiction was being exercised.

38. In *Mason v Farbrother* [1983] 2 All ER 1078 His Honour Judge Blackett-Ord V-C (sitting as a judge of the High Court) expressly considered that section 57 conferred jurisdiction. He said:

“That power was exercised by Danckwerts J in a charity case, *Re Shipwrecked Fishermen* ... so as to extend the investment powers of the trustees. “Shortly afterwards, in *Re Coates' Will Trusts* the view was put forward by Harman J. that the proper way to proceed where the trustees wished to obtain extended investment powers was by way of application under the Variation of Trusts Act 1958, and that advice, in my experience, was acted on and applications were made under the Act but the law as laid down by Danckwerts J in *Re Shipwrecked*

Fishermen has not been overruled, and I am satisfied that where in the management or administration of trust property it is in the opinion of the court expedient, I have the power to authorise the substitution for clause 5 and 6 of the 1929 deed of the sort of investment clause which is being put forward here.” The Judge also conferred other ancillary powers, including the powers to appoint nominees and so on, and so the authority is not confined solely to investment powers.

39. These authorities were then applied by His Honour Judge Paul Baker QC (sitting as a judge of the High Court) in *Anker-Petersen v Anker-Petersen* [1990] Lexis Citation 1639. The application was for the extension of the power of investment “and other associated powers”, and was brought under section 57, or alternatively under the Variation of Trusts Act 1958. His Honour Judge Paul Baker QC identified as “the first point” whether the application should be under section 57 or under the Variation of Trusts Act 1958. He said:

“Although the prime object of the latter Act, the Variation of Trusts Act 1958, was to remove the limitation on the jurisdiction of the court to give its approval to variations of beneficial interests under settlements, it also allowed the court to sanction arrangements “enlarging the powers of the Trustees of managing or administering any of the property subject to trusts.” There is no restriction on the class of powers of management or administration which can be enlarged. In this respect its language is broader than S 57 which contains the list of transactions that I have read already read out --but which I repeat: “any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction.” The specific nature of this list has led to the expression of doubt whether the Section can be used to enlarge a power of investment generally rather than simply to authorise a particular investment: see *Re Coates' Trusts* [1959] 2 All ER 47n, [1959] 1 WLR 375 at 378 --a decision of Harman J (as he then was); or *Re Byng's Will Trusts* [1959] 2 All ER 47n, [1959] 1 WLR 379 at 381, a decision of Vaisey J.

“These doubts have not troubled other judges and one can see *Re Brassey's Settlement* [1955] 1 All ER 577, [1955] 1 WLR 192 at 196 and *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society* [1959] Ch 220, both decisions of Danckwerts J, and much more recently *Mason v Farbrother* [1983] 2 All ER 1078, a decision of the Vice-Chancellor of the County Palatine of Lancaster, Judge Blackett-Ord. For my part, I see no reason to adopt a restrictive construction of the Section. Its manifest object was to enlarge the inherent administrative jurisdiction of the court which had hitherto been confined to cases of emergency: that is *Re New* [1901] 3 Ch 534. It was widened so that it was no longer necessary to wait for an emergency. The court was empowered to authorise transactions which were, in its opinion, expedient.”

40. His Honour Judge Paul Baker QC found that he did have power to confer a wider general power of investment. Moreover, he conferred other powers, including those of delegating, employing nominees and borrowing which he considered to be “either transactions in themselves (such as borrowing) or adjuncts to the power of investment and hence can form part of the provisions and conditions which the court may impose”. He noted that similar powers were conferred in *Mason v Farbrother*.

