



## Benefiting non-objects with powers of appointment: Squaring the circle?

COMMENTARY BY [EMILY CAMPBELL](#), 15<sup>TH</sup> APRIL 2021

Private client practitioners will be familiar with the principle that powers of advancement can be used to create new powers (notwithstanding the rule against delegation) and to benefit non-objects (notwithstanding the rules on excess of power) if it is for the benefit of an object to do so. Powers of advancement are generally thought of as being the statutory power of advancement (as usually extended to the whole share rather than the half) and other powers of trustees "to apply" capital which are expressed to be exercised for the benefit of an object.

The principle that a power of advancement may be used to benefit a non-object if it is for the benefit of an object is often referred to as the "*Re Clore*" principle<sup>1</sup>. Practitioners were reminded of the need to adopt an approach to the principle which was not overly liberal in the judgment of Hart J in the later case of *X v A*<sup>2</sup>. A similar approach to the word "benefit" has been taken in the context of applications under the Variation of Trusts Act 1958<sup>3</sup>.

These days, powers of appointment in many trusts (even older ones) contain an express power to delegate by the creation of new powers, which has reduced the need for debate on delegation. But what of the possibility of benefiting non-objects? Can they be used in a similar way to powers of advancement where they are

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<sup>1</sup> After *Re Clore* [1966] 1 WLR 955. In relation to the possibility of delegation, see *Pilkington v IRC* [1964] AC 612.

<sup>2</sup> [2005] EWHC 2706 (Ch). See generally on this *Lewin on Trusts* (20 ed), paras 32-015 to 32-016.

<sup>3</sup> See *Re CL* [1969] 1 Ch 587.

expressed to be exercisable "for the benefit of" an object? Or is there some magic in the verb "to apply" rather than "to appoint". There is a surprising dearth of authority on this<sup>4</sup>.

In my 2002 book, "*Changing the Terms of Trusts*"<sup>5</sup>, I commented that I was not in favour of drawing a distinction between powers of appointment and powers of advancement but commented that the practitioner should exercise caution owing to the absence of any positive authority saying that it was permissible to use a power of appointment to benefit non-objects. *Lewin on Trusts*<sup>6</sup> states (in fairly uncompromising terms) that "A power to appoint in favour of one or both of A and B is plainly not well exercised by an appointment in favour of C or of A, B and C ... Unless the appointment is in substance to an object and is made with the consent of that object". There is a useful discussion in *Thomas on Powers*<sup>7</sup>, which (after identifying the lack of clear authority on the position) concludes: "...while acknowledging the differences between the two kinds of power ... there may be little logic or sense in distinguishing between them on the basis of a narrow point of construction".

Against this backdrop, I would draw readers' attention to the 2019 case of *PQ v RS*<sup>8</sup>, which is a decision of Chief Master Marsh. In that case, there was doubt as to whether illegitimate children were capable of benefiting from a power of appointment and this was relevant in relation to a child V, whose birth pre-dated her parents' marriage. It was desired to exercise the power so as to ensure that illegitimate, legitimated and adopted children could benefit and to make provision for V. The exercise was to be made on the basis that it was for the benefit of the undoubted objects RS (V's father) and TU (a sibling of RS). The Court authorised the exercise of power, having been addressed on the differences between powers of appointment and powers of advancement. There was no authority to rule out the proposed exercise of power. The

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<sup>4</sup> A case which might suggest that the use of the words "for the benefit of the beneficiaries" do not make any difference to the limited scope of a power of appointment is *Re Hunter's Will Trusts* [1963] Ch 372 (see per Cross J at 380).

<sup>5</sup> *Butterworths Lexis Nexis*, at [2.31].

<sup>6</sup> (20 ed), para 30-019 and note 67. In relation to the proviso, see 30-075. See also 30-022 (in relation to express powers to make transfers to other settlements).

<sup>7</sup> (2<sup>nd</sup> ed), para 9.51 to 9.58.

<sup>8</sup> [2019] EWHC 1643 (Ch).

Master found that the word "appoint" was not uncommon and was wide and the power in question was widely drafted.

This is an important case, which is deserving of greater attention than it has received. It is submitted that it is correct. Whether, however, it is a clear enough authority to enable practitioners to adopt the approach which it suggests without the comfort of a Court Order is less clear.

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