

S.57 TRUSTEE ACT 1925

A NOVEL JURISDICTION FOR AMENDMENT
RESTRICTED SCHEMES?

Nicolas Stallworthy KC & Victoria Brown



Key Elements



management or
administration



any... other transaction



expedient



S.57 Trustee Act 1925

*“Where in the **management or administration** of any property vested in trustees, **any** sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure **or other transaction**, is in **the opinion of the court expedient**, but the same cannot be effected by reason of the **absence of any power** for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, **either generally or in any particular instance**, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.”*



MANAGEMENT OR ADMINISTRATION

KEY DISTINCTION WITH REWRITING BENEFICIAL INTERESTS

- *“It is clear, in our judgment, that the subject-matter both of “management” and of “administration” in section 57 is trust property which is vested in trustees; and in our opinion “trust property” cannot, by any legitimate stretch of the language, include the equitable interests which a settlor has created in that property...”*

Re Downshire Settled Estates [1953] Ch. 218 at 247

- *“there is no jurisdiction under section 57(1) to confer a power to depart from the beneficial interests under the trustees by rewriting, remoulding or rearranging them...”; but NB that does not prevent granting powers which may affect the beneficial interests incidentally (e.g. on partitioning a fund).*

Sutton v England [2011] EWCA Civ 637, [2012] 1 WLR 326 at [6] & [43]



ANY... OTHER TRANSACTION: I

explained in **Cotterell v Allendale** [2020] EWHC 2234 (Ch):

- Not limited to conferring a power to effect a specific transaction - includes enlargement or variation of powers (of management or administration) generally: [41]-[50]
- Not limited to conferring a power to effect the transaction itself - includes ancillary powers to facilitate the operation of the power: [48]-[55]
- But, is limited by the overarching restrictions in s57 - *“the new power to be granted under section 57 must either enable the trustees to implement or undertake transactions, or be a necessary ancillary provision relating to that additional power”*: [50]



ANY... OTHER TRANSACTION: II

Case law shows the breadth of what may constitute a transaction. Some examples...

- modifying quorum requirements
- substituting a wider investment clause
- conferring power to adopt a consolidated governing instrument
- conferring power to appoint a sole corporate trustee
- modernising administrative provisions
- disapplying a rule against self-dealing



EXPEDIENCY

“IN THE INTERESTS OF THE TRUST AS A WHOLE”

Sutton v England at [5]

[Is “the trust as a whole” different from its beneficiaries ? Does it permit regard to the purpose of the trust (e.g. not just present beneficiaries) ?

...EVEN THOUGH IT IS
DISADVANTAGEOUS FOR SOME
BENEFICIARIES, AS LONG AS THE
OVERALL BENEFITS ARE SUFFICIENT...

Gelber v The Sunderland Foundation [2018]
EWHC 2344 (Ch), [2019] WTLR 29 at [12]



“MUST MEAN... THE SAME AS
“EXPEDIENT IN THE INTERESTS OF
ALL THE BENEFICIARIES UNDER
THE TRUST”

