New world order for trusts?: The meaning of 'prior interest' in section 32

COMMENTARY BY ROBERT HAM QC, 24TH JUNE 2021

The statutory power of advancement conferred by section 32 of the Trustee Act 1925 is a valuable tool for trustees given them as an aid to enable trust property to be used for the fullest benefit of a beneficiary with an interest in capital: see *Lord Inglewood v IRC* [1983] 1 WLR 366, 372–3 per Fox LJ, a judgment which contains a useful catalogue of ways in which the power has been exercised.[1]

But the power is not unrestricted:

- Unless section 69(2) it applies only if and so far only as a contrary intention is not expressed in the trust instrument and takes effect subject to the terms of that instrument.
- For trusts created before October 2014 it is limited to one half, unless extended by the trust instrument.
- Paragraph (c) of the proviso to section 32(1) says that no advance may be made that would prejudice any person entitled to any prior life or other interest, whether vested or contingent, unless that person is in existence and of full age and consents in writing to the advance.

In *Womble Bond Dickinson Trust Corporation v Glenn* [2021] EWHC 624 (Ch) Master Clark had to consider how that last restriction applied to a trust in *Hancock v Watson* [1902] AC 14 form, that is to say a trust where there there is an absolute gift to a

[1] The judgment downplays the flexibility given by section 32, understandably in the context of a Revenue argument that the statutory power was inconsistent with accumulation and maintenance trust status. But the cases referred to by Fox LJ speak for themselves.

beneficiary in the first instance and trusts are engrafted or imposed on the interest of the beneficiary. In such cases, the court reconciles the two inconsistent dispositions made by the absolute gift, on one hand, and by the engrafted trusts, on the other hand, by imputing to the settlor an intention to modify the absolute gift only in so far as necessary to give effect to the engrafted trusts. If the engrafted trusts fail for any reason, the result is that the initial absolute gift stands except to the extent to which it is cut down in the events which have actually happened.

The *Hancock v Watson* principle does not apply where there is no separate initial gift but merely a gift coupled with a series of limitations over so as to form (as it is put) one system of trusts – for example .where a trust fund is divided into shares, each held on trust for a beneficiary for life, with remainder to his/her children and an ultimate trust for the beneficiary if the share is not wholly disposed of, without an initial trust of the share for the beneficiary.

In the *Womble Bond Dickinson* case, there was a trust in favour of a class of beneficiaries made up of the settlor's present and future grandchildren contingently on attaining the age of 25 in such shares as the trustees should appoint. The next clause – which was in the form of a proviso – then laid down that the share taken by any of the beneficiaries should not vest in him or her absolutely but should be retained by the trustees (a) on trust for the beneficiary for life, and subject thereto (b) for the sons of the beneficiary in tail with remainder (c) to the beneficiary absolutely.

The trustees wished to advance capital for the benefit of grandchildren to enable them to buy homes to live in. The question was whether there was power to do so, and the Master held that they did:

(1) Much of the judgment consists of an analysis of whether the rule in *Hancock v Watson* was engaged, and the Master held that it was notwithstanding the inclusion of a trust of capital for the beneficiary in the engrafted trusts. This was (she said) insufficient to displace the inference to be drawn from the other features of the trust deed: in her judgment this was a "belt and braces" provision by the drafter, seeking to draft provisions falling within the rule in *Hancock v Watson* or, putting it another way, the drafter was, by including the beneficiary as ultimate beneficiary, acknowledging that *Hancock v Watson* was intended to apply.

(2) The Master then held that the grandchildren had interests in capital for the purposes of section 32.

(3) Finally, she held that the interests of the unborn beneficiaries were not "prior" interests for section 32 purposes.

There can be no doubt that the grandchildren had interests in capital, but it is not clear what part (if any) the rule in *Hancock v Watson* has to play in the case of trusts where (as in this case) the engrafted trust are exhaustive and themselves contain a trust of capital for the beneficiary. The function of the rule is to reconcile two inconsistent dispositions made by (a) the absolute gift, and (b) the engrafted trusts and to determine the devolution of the trust property if the engrafted trusts fail. But here there is no inconsistency and there is no possibility of the engrafted trusts failing, given that the grandchild beneficiary has a vested interest in capital under the engrafted trusts.

Nor is it clear that the Master was right to hold that the interests of the unborns were not prior to those of the grandchildren. She treated "prior" as referring to the order in which the trust property is enjoyed, with a life interest being enjoyed before the interest in remainder and her starting point was the position if a son is born to a grandchild. This would (said the Master) cause the grandchild's absolute interest to become a life interest, limiting his or her entitlement to the income of the trust property. That interest was a "prior life interest" to that of the son, and it followed that the son's interest, even when unborn, was not prior, but subsequent, to that of the grandchild, and fell outside para (c) of the proviso.

The result is convenient, because as the Master pointed out the trustees as fiduciaries were bound to consider the interests of the unborns, but provided they have done so, and made a balanced decision, the power was there to be used.

However, as a matter of substance – and putting on one side the question whether the rule in *Hancock v Watson* applies – the interests in capital of unborn sons (and their heirs under the entails) rank ahead of the interest in capital of a grandchild. It is clear that the settlor intended capital to go to the sons of his grandchildren (and their heirs) rather than the grandchildren themselves and whether or not the interests of the sons are classified as prior interests it is suggested that the decision frustrates the intention of the settlor. The status of decisions of Masters as a matter of precedent is not clear,

but whatever that may be, it would not be safe to rely on this decision in other cases without a further application to the court.

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