41. What therefore emerges from the investment cases is that:
- (1) The authorities do grapple with the issue of whether the section confers a power only in respect of contemplated transactions or more widely.
 - (2) There was a view that section 57 might not confer power only in respect of contemplated transactions.
 - (3) There was, though, a wider view. Moreover, this view seems to be the one which is followed and applied; see especially *Mason v Farbrother* and *Anker-Peterson*.
 - (4) *Anker-Peterson* is direct authority that the court does have power to confer general powers, including both investment powers and wider non-investment powers so long as they involve transactions or are linked to them.
42. In *Re the Portman Estate* [2015] EWHC 536 (Ch) Birss J. was asked to confer a number of general powers upon the trustees. The application to the court concerned five trusts, each with a number of funds. The administrative powers of the trustees were described by Birss J as being a “patchwork with different trusts having different powers.” The absence of a power to trade in relation to some of the funds was of particular importance because the trustees wished to be able to (a) operate certain hotels in Gloucester Place, (b) to operate a farm and (c) to develop a particular property as a mixed residential and commercial development. A general power to trade was granted in relation to each of these properties. Birss J was satisfied that it was appropriate to grant a general power to trade because it avoided “... the need for continued applications to court and will allow the trustees to adapt to changing circumstances ...”.
43. In addition, powers falling into six categories were sought:
- (1) Power to provide guarantees for the beneficiaries and cross-guarantees between different funds.
 - (2) Power to accept as a good receipt for payments of income to beneficiaries who are under 18 years old.
 - (3) Power to hold property via nominees.
 - (4) Power to employ a person to advise on, manage and deal with trust property.
 - (5) Power for the trustees to act as an officer of a company in which a trust has invested and to receive remuneration for this role.
 - (6) Power for the trustees to confer on themselves any further power of management or administration, subject to a safeguard that the power could not be exercised with a supporting opinion from suitably qualified counsel.
44. Birss J granted the first five powers summarised above on the basis that it was expedient for the trustees to have those powers for the future management and administration of the trusts. However, he declined to grant the sixth power despite the safeguard that was included.

45. Birss J considered the width of section 57. After considering the authorities that were cited to him, including *Anker-Petersen*, he said at [13]:

“... ”

In *Re Downshire Evershed* MR explained the purpose of section 57 at p248 as being to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries. Ms Bedworth submitted that although in the passage at p248 the Master of the Rolls then referred to the authorisation of “specific dealings”, it is clear from the words of the statute that the court not only has power to authorise a transaction on a 'one off' basis, it may also authorise the insertion of additional more general administrative powers. I accept that submission. The words used in s57(1) are “either generally or in any particular instance” and make it clear that the court's power is not confined to authorising specific transactions.”

46. It is also helpful to refer to Lewin on Trusts. Between the hearing in December 2019 and the hearing in July 2020 a new edition of the work has been published and the commentary about the scope of Section 57 now includes the text in the fourth supplement. Under the heading “Enlargement of investment and other administrative powers” at 45-017 to 45-020 there is an analysis of what are said to be the three issues that arise for consideration on an application of the nature described in the heading, the first of which is:

“(1) Whether the jurisdiction under section 57 authorises the enlargement or conferral of investment and other administrative powers, including the conferral of powers of delegation of investment management and the holding of investments in the names of nominees, as well as the authorisation of a particular transaction.”

47. In the 19th ed. it was said in a single sentence that the jurisdiction under section 57 does extend to enable the court to confer powers of the type that are described in the heading citing *Anker-Petersen* and other authorities.

48. In the 20th ed. although the court’s jurisdiction under section 57 is described at 52-008 as relating to “transactions”, at 52-14, in answer to the question now posed at 52-13 (formerly at 45-17) the authors express their views in an expanded form:

“As to the first issue, the court has jurisdiction under section 57 of the Trustee Act 1925 where in the management or administration of any property subject to a trust any sale, mortgage, surrender, release or other 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. That wording, read alone, may suggest that the court has jurisdiction only where some particular disposition or transaction is under consideration and before the court. However, section 57 then goes on to authorise the court to confer the requisite power, either generally or in any particular instance, and this wide wording suggests that the jurisdiction is not limited to particular dispositions or transactions before the court. It is now settled, after earlier doubts, that the jurisdiction is not limited in that way, but extends generally to the enlargement of investment and other administrative powers. We

consider that the conferral of very wide or general new administrative powers comes within the jurisdiction, including even a power for the trustees to add new administrative powers. That does not, in our view, involve any ouster of the court's jurisdiction. Rather, it is an exercise of the court's jurisdiction. Where a new administrative power is conferred on the trustees, we consider that the new power may, if appropriate, be conferred for a limited period or be made subject to a power for the trustees to release or restrict it, since that operates as a limitation on the new power. But it is open to some doubt whether the jurisdiction extends to the conferral of a power to release or restrict an existing administrative power conferred by the trust instrument or by law, even though such a power may be expedient, for instance for tax reasons, since that is a matter of restriction of administrative powers rather than limited enlargement of administrative powers." [emphasis added]