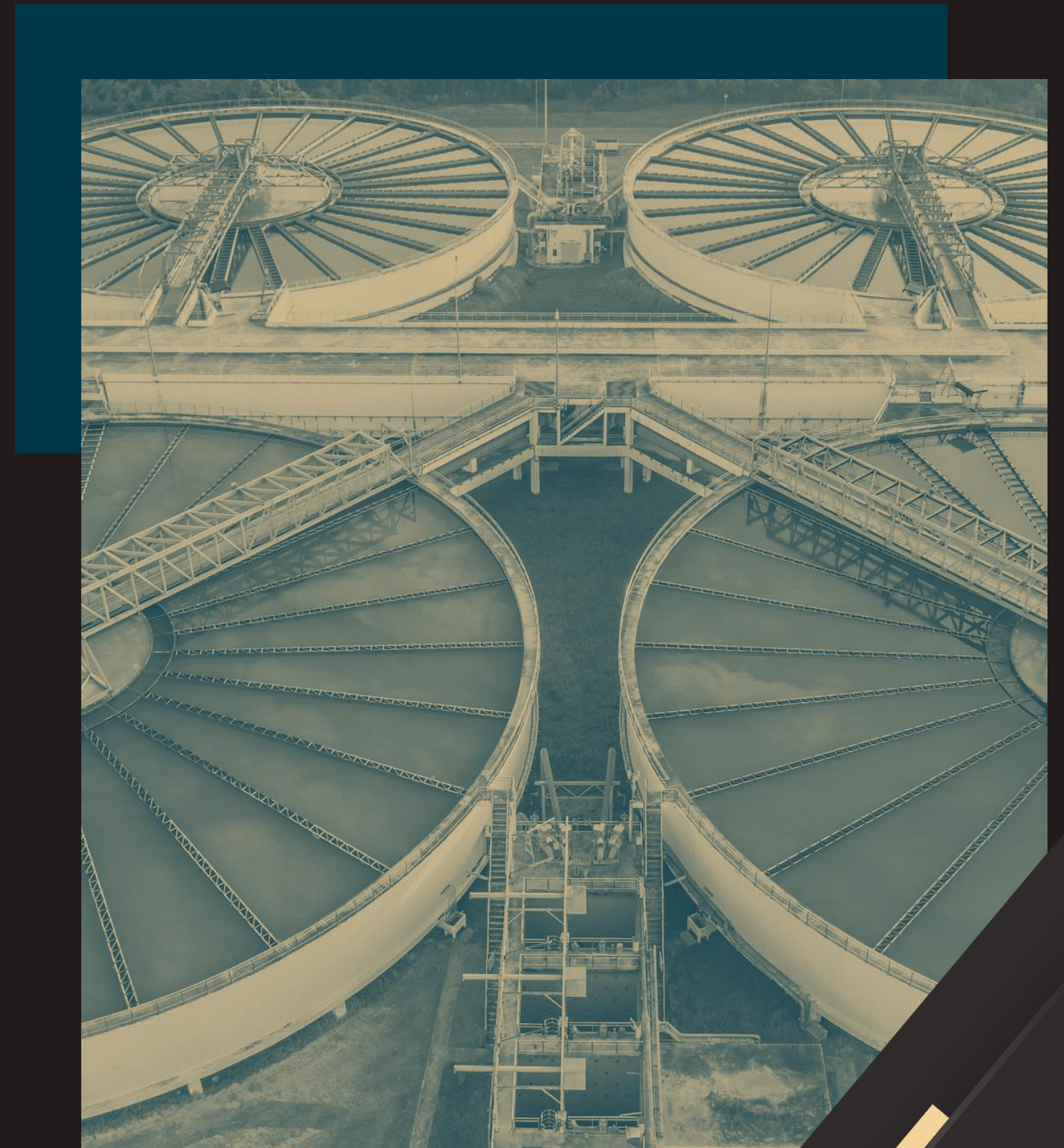
Re Earl of Strafford [1980] Ch. 28 at
pp44-45

“PROVIDED THAT... MUST TAKE INTO
ACCOUNT THE EFFECT... UPON THE
SEVERAL INDIVIDUAL INTERESTS...
AND HOLD THE SCALE FAIRLY
BETWEEN THEM.”

Re Earl of Strafford at pp44-45

Pennon Group Pension Scheme

- In 1989, on privatisation of the water industry, scheme created to mirror benefits in WASF (the “Mirror Image Scheme” or “MIS”)
- Protections baked into the rules, including a minimum of 2x MNTs, amendment restrictions and, while beneficiaries remained, vetoes to various provisions such as amendment and winding up
- In 1999 merger into a non-segregated section of PGPS. Protections retained, in context of ongoing accrual, 2 sections and 16 directors.
- In 2021, closed to future accrual (veto exercised by MIS MNDs, but opt outs agreed by the few MIS actives). By 2022, MIS members = 8.9% of membership, but were represented by 50% of the MNDs
- In connection with reducing number of directors of entire board, Trustee applied for power to amend the rules re: the proscribed minimum number of MIS MNDs and/or simply to reduce the number of MIS MNDs; from 3 to 1.



Scheme Rules

Re MIS MNDs:

