Trusts & Trustees, 2025, **31**, 1–7
https://doi.org/10.1093/tandt/ttaf001
Article

OXFORD

Invalid exercises of powers and defective changes of trustees: what can go wrong and how to put it right

Tony Pursall*

*Consultant, Mourant Ozannes, 10th Floor, 110 Cannon Street, London, EC4N 6EU, UK. Tel: +44 207 796 7600;
Email: tony.pursall@mourant.com

ABSTRACT

The first part of this article outlines some of the reasons why the exercise of powers can be invalid, with a focus on the failure to comply with formal requirements. The second part considers possible remedies, including the implied exercise of powers doctrine and the defective exercise of powers doctrine, as well as those available to the court where there has been a defective change of trustees. It argues that there will often be an available remedy that enables the invalid exercise of dispositive powers to be retrospectively validated even where the court does not have that jurisdiction.

INTRODUCTION

In the first part of this article, I discuss what can (and often does) go wrong with the exercise of powers under a trust and some of the ways in which they can be put right. The focus is on formalities and other requirements specified in the trust instrument itself, rather than a consideration of the duties that attach to the exercise. Unless otherwise stated, the points apply equally to trustees and other power-holders.[1] As we shall see, most of them have been the subject of reported cases and could have been easily avoided from a careful review of the trust instrument.

In the second part, I consider some of the difficulties that can arise when the invalid exercise relates to a change of trustees (or, increasingly, a change of power-holder) in relation to the confirmation or ratification of invalid acts by the persons who thought they were trustees, but in fact, were not (ie trustees de son tort). Those difficulties can be considerable, not least as the case law shows that the court's jurisdiction in those matters is limited, but I suggest that there may often be an available remedy, even where a retrospective validation is required, on the authority of an English Court of Appeal judgment.

The points generally concern powers of appointment (or similar dispositive powers) but many of the points (in particular, those relating to formalities) also apply to the exercise of administrative powers.

Except where otherwise indicated in this article, the problems and the possible remedies apply equally to Jersey, Guernsey, Cayman and BVI.[2]

INVALID EXERCISE OF POWERS

Is the power exercisable?

The first question to consider is whether the power is exercisable at all. There are two main ways in which this issue can arise.

First, if a time limit is specified, the power will lapse when the time limit expires; in one reported case,[3] the time limit was missed by one day, the deed was void and the court had no power to rectify it. The second way (and the flipside of the first) is that the power has not yet arisen in the first place. In *Re Y Trust No 1*,[4] there was a last-minute change of mind about the identity of the protector (who was named in the trust deed) which led to a separate deed of appointment being executed by the trustees on the same day as the trust deed to appoint the intended protector. The problem was that, under the terms of the trust, the trustees' power to appoint new protectors only arose when there had been no protector in office for a month and the appointment was therefore void.

Scope of the power

Assuming the power is exercisable, is it wide enough to cover the proposed exercise? If it is not, it is an excessive execution

[1] I refer to "power-holders" to mean any person (other than the trustee) who has powers under a trust that are subject to fiduciary duties.
[2] The jurisdictions on which Mourant Ozannes advise, but most of these principles will apply in other trust jurisdictions.
[3] *Breadner v Granville-Grossman* [2001] Ch 523.
[4] [2016] (1) CILR 9.

© The Author(s) (2025). Published by Oxford University Press. All rights reserved.

and is void.[5] One situation in which this issue arises is where there is a power to resettle assets on new trusts, but the new trust must meet particular requirements. *Schroder Cayman Bank and Trust Company Limited v Schroder AG*[6] concerned an employee benefit trust where the trustee had the power to resettle trust property on a "qualifying settlement," defined in the trust deed to mean a settlement under which every person who could benefit was a beneficiary of the existing trust. The recipient trust included a new class of beneficiaries comprising "dependents" of the members of the scheme, who were not beneficiaries of the donor trust. It was not possible to sever the purported exercise from a permissible exercise as it was impossible to say which proportion was to go to those beneficiaries within the power (the trusts were discretionary) so the purported exercise was void.[7]

Another aspect of the scope of the power is whether it permits delegation. If not, it may not be possible to appoint on terms that someone is given dispositive powers.[8] In *Re Joicey*,[9] the property was held on trust for the beneficiaries "*for such interests in such proportions and in such manner in all respects as the appointor should appoint.*" An appointment of trust property for children on attaining a specified age with a power to advance capital to them under that age was made, but the power of advancement was held to be void as an unauthorised delegation. In *Re Hay*,[10] it was even held that the trustees had wrongly delegated their discretions to themselves! *Re Joicey* has been criticised,[11] but until it is overturned, the only safe course is to proceed on the assumption that it is still good law.

A failure to comply with any applicable rule against perpetuities may also constitute an excessive execution. If the power is a dispositive one, it may be necessary to ensure that it complies with the relevant rule against perpetuities or maximum duration. The rule to apply will normally be the one that applied at the time of the original settlement, as any appointment to a new trust under a special power of appointment[12] must comply with that rule.