49. I consider that, subject to two qualifications which I express below, this passage accurately summarises the law as it now stands. Although doubts were expressed in some of the investment cases in the 1950's, there is now a long line of first instance authority in which section 57 has been construed as giving jurisdiction to confer general administrative powers. It is, despite the uncomfortable drafting of section 57, unnecessary for an application to the court to be based upon a transaction that is under contemplation.
50. The two qualifications I have in mind are:
 - (1) The jurisdiction is limited by the overarching restrictions that arise from the opening part of section 57. The extension of powers must relate in some way or other to a transaction or transactions generally. Although it is not a complete answer, additional powers that include a transaction type verb such as pay, transfer, delegate, form (as in the case of an entity), underwrite, guarantee and so on may well qualify. As it seems to me, the new power to be granted under section 57 must either enable the trustees to implement or undertake transactions, or be a necessary ancillary provision relating to that additional power.
 - (2) The application must satisfy the court that it is expedient for the court to make the order. Where the court is asked to make a series of extensions to the powers of the trustees, the court must be satisfied about expediency in relation to each element of the application. If the trustees' powers were granted many decades ago it may be relatively easy to persuade the court that it is expedient to 'modernise' their powers to reflect current practice and needs and that an order should be made. On the other hand, a wholesale re-writing of the trustees' powers, merely as an exercise of modernising the powers, may or may not be expedient. Furthermore, although it is right in my judgment that, as a matter of jurisdiction, the court has power to grant trustees a power to add new administrative powers of a specified type, or even generally, whether it will be expedient to do so and for the court to exercise its discretion to make an order in the circumstances of any given case is a different matter. *Portman Estate* is a case in point.
51. The court was satisfied that it had power under section 57 to grant the trustees additional powers of the type summarised in paragraph 22 above (and the power to re-

appropriate between funds), and should exercise its discretion to do so, with two exceptions. It can readily be seen that:

- (1) establishing entities;
- (2) paying assets to a minor;
- (3) appointing investment advisors;
- (4) delegating the management of investments and other assets;
- (5) giving indemnities;

all involve transactions. The grant of these additional powers will assist the trustees in undertaking their role and be of real benefit to the beneficiaries of the Settlement.

52. The self-dealing powers that have been approved are not obviously transactions in themselves. They can be seen, however, as falling within Section 57 because by restricting the scope of the self-dealing rule the court is increasing the power of the trustees to carry out transactions. The self-dealing rule provides protection for beneficiaries; but this benefit needs to be balanced against the difficulties the rule can create where trustees are trustees of related trusts, or shareholders of related companies or beneficiaries of the trust. The clause that the court has approved requires there to be an independent trustee to ensure that there is adequate protection for the beneficiaries whilst relaxing the effect of the rule. A similar clause was approved in *Somerset v Fitzgerald* [2019] EWHC 726.
53. The request for the court to confer a general power to delegate was refused. Delegation is a type of transaction in the broad sense of the word and granting a power to delegate investment responsibilities, where such power is absent, is not controversial. However, the trustees were unable to show that it is expedient to confer a general power to delegate or that the court should exercise its discretion to do so.
54. So far as remuneration of trustees is concerned, although there is an existing remuneration clause in favour of trustees who are individuals, and there is power to appoint a trust corporation, the trustee charging clause does not permit a trust corporation to be remunerated. Although the trustees do not currently have plans to appoint a trust corporation, it is right for the court to recognise that it is increasingly common to do so because it avoids issues of personal liability and trustee succession.
55. The court has power under section 57 to add powers that are only indirectly related to a transaction or transactions. However, there is only jurisdiction under section 57 to 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.
56. The absence of jurisdiction under section 57 is not fatal to this element of the trustees' application. In *Duke of Norfolk's Settlement Trusts* [1982] 1 Ch. 61 the Court of Appeal considered the scope of the court's inherent jurisdiction to authorise the remuneration of trustees in the context of a trust instrument that permitted a named trust company to receive remuneration but only on a restricted basis. The claim was for the court to authorise additional remuneration for the trust company on a general

basis for the future. In the course of an extensive review of the authorities the Court of Appeal concluded that the court holds a wide power to authorise the remuneration of trustees both as to past remuneration and future remuneration and to increase the remuneration already authorised by the trust instrument. As Fox LJ put it at page 79C, the basis of the jurisdiction is “the good administration of trusts”.

