



## When is an order under s48 AJA appropriate? That's a matter of opinions

COMMENTARY BY [RAM LAKSHMAN](#), 21<sup>ST</sup> OCTOBER 2021

S48(1) of the Administration of Justice Act 1985 empowers the High Court to authorise personal representatives or trustees to take action on the basis of counsel's opinion where any question of construction has arisen out of the terms of a will or trust. The opinion must be given by counsel with a minimum of 10-years High Court qualification. If so authorised, the personal representative or trustee will be protected from liability for mismanagement of the estate or breach of trust.

Where the High Court exercises its powers under s48, it can do so on the basis of the papers and without hearing argument. Consequently, the process under s48 has the potential to offer a quick and cost-effective route for personal representatives and trustees to gain protection where a question of construction has arisen, without having to make a full claim for interpretation of the will or trust pursuant to CPR part 64.

However, s48(2) provides that "*the High Court shall not make an order under subsection (1) if it appears to the court that a dispute exists which would make it inappropriate for the court to make the order without hearing argument.*". This begs the question: when is it inappropriate (or, conversely appropriate) for the court to make an order without hearing argument?

One possible answer is that the procedure can only be used where it is clear what the correct construction should be. This is the approach taken in *Theobald on Wills* (19<sup>th</sup> Ed, para [20-006]) and in the *Chancery Guide* (para 29.105), both of which state that "*s48 is intended for use in clear cases only*".

Yet this answer must be overly simplistic. It cannot be the case that s48 can only be used where it is clear what the correct construction should be:

- Firstly, if it was clear what the correct construction should be, then arguably there would be no "*question of construction*" as required under the Act;
- Secondly, if it was clear what the correct construction should be, then there would be no reason for the personal representatives or trustees to seek the advice of experienced counsel;
- Thirdly, if it was clear what the correct construction should be, then the personal representations or trustees could confidently act in accordance with the opinion of counsel, without requiring the authorisation of the court.

Defenders of Theobald and the Chancery Guide are likely to be jumping to their feet at this point: what the authors of these texts surely meant was not that it must be completely clear what the correct construction should be, but just that it must be clear *enough*. But this response raises more questions than it answers. Just how clear must the question of construction be for it to be suitable for determination without hearing argument?

This article aims to provide guidance to trustees and personal representatives (and their legal advisers) who are considering making use of the s48 procedure. Part (A) sets out the requirements for an application and the process which is to be followed. Part (B) then considers the question of when it is appropriate to make an application under s48 AJA, having regard to the cases on this subject.

#### **(A) The process under s48 AJA**

In order for an order to be made under s48 AJA, the following requirements must be met:

- 1) A question of construction must have arisen out of the terms of a will or trust;
- 2) An opinion in writing must have been obtained on that question by the personal representatives or trustees under the will or trust;

- 3) The opinion in writing must have been given by a person who has a 10-year High Court qualification, within the meaning of s71 of the Courts and Legal Services Act 1990 (a **Qualified Person**);
- 4) An application to the High Court must be made by the personal representatives or trustees;
- 5) The application must be asking the court to authorise the personal representatives or trustees to take steps in reliance of the said opinion;
- 6) There must be no dispute which makes it inappropriate for the court to make the order without hearing argument.

Further guidance as to the process for making an application is set out in the Chancery Guide (at paras 29.29 onwards). The application should be made using a Part 8 claim form, without naming a defendant.

The application should be supported by a witness statement or affidavit exhibiting:

- 1) Copies of all relevant documents;
- 2) Instructions to the Qualified Person;
- 3) The Qualified Person's Opinion; and
- 4) Draft terms of the desired order.

The witness statement or affidavit should state:

- 1) the reason for the application;
- 2) the names of all persons who are, or may be, affected by the order sought;
- 3) all surrounding circumstances admissible and relevant in construing the document;
- 4) the date of qualification of the Qualified Person and his or her experience in the construction of trust documents;
- 5) The approximate value of the fund or property in question;
- 6) Whether it is known to the applicant that a dispute exists and, if so, details of such dispute; and
- 7) What steps are proposed to be taken in reliance on the opinion.

The file will initially go before a Master, who will consider whether the evidence is complete and, if so, whether she can deal with it herself or whether it is necessary to send the file to the Judge. If the Master or Judge is satisfied that the order sought is appropriate, it will be made and sent to the applicant. Alternatively, the Master or Judge might direct that further information is required or that notices should be served on parties who might be affected by any order made (ie: the potential beneficiaries under the will or trust).

If an order is made, the effect will be to protect the personal representatives or trustees from liability for misadministration of the estate or breach of trust. It will not determine the substantive question of construction, and the beneficiaries will remain free to contend later for a different construction and, if necessary, follow any estate property distributed in reliance on the order.

### **(B) When is an order appropriate**

A useful starting point is the case of *Greenwold v Pike* [2007] EWHC 2202. The issue in that case was whether the word "spouse" used in a settlement included a "widow". The trustees applied for an order under s48 to administer the estate on the basis that "spouse" did include "widow". This was in accordance with an opinion which had been given by Mr Michael Waterworth of counsel.

However, prior to coming before the court, the trustees received an opinion from [Mr Brian Green QC](#) which stated that, in the absence of evidence as to conversations which were had between the deceased and the draftsman of the will, he considered it by no means clear that the clause should be construed so that "spouse" included widow.

Mr Justice Briggs held that the case was not appropriate for making an order under s48. In particular, he held that:

- 1) He was not persuaded that the evidence of conversations which were had between the deceased and the draftsman could be taken into account in determining an application under s48, which deals with questions of construction and not rectification.

- 2) Given that there was a clear difference of opinion between well qualified counsel as to the true construction of the clause (if regard was not had to that evidence) it would be inappropriate to resolve that difference without hearing argument.

However, *Re BCA Pension Plan* [2015] All ER(D) 38 provides a more positive outlook on the potential availability of orders under s48. The question of construction related to the increase rule within a pension scheme. The trustees had obtained an opinion from [Mr Paul Newman QC](#) which stated that it was obvious that a mistake had been made in omitting certain words from the rule, which had been included in previous versions of the rules of the scheme, and without which the provision was nonsensical. Mr Justice Snowden considered the caselaw on construction and concluded that the court was entitled to cure an obvious and easily-correctible mistake as a matter of construction (without a need for rectification). Consequently, he was prepared to grant an order authorising the trustees to administer the scheme as if the words had been included in the rule.

Where do these cases leave us? The reality is that there remains a considerable degree of uncertainty as to when it is appropriate to make an order under s48. On one end of the spectrum there are cases where the correct construction is clear, or an obvious mistake has been made. On the other end of the spectrum are cases where the issue of construction is so unclear that experienced counsel might reasonably reach different views. But in between these two extremes, there may well be lots of cases, where a particular construction is by far the most likely one but not clearly or obviously correct. It would be disappointing if s48 was not available to assist personal representatives and trustees in these cases. However, further guidance from the courts would be very helpful.

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