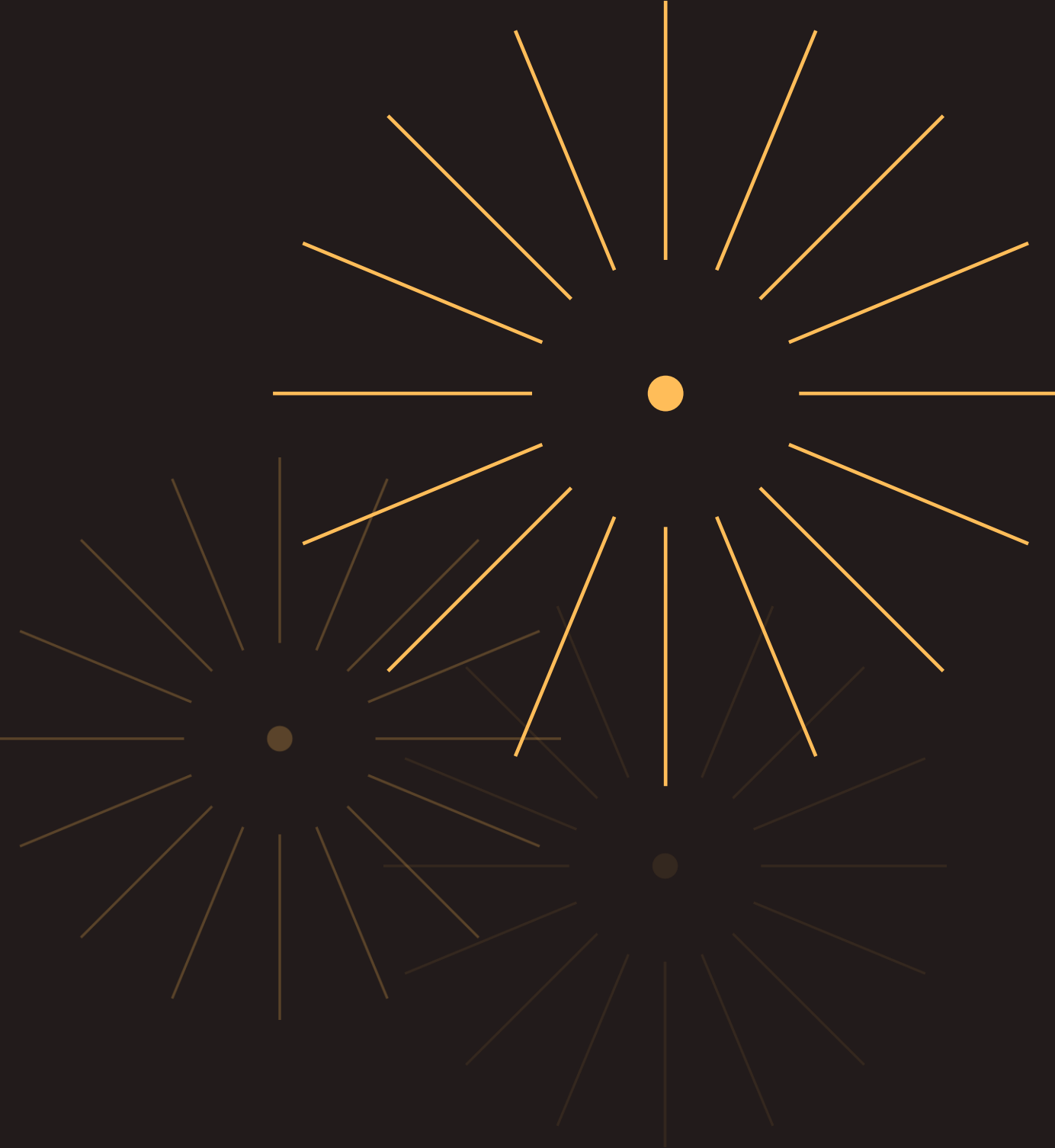
*"The Principal Employer must, subject to sections 241 and 242 of the Pensions Act 2004, ensure that, if there are persons able and willing to act as such, there are **at least three Trustees**, or three directors of a sole corporate Trustee... **appointed...** to represent the Mirror Image Scheme Transferred Beneficiaries"*

Amendment power:

*"...the Principal Employer may with the Trustees' consent at any time, by deed executed by the Principal Employer and the Trustees, alter or modify all or any of the trusts, powers and provisions of the Scheme and make new provisions in place of or in addition to the same with effect from a retrospective, coincident or future date specified in the deed **...To the extent that they relate to the MI Section, the following Rules must not be removed or altered...**"*



Judgment

- 
- In the event, uncontested disposal hearing. Sole corporate trustee C. Two Ds: sponsoring employer and RepBen for MIS beneficiaries
 - **Nomura** principles (RB role is to satisfy themselves, legally and evidentially, that requirements for the relief sought are met) apply similarly to s.57 as to rectification
 - Summary of reasoning on expediency was that the order “*would improve the working of the Board*”
 - Only point between the parties was whether to vary the TDR or straightforwardly reduce the number of Trustees. Unnecessary to decide, but if pushed would choose variation.
 - Master satisfied on all elements of the test and went on to exercise his discretion. To the best of our knowledge: first use of s.57 in pensions context since 1980s

PROCEDURE

- Part 8 claim form
- Supported by witness statement
 - Addressing why the Trustee seeks the relief and expediency
- RepBen (or multiple, depending on relevance of their interests) and principal employer joined as defendants
- RepBen will not necessarily oppose (as in rectification)
- Communication to members is best practice: Chancery Guide para 29.99
- If straightforward, ought to be suitable for a disposal hearing before a Master in c.1 day
- Given the restrictions in s.57, likely to require cost/benefit analysis re making application

FUTURE POSSIBILITIES?

A hand holding a glowing lightbulb with a circuit board overlay.

IN WINDING UP

If no express provision that amendment power continues to be available in winding up ?

REDUCE TRUSTEES

Proscribed minimum trustee numbers for aging Scheme or section thereof, or prohibitions on corporate trustees.

SURPLUS

Facilitating use of trapped surplus ? Perhaps mergers in winding up (see above) ?

ETC...?

QUESTIONS?



Nicolas.StallworthyKC@outertemple.com

Victoria.Brown@outertemple.com