57. If, in future, the trustees of the Settlement consider that the good administration of the trusts requires the appointment of a trust corporation, that power could only, in practice, be exercised upon terms that remuneration is paid. It seems to me, therefore, that it is appropriate to exercise the court’s power under its inherent jurisdiction to permit remuneration to be paid to a trust corporation on its standard terms.
58. The revised order lodged by Mr Dew following the hearing on 17 July 2020 has been approved and sealed. The amendments to the Settlement form an appendix to this judgment.

Appendix

“13B. In addition to those powers conferred by this Settlement and by law the Trustees shall have the following powers:

13B.2 Entities

13B.2.1 In this clause 13B.2 '**Entity**' means any company, partnership, trust, foundation, establishment, association or other body established or resident in any part of the world and whether or not it has separate legal personality and/or corporate identity.

13B.2.2 The Trustees may (without prejudice to the generality of their powers of investment) promote or incorporate or establish, or join with any other person in promoting or incorporating or establishing, any Entity, or subscribe for or acquire any interest in or any of the shares, stock, securities, debentures, debenture stock or loan capital of any Entity with a view to or in consideration of:

13B.2.2.1 the establishment and carrying on by such Entity of a business of any kind which the Trustees are for the time being authorised to carry on themselves and the acquisition of any of the assets comprised in the Trust Fund which may be required for the purposes of such business;

13B.2.2.2 the acquisition of the assets and undertaking of any business being carried on by the Trustees; or

13B.2.2.3 the acquisition of all or any of the assets comprised in the Trust Fund to be held as investments of the Entity acquiring the same.

13B.2.3 The Trustees may underwrite, sub-underwrite or guarantee the subscription for, or the purchase or other acquisition of any interest in, or any shares, stock, securities, debentures, debenture stock or loan capital of, any Entity.

13B.2.4 The Trustees may enter into any compromise or arrangement (whether in connection with a scheme of reconstruction, amalgamation or otherwise) with respect to all or any of the rights of the Trustees as holders of any interest in, or of any shares, stock, securities, debentures, debenture stock or loan capital of, or otherwise as creditors of, any Entity (whether in connection with a scheme of reconstruction or amalgamation or otherwise). They may accept in or towards satisfaction of all or any such rights such consideration as they

think fit, whether in the form of cash or options or any interest in, or any shares, stock, securities, debentures, debenture stock or loan capital of, the same or of any other Entity, or in any other form.

13B.2.5 The Trustees may concur in the winding up or liquidation of any Entity in which they are interested as holders of any interest or of any shares, stock, securities, debentures, debenture stock or loan capital, and may accept in satisfaction of all or any of their rights in any such winding up or liquidation a distribution in specie of the assets of any such Entity, and may thereafter hold or carry on business with such assets, either alone or with any other person.

13B.2.6 Where the Trustees have promoted or incorporated or established, or joined with any other person in promoting or incorporating or establishing, any Entity, or where they have subscribed for or acquired any interest in or any of the shares, stock, securities, debentures, debenture stock or loan capital of any Entity the Trustees the Trustees shall not be bound or required to interfere in the management or conduct of the business of any Entity even if the shares or the interest carrying control of the Entity are comprised in the Trust Fund and, so long as the Trustees have no actual notice of any act of dishonesty or misappropriation by any of the directors or other authorised officers of the Entity, the Trustees may leave the conduct of its business (including the payment or non-payment of dividends) wholly to the directors or other authorised officers.

13B.3 Powers in relation to minors

The Trustees may pay or transfer any assets comprised in, or any income of, the Trust Fund to which any minor is beneficially entitled, to that minor or to any parent or guardian of that minor and the receipt of that minor or of that parent or guardian shall be a full discharge to the Trustees. The parent or guardian shall, in respect of any assets or income received in accordance with this clause, have the powers conferred on the Trustees in this Settlement.

13B.4 Power to appoint Investment Adviser and delegate management of investments

In this clause:

13B.4.1 '**Investment Adviser**' means any person or partnership engaged to advise the Trustees on the investment of the whole or any part of the Trust Fund.

