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## A significant advance

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An analysis of significant but overlooked amendments to trustees' powers of maintenance and advancement under the Inheritance and Trustees' Powers Act 2014

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### Abstract

- The *Inheritance and Trustees' Powers Act 2014* contains important, if potentially overlooked, amendments to the powers of maintenance and advancement set out in the *Trustee Act 1925* in England and Wales.
- The amendments in each case seek to bridge a gap that existed between the statutory powers and what was commonly incorporated in trust instruments, in particular the removal of the one-half restriction on the exercise of the power of advancement as set out in s32 *Trustee Act 1925*.
- The effect of the changes will principally be of importance for will trusts (where little thought may have been given to such powers) and trusts arising on intestacy (where no instrument exists), but the amendments, in

placing greater focus on the discretion of trustees, do act as a reminder that such powers, being fiduciary in nature, should be exercised properly.

- The amendments may encourage certain other Commonwealth jurisdictions to consider the need for similar changes.

The *Inheritance and Trustees' Powers Act 2014* (ITPA 2014) came into force in England and Wales on 1 October 2014. The weight of press coverage has been such that one could readily be forgiven for thinking that the reference to trustees' powers was a mistaken flourish of the draftsman's pen.<sup>1</sup> It is also unsurprising, given that the (undoubtedly highly important) inheritance provisions can be neatly packaged under the heading of 'who gets what now', whereas the changes to trustee powers concern the niceties of maintenance and advancement when dealing with income and capital respectively.

But the objective in both cases is the same, namely to bring the law into line with modern practice and thinking. In the case of trustees' powers, this has led to the most substantial amendments to sections 31 and 32 *Trustee Act 1925* (TA 1925) since those provisions came into force almost 90 years ago. This article, therefore, sets out why the reform was felt to be necessary, in order to explain why the amendments matter to trustees and their advisors, even if not thought to be of interest to the public as a whole.

## The problem before ITPA 2014

Sections 31 and 32 TA 1925 respectively set out the trustees' powers to apply the income and capital of trust property. They are of particular relevance to minor beneficiaries. In the case of s31, the power is expressly stated to be to apply income for maintenance (along with a duty to accumulate surplus income) during a minority, whereas the meaning of 'advancement' in the context of s32 refers to the establishment in life of a beneficiary, and the exercise of the power in that sense (distinct from an exercise to 'benefit' in the more general sense), thereby naturally lends itself to minor beneficiaries.

Both sections as amended are more consistent with current practice because they place greater emphasis on what

trustees can do and, with that, greater faith in how trustees will exercise their discretion

The inclusion of such statutory powers is of obvious utility where the relevant trust instrument is short on detail – as is common in the case of will trusts – and also in outlining the terms of certain statutory trusts, such as those arising on intestacy under the *Administration of Estates Act 1925*. Beyond those examples, the use of sections 31 and 32 was limited in practice by the terms of s69(2), which provides that the powers conferred by the TA 1925 apply ‘if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument’, coupled with a dissatisfaction with the scope and nature of the powers conferred under sections 31 and 32. As such, it was common practice for draftsmen to either make separate provision in the trust instrument itself,<sup>2</sup> or only incorporate the statutory powers with modifications, thereby relying on s69(2).<sup>3</sup>

Two aspects of the statutory powers, in particular, encouraged this practice:

- The exercise of the trustees’ discretion under s31(1) to apply income of the trust property, which was stated to be limited by an objective criterion that any exercise of the power should in all of the circumstances be reasonable. Section 31(1) went on to provide a list of factors to which the trustees should have regard in deciding whether income should be so applied, namely: (i) the age of the infant, (ii) their requirements, (iii) what other income is applicable for the same purposes and (iv) the circumstances of the case generally, lest the reference to acting reasonably in all of the circumstances was unclear (which it was not).
- The restriction on trustees advancing under s32(1) more than one-half of the share or interest of the relevant person in the trust property, which was felt to be needless and potentially harmful to a beneficiary who, absent an application to court by the trustees, would be unable to access funds when they were most needed. <sup>4</sup>

