PAYNE | HICKS | BEACH

PAYNE HICKS BEACH LLP
10 New Square, Lincoln's Inn, London WC2A 3QG

Telephone: +44 (0)20 7465 4300
Fax : +44 (0) 7465 4400
DX 40 London/Chancery Lane

WBD(TC) LTD v Glenn [2021] EWHC 624 (Ch) - A rare study of the statutory power of advancement

08 April 2021

As Benito Mussolini proclaimed himself "Il Duce" of Italy, and Virginia Woolf was streaming consciousness in *Mrs Dalloway*, a bill "*to consolidate certain enactments relating to trustees in England and Wales*" was working its way through the Houses of Parliament. The Trustee Act 1925 came into effect on the 1 January 1926 – just a few weeks before the German-Soviet Neutrality and Non-aggression Pact.

Happily, the validity and effectiveness of the Trustee Act 1925 (the "Act") has far-outlived that pact and, nearly 100 years on, remains the primary source of English statute governing trustees – their powers and their appointments.

Since the introduction of the Act, it is rare to find an English will or trust instrument that does not intend reliance upon, or expressly incorporate (usually with slight modifications), the statutory power of advancement conferred by Section 32 of the Act.

Only (relatively) recently has the Inheritance and Trustees' Powers Act 2014 "tweaked" Section 32 principally to give legislative effect to the modifications often made in practice – most notably the removal of the restriction on advancing more than one-half of the relevant capital interest in the trust property. Beyond that, the provision has remained in the same form since its enactment in 1926 and only a small handful of cases has informed its application since then.

WBD(TC) LTD v Glenn is one of those rare birds: a case that examines the "nuts and bolts" of Section 32 and demands consideration of the statutory power from first principles.

Before turning to that analysis, it is worth pausing for a moment to consider the nature of powers of advancement. You would be forgiven, if, like this author, you had also laboured under the misapprehension that powers of advancement are so-called because they effect an 'advance' of the beneficiary's interest in capital. Certainly, the purpose of such a power is usually to enable trustees to accelerate the enjoyment of a beneficiary's contingent interest and 'advance' capital for their benefit. However, it is right to acknowledge that the power can also be used to postpone the vesting of such an interest (*Pilkington v IRC* [1964] A.C. 612). And in fact, "advancement" in this context does not refer to the advance of capital but to the advancement of the beneficiary in question. Properly exercised, the power should provide some permanent benefit or advantage in life to establish the beneficiary in question: think tertiary or professional education; getting on the first rung of the property ladder; or seed capital for a start-up.

The trustees in *Glenn* had just such benefit in mind for their primary beneficiaries, "the grandchildren"– in the main, young adults establishing careers and looking to purchase first homes. By way of

PAYNE HICKS BEACH LLP
10 New Square, Lincoln's Inn, London WC2A 3QG

Telephone: +44 (0)20 7465 4300
Fax : +44 (0) 7465 4400
DX 40 London/Chancery Lane

additional motivation, the trusts in question were no longer fit for purpose and the remaining funds risked being eroded by administrative costs and IHT charges. The obvious solution would be to apply the capital funds for the permanent benefit of the beneficiaries to allow them to purchase first homes and otherwise establish themselves in life. The question before the Court was whether the Section 32 power[1] could in fact be exercised by the trustees to achieve this objective.

As part of this enquiry, the Court confirmed the pre-requisite that a beneficiary must be entitled to an interest in capital for the statutory power to be exercised in his or her favour. That interest may be contingent (e.g. on reaching a certain age); subject to a gift over (usually on death); granted in the remainder; or even liable to be defeated by the exercise of a power of appointment or revocation. However, because the net is cast so widely over varying types of capital interests, the counterbalance is that the power can only be exercised with the written consent of any person entitled to a "*prior life or other interest*" in the capital in question.

In *Glenn*, the first issue Master Clark considered was whether the grandchildren could be said to have capital interests of the kind captured by the Section 32 'net'. This triggered an enquiry of its own confirming that the rule of construction in "*Hancock v Watson*" was engaged such that the grandchildren could be said to have an interest in capital – albeit defeasible in the event of their unborn sons or remoter issue taking under engrafted trusts. It is worth noting (without repeating them here) that Master Clark made a number of very helpful findings about the application of the rule in "*Hancock v Watson*" in the course of her enquiry.[2] Critically, she also determined that the capital interest created by the "*Hancock v Watson*" construction creates a sufficient capital interest for the purposes of Section 32. This concurs with the learned authors of *Lewin on Trusts* who had already ventured that "*until the interest in capital has been defeated* [by those taking under engrafted trusts]*, the beneficiary retains the interest in capital, and the statutory power is available*". *Glenn* now provides judicial authority to this effect.

With a sufficient interest in capital identified, the next issue in *Glenn* was whether unborn heirs (who might still take under the engrafted trusts) could be said to have "*prior interests*" thereby (impossibly) requiring their consent to be obtained and, critically, putting paid to the trustees' proposals.

So, what is a "prior interest" for these purposes? In 1935, the Court only got as far as concluding (in the case of *Re Spencer*) that this was a question "*of great difficulty*". Happily, nearly 90 years on, Master Clark confronted that difficulty head on and reasoned that the term "prior" referred to the order in which the trust property was enjoyed. If a son were born to a grandchild, this would cause the grandchild's absolute interest to be cut down to a life interest. Nevertheless, that income entitlement would be a prior (life) interest to that of the son. It therefore followed that the son's interest, was not prior but subsequent to that of the grandchild.

The Master went on to confirm that although Section 32 did not require the consent of persons with interests *subsequent* to the capital beneficiary, it was still incumbent on trustees, as fiduciaries, to consider those interests in the exercise of the Section 32 power. Ultimately, however, "*provided they have done so, and made a balanced decision, the power is there to be used*."

This is of course extremely welcome news: the decision has provided the key to unlock capital funds which will now allow young adults to purchase first homes or otherwise invest prudently in their future. The average house price has increased somewhat since 1926 (then £619) but the desire to advance the lives of beneficiaries, and particularly to assist in the establishment of young adults, is still a common priority for trustees. In that sense, the Master's decision provides welcome guidance on a vital trustee power that, despite being introduced nearly a century ago, is just as relevant to trustees today as it was then.

Jessica Henson and Charlotte Henshall of Payne Hicks Beach, and Penelope Reed QC of 5 Stone Buildings acted for the trustees in their successful application.

PAYNE HICKS BEACH LLP
10 New Square, Lincoln's Inn, London WC2A 3QG

Telephone: +44 (0)20 7465 4300
Fax : +44 (0) 7465 4400
DX 40 London/Chancery Lane

For further information please contact Jessica Henson, Partner and specialist trusts litigation lawyer at Payne Hicks Beach, by email or telephone on 020 7465 4300.

[1] As varied by the trust instrument (to remove the one-half restriction) but not as amended by the ITPA 2014 (which does not apply retrospectively).

[2] In crude summary, the rule should not be limited to instances where the engrafted trusts have actually failed and/or are non-exhaustive.