13B.4.2 The Trustees may engage the services of an Investment Adviser. The Trustees may delegate to the Investment Adviser discretion to manage the investments comprised in the whole or such part of the Trust Fund within the limits and for the period stipulated by the Trustees. The Trustees may settle the terms and conditions for the engagement of, and any delegation to, the Investment Adviser including, if they think fit, terms and conditions as to remuneration and reimbursement of the Investment Adviser's expenses at the expense of the capital or income of the Trust Fund, and provisions (which may include the giving of security or indemnities) to protect the Investment Adviser from any loss that may result from a failure by the Trustees to observe such terms and conditions. None of the restrictions relating to asset management functions and none of the requirements to review, replace or revise investment policy statements set out in s15 or s22(2) of the Trustee Act 2000 shall apply.

13B.4.3 The Trustees shall not be bound to enquire into, nor be in any manner responsible for, any change in the legal status of the Investment Adviser.

13B.4.4 The Trustees shall incur no liability for any action taken pursuant to, or for following the advice of, the Investment Adviser, however communicated.

13B.5 Power to delegate operation of bank accounts

The Trustees may, at the expense of the capital or income of the Trust Fund, delegate to any person the operation of any bank, building society or other account.

13B.6 Power to give indemnities and other commitments

The Trustees may enter into any indemnity in favour of any former trustee or any other person in respect of any fiscal imposition or other liability of any nature relating to this Settlement or to the Trust Fund, any part of it, any assets comprised in it or its income, and may charge or deposit the whole or any part of the Trust Fund, or any assets comprised in it, as security for any such indemnity, in such manner in all respects as they think fit. The Trustees may give any indemnity, warranty, guarantee, undertaking or covenant, or enter into any type of agreement, that they think fit relating to the transfer or sale of any business, or any interest or shares in any Entity owned or held by the Trustees (whether relating to the business or Entity itself or to the assets, liabilities, shares or employees, or any other aspect of, the business or Entity) or any other asset forming part of the Trust Fund in favour of any transferee, purchaser or other relevant party, and including any limitation or restriction on value or otherwise as the Trustees think fit.

13B.7 Trustee charging

Any trustee which is a trust corporation or company authorised to undertake trust business shall be entitled to reimbursement of its proper expenses (including expenses incurred in connection with professional or other charges for business done, services rendered or time spent by any firm or member of a firm associated or connected with such trustee) and to remuneration for its services in accordance with its published terms and conditions for trust business in force from time to time, and, in the absence of any such published terms and conditions, in accordance with such terms and conditions as may from time to time be agreed between such trustee and the Settlor, or (if the Settlor is unfit, unable or unwilling to act) the person by whom the power of appointing new trustees is for the time being exercisable.

Any trustee, whether a solicitor or other person engaged in a profession or business or a person acting in a personal capacity, shall be entitled to charge and be paid all normal professional or other fees and charges for business done, services rendered or time spent by such trustee personally, or by such trustee's firm or company, in the administration of this Settlement including acts which a trustee not engaged in any profession or business could have done personally.

13B.8 Power to exercise powers notwithstanding personal interest

In this clause:

13B.8.1 **'Fiduciary'** means a person subject to fiduciary duties under this Settlement.

13B.8.2 **'Civil Partner'** has the same meaning as in section 1 Civil Partnership Act 2004.

13B.8.3 **'Independent Trustee'**, in relation to a person, means a Trustee who is not:

- (i) that person;
- (ii) a brother, sister, ancestor, descendant or dependant of the person;
- (iii) a spouse or Civil Partner of (i) or (ii) above; or
- (iv) a company controlled by one or more persons within (i) (ii) or (iii) above.

13B.8.4 A Fiduciary may:

13B.8.4.1 enter into a transaction with the Trustees, or

13B.8.4.2 be interested in an arrangement in which the Trustees are or might have been interested, or

13B.8.4.3 act (or not act) in any other circumstances even though his/her fiduciary duty under this Settlement conflicts with other duties or with his/her personal interest.

13B.8.5 Clause 13B.12.4 has effect only in relation to administrative and not dispositive matters, and only applies if:

13B.8.5.1 the Fiduciary first discloses to the Trustees the nature and extent of any material interest conflicting with his/her fiduciary duties,
and

13B.8.5.2 there is in relation to the Fiduciary an Independent Trustee in respect of whom there is no conflict of interest, and he/she considers that the transaction arrangement or action is not contrary to the general interest of the Trust.

13B.8.6 The powers of the Trustees may be used to benefit a Trustee (to the same extent as if he/she were not a Trustee) provided that there is in relation to that Trustee an Independent Trustee in respect of whom there is no conflict of interest.”