**The solution under ITPA 2014**

The reforms<sup>5</sup> themselves were, in large part, based on recommendations from the Law Commission, as set out in a Bill attached to its report.<sup>6</sup> *In broad terms, both sections as amended are more consistent with current practice because they place greater emphasis on what trustees can do and, with that, greater faith in how trustees will exercise their discretion. This is apparent if one looks at the amendments to sections 31 and 32 in turn. They will seem far from revolutionary or even surprising to those involved in the drafting of instruments.*

### **Section 31 (power of maintenance)**

*Section 31, as amended, removes the objective criterion of reasonableness in favour of giving trustees a freer hand by simply providing that the power to apply income under s31(1)(i) may be exercised 'as the trustees may think fit'.*

*Consistently with that approach, the proviso setting out the list of factors to which trustees should have regard has been deleted.*

***As amended, s32 gives increased flexibility to trustees to advance capital to a beneficiary when it may be most needed***

*The removal of the criterion of reasonableness, in particular, was in direct response to the consultation process, which revealed a prevalent feeling that s31 was inconsistent not only with common practice but also with s32, which refers (at subsection (1)) to the power of advancement being exercised as the trustees 'may, in their absolute discretion, think fit'. Such a curiosity in the respective treatment of income and capital was, as the Law Commission noted, neither necessary for the protection of beneficiaries (as the statutory power is, after all, a fiduciary one and must be exercised accordingly) nor desirable for trustees as a matter of practice, by reason of both the potential additional administrative burden to keep appropriate records to satisfy the requirements of the section, and a more general concern about exercising the power in the first place due to the terms of s31.*

### **Section 32 (power of advancement)**

*The amendments to s32 are more extensive but are, by and large, directed at the same end. They concern three questions:*

- *How much can be advanced?*
- *What can be advanced?*
- *How can certain advancements be accounted for?*

## *How much can be advanced?*

*The provisional proposal was for s32 to be amended to remove the one-half restriction only for statutory trusts on intestacy, but the response to the Law Commission consultation was such that the final proposal was to remove the restriction for all trusts.<sup>7</sup> As amended, s32, therefore, gives increased flexibility to trustees to advance capital to a beneficiary when it may be most needed, subject only to the obvious proviso, as set out at s32(1)(a), that any advancement must not represent more than the presumptive or vested share or interest of the beneficiary in the trust property. Presumably, it will remain the case that the advancement of that share or interest will exhaust the power so that any subsequent increase in the value of the remaining trust assets will not renew the power (although the position will be different if the share of another beneficiary simply fails to vest).<sup>8</sup>*

## *What can be advanced?*

*Prior to ITPA 2014, the power of advancement under s32 was confined to ‘any capital money’. This encouraged a rather artificial practice when the statutory power was engaged of the trustees advancing money to the beneficiary purely for the purposes of entering into a transaction with the trustees for other non-cash trust assets. This represented a separate restriction of a different kind on trustees and has similarly been removed, so that trustees may, as set out in s32(1) itself, now transfer or apply ‘any other property forming part of the capital trust property’, clearly being words of the widest possible application.*

## *How can certain advancements be accounted for?*

*Under s32(1)(b), advances of money or other property should be brought into account as part of the share of a beneficiary who becomes absolutely and indefeasibly entitled. In connection with this, a new s32(1A) has been added*

*which provides that, in the exercise of the power, the trustees may pay, transfer or apply money or other property on the basis (express or implied) that it shall be treated as a proportionate part of the capital out of which it was paid, transferred or applied, for the purpose of bringing it into account in accordance with s32(1)(b).*

*This addition was not part of the Law Commission's proposals but is important when considered against the general rule that advances are brought into account as at their value at the date of the advance, whereas the trust property is valued as at the time of actual distribution of the trust property. If relied upon by trustees, s32(1A) avoids any potential unfairness caused by the general rule if property is advanced to a beneficiary and the retained trust property increases in value thereafter. That carries with it the practical requirement to value the property to be advanced and the remaining trust property at the time of the advance, which may be particularly complex (and expensive), depending on the nature of the trust property. [9](#)*