Any restrictions contained in the trust instrument, such as a settlor exclusion clause or a provision that "Excluded Persons" cannot benefit in any way from the exercise of any powers must of course be respected, but they are sometimes missed, particularly when they are in a separate clause.

Some thought may also need to be given to the proper purpose rule (formerly known as the fraud on a power doctrine) in light of *Wong v Grand View*.[13] A detailed discussion of the rule is outside the scope of this article and much has already been written on it elsewhere, including in this journal.[14]

Self-dealing

This is an issue which applies to both dispositive and administrative powers, if the appointment or transaction might benefit the trustee or other fiduciary power-holder.

> "*It is an inflexible rule of a Court of Equity that a person in a fiduciary position … is not, unless otherwise expressly provided … allowed to put himself in a position where his interest and duty conflict.*"[15]

The rule can be excluded or modified by the trust instrument, but the precise terms of the power are important: a power permitting trustees to buy trust property from the trust will not permit an appointment of an affiliated company as the investment manager. Nor would it permit a trustee to consent to an assignment of a lease to a company of which he is a director,[16] or to take a new lease of property after an earlier lease had expired. [17]

The rule applies equally to other fiduciary power-holders: a protector consenting to a distribution to themselves (or a close family member) is likely to be caught, although where the protector was appointed by the settlor, the rule may be implicitly excluded.[18] Another point to watch is where there the trustee is proposing to transfer property to a new trust that confers greater rights of exoneration, indemnity or remuneration on the trustee.

If there is a requirement for an independent trustee or protector to authorise self-dealing transactions, that must of course be complied with.

Formalities

Any formalities required by the terms of the trust must be complied with. In one old English case, it was put in this way:

> "*Whatever arbitrary terms the grantor of the power may impose upon the party executing it, or however absurd and unreasonable they may seem, they must be fulfilled …*"[19]

There is a limited exception to this rule (under the defective exercise of powers doctrine, which is discussed in the second part of this article) but in general, this means that:

[5] *Thomas on Powers* (2nd edn, OUP, 2012) at 8.16.
[6] [2015] (1) CILR 239 ("Schroder").
[7] *Schroder*, at [66].
[8] Kessler, Pursall & Chand, *Drafting British Virgin Islands Trusts* (1st edn, Sweet & Maxwell, 2014) at 10.6 (The problem with narrow powers of appointment).
[9] [1915] 2 Ch 115.
[10] [1982] 1 WLR 202.
[11] See Kessler, Pursall and Chand, *Drafting British Virgin Islands Trusts* (1st edn, Sweet & Maxwell, 2014) at 10.6 (The problem of narrow powers of appointment).
[12] That is one which can be exercised so as to vest the whole of the beneficial interest in the relevant property in the power-holder without anyone else's consent or any other condition (other than a formality).
[13] [2022] UKPC 47.
[14] See, for example, Toby Graham and David Russell, *The proper purpose rule after Grand View v Wong*, Trusts & Trustees, Vol. 29, Iss. 2, March 2023, 89–100; Robert Avis and Tom Denham-Smith, *Letters of wishes and trustee decision-making after Grand View v Wong*, Trusts & Trustees, Vol. 29, Iss. 5, June 2023, 393–401; Tom McPhail, *A proper headache: trust drafting and the proper purpose rule after Grand View v Wong*, Trusts & Trustees, Vol. 29, Iss. 4, May 2023, 325–331.
[15] *Bray v Ford* [1896] AC 44.
[16] *Re Thomspon* [1986] Ch 99.
[17] *Keech v Sandford* (1726) Sel Cas Ch 61.
[18] For a discussion on this point, see *Lewin on Trusts* (20th edn, Sweet & Maxwell, 2020) ("Lewin on Trusts") at 46-041 (Trustee not placing himself in a position of conflict of interest and duty).
[19] *Rutland v Doe d Wythe* (1843) 10 Cl & Fin 419; *Thomas on Powers* (2nd edn), at 7.103 (Requirements specified by the donor of the power).

- if it is exercisable by "deed", it cannot be exercised by will[20];
- if it is exercisable by "will", it cannot be exercised during the power-holder's lifetime[21];
- if it is exercisable by "writing under hand" it cannot be exercised by an unsigned writing[22]; and
- if there is a requirement that the exercise must specifically refer to the power, it is invalid if it does not refer to it.

However, even if the document has not been executed as intended, all may not be lost. For example, if the parties have attempted to exercise a power by deed, but the document is not a deed, the exercise is likely to be valid if the relevant power did not in fact require a deed and it does comply with the required formalities.[23]

Where the requirement is that something must be done "in writing", it will not normally need to be signed; for example, an e-mail will usually be sufficient. Even where the writing must be 'signed', an e-mail may sometimes still be sufficient, if there is the necessary authenticating intention.[24]

What is a "deed" under Jersey and Guernsey law?