## *What does this mean for the future?*

*In England and Wales, the practical effect in the immediate term will be limited, as the amendments to s31 and the removal of the one-half restriction applicable to the power under s32 apply only in relation to trusts created or arising after 1 October 2014, or if an interest under a trust is created or arises as a result of the exercise of a power after that date. [10](#) Elsewhere, however, it may well be that the changes in England and Wales will encourage other Commonwealth jurisdictions to consider the need for similar changes. It should be noted in this regard that the overall scheme of sections 31 and 32 as amended is closer to that of certain jurisdictions, such as Jersey, [11](#) and Guernsey, [12](#) but the position in, for example, the Cayman Islands, [13](#) the British Virgin Islands, [14](#) Singapore, [15](#) and Hong Kong, [16](#) is near identical to the pre-ITPA 2014 position.*

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*The statutory powers themselves are likely to remain of the greatest importance for those trusts created without full consideration being given to the necessary powers, or without the benefit of a draftsman. The removal of the one-half restriction under s32, in particular, will be of great practical benefit when dealing with statutory trusts arising on intestacy, as the size of the estate will often be small and there may well be a strong incentive to simply pay out a beneficiary's share in full, in exercise of the power, and move to bring the trust to an end.*<sup>17</sup>

*However, as s69(2) TA 1925 remains in place, it is far from clear that draftsmen will be inclined to move away from what will now be familiar (if not necessarily tried and tested) precedents in favour of relying on the statutory powers alone. This practice may change over time due to growing awareness of the effect of ITPA 2014 but, in the short term at least, it may well be that the statutory powers continue to be under-utilised, despite the most common modifications in trust instruments now being unnecessary.*

*As for trustees, the fact that the amendments give them a freer hand to exercise the statutory powers should not be misconstrued as affording them a free hand. The removal of the objective criterion of reasonableness and the proviso in s31, for example, was predicated on the recognition that these were largely superfluous, as beneficiaries may take action against the trustee if the power, being fiduciary in nature, is exercised improperly. The same applies to s32. Accordingly, while the changes introduced by ITPA 2014 are unquestionably directed at trustees, the core considerations and practices have not substantially altered and it is, to some extent at least, business as usual. With that in mind, it is perhaps less than surprising that the impact of ITPA 2014 on trustee powers, although plainly significant, has not commanded headlines in its own right.*

- <sup>1</sup>*Far from the most egregious example, the BBC report was titled 'Inheritance law changes come into force' (1 October 2014)*
- <sup>2</sup>*E.g the precedents in James Kessler, Drafting Trusts and Will Trusts, 11th edn, part 2, chapter 1* By the time of publication, it is expected the 12th edition will have been published
- <sup>3</sup>*As noted in Lewin on Trusts, 19th edn, §31–008 and §32–014*

- [4.](#) *Noted in Law Commission, Intestacy and Family Provision Claims on Death (Law Com No.331), §4.64*
- [5.](#) *Set out in ITPA 2014, sections 8–10*
- [6.](#) *Intestacy and Family Provision Claims on Death*
- [7.](#) *Intestacy and Family Provision Claims on Death, §4.60*
- [8.](#) *Held to be the case in the context of an express power in the settlement: see Marquess of Abergavenny's Estate Act Trusts [1981] 1 WLR 843*
- [9.](#) *For an example of such an exercise being carried out in a different context, see Re Leigh's Settlement Trusts [2006] WTLR 477 (a decision of interest more generally with this amendment in mind)*
- [10.](#) *Section 10(4) and (5) ITPA 2014*
- [11.](#) *Section 48 Trusts (Guernsey) Law, 2007*
- [12.](#) *Article 38 Trusts (Jersey) Law 1984*
- [13.](#) *Sections 32 and 33 Trusts Law (2011 Revision)*
- [14.](#) *Sections 32 and 33 Trustee Ordinance, 1961*
- [15.](#) *Sections 33 and 34 Trustees Act (2007 Revision)*
- [16.](#) *Sections 33 and 34 Trustee Ordinance (Cap 29)*
- [17.](#) *One of the reasons cited by the Law Commission in support of the proposal: see Intestacy and Family Provision Claims on Death, §4.64*

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