It is fairly common to see requirements for powers under Jersey and Guernsey trusts to be exercisable only by "deed," even though the concept does not exist under Jersey or Guernsey law. As far as I am aware, there is no Jersey or Guernsey authority on what constitutes a deed for these purposes, but the question has been considered by the courts in Scotland. In Scots law, the word similarly has no technical meaning[25] and the Scottish cases would be persuasive authority on the point in the Jersey and Guernsey courts.

In Scotland, it has been held to mean "*any formal instrument which creates a legal relation*"[26] and that its key characteristics are " *… that it should have some degree of formality and … must demonstrate an intention to create a legal relation.*"[27]

In *Low & Bonar*, it was held that those requirements were satisfied by the signed minutes of a board meeting for the purpose of amending the rules of a pension scheme.

"Acknowledged"

Another formality that can lead people astray is a requirement for a document to be "acknowledged" (where the term is undefined). It is sometimes assumed to mean simply acknowledging receipt. It might well mean that; it will be a matter of construction in each case, but it may also mean that the document must be executed before a duly authorised officer such as a notary public, where the notary verifies their identity. That was historically the typical usage in England.[28] The Oxford English Dictionary defines "acknowledgment" as "a formal declaration or avowal of an act or document so as to give it legal validity."

It is of course also important to check definitions, as terms may be defined in ways that you would not expect and defined terms are sometimes used without any indication that they are defined. In one Cayman case,[29] amendments to a trust were exercisable "*by written instrument*". The term "written instrument" was not capitalised, nor was there any other indication that it was a defined term, but in another clause of the trust deed, *a "written instrument"* was defined as "*any instrument in writing which has been duly signed, witnessed and notarized.*" In that case, the document had not been notarised and was therefore ineffective.[30]

Another example I have seen more than once (and a point often missed in practice) is "deed" defined as "*any instrument in writing under seal or which is properly executed in accordance with the law of the jurisdiction in which it is signed and which (in either case) is attested by at least one witness*" [emphasis added] where the requirement applies to companies as well as individuals. An authorised signatory of the company is not a witness for these purposes: it is the execution by the authorised signatories that the witness is attesting:

> " *'Attest' … means the persons shall be present and see what passes and shall, when required, bear witness to the facts.*"[31]

Pre-conditions

Any conditions specified in the trust instrument as a pre-requisite for the exercise of the power must also be complied with.

Delivery

If the document has to be delivered to someone,[32] it is ineffective if it is not delivered to that person.[33] Delivery to an affiliate of the trustee is not sufficient if delivery to the trustee is required if the affiliate is not acting as the trustee's agent.[34] The original executed document should normally be delivered, rather than a copy of it, unless the condition permits delivery of a copy.

Consent

Similarly, if the consent of another person is required, the exercise is invalid if it has not been obtained.

[20] *Re Hambro's Marriage Settlement* [1949] Ch 484, 488-9.
[21] *Re Evered* [1910] 2 Ch 147 at 156, CA.
[22] *Trustee Solutions v Dubery* [2006] EWHC 1426.
[23] *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375; *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232, CA, at 250.
[24] In *Golden Ocean Group v Salgaocar Mining* [2012] EWCA Civ 265, an e-mail was held to be sufficient to comply with section 4 of the Statute of Frauds which requires a guarantee to be "in writing and signed … ." See also Fred Milner and Tony Pursall, *"Electronic execution of trust documents,"* Trust Quarterly Review (Volume 19 Issue 1), pages 23–30; see also *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch); [2006] 1 W.L.R. 1543.
[25] *Henderson's Trustees v IRC* [1913] SC 987 ("Henderson"), at 989.
[26] *Henderson*, at 990.
[27] *Low & Bonar PLC v Low & Bonar Pension Trustees Limited v Mercer Limited* [2010] CSOH 47 at [16] ("Low & Bonar").
[28] See, for example, the Acknowledgment of Deeds by Married Women Act 1854.
[29] *Al-Ibraheem v Bank of Butterfield* [1999] CILR 436 ("Al-Ibraheem")
[30] *Al-Ibraheem*, at 448.
[31] *Bryan v White* (1850) 2 Rob Eccl 315 at 317, per Dr Lushington, referring to the UK Wills Act requirements, but the point is of general application.
[32] Not to be confused with the requirement for a deed to be 'delivered' in order to be valid, where 'delivery' refers to an intention to be bound.
[33] *Harris v Rothery* [2013] NSWSC 1275; 16 I.T.E.L.R. 681, NSW SC, at [155].
[34] *Smith Barney v Cebreros* [2006] CILR 517.

An issue that has come before the Cayman courts in two separate cases is whether the trustee's consent to an amendment made by the settlor can be made after the settlor's death.

In the first case,[35] the settlor delivered the amendment to his financial consultant (who was an employee of a company affiliated with the trustee, but the affiliate was not acting as the trustee's agent). It was only delivered to the trustee in Cayman after the settlor's death. It was held that the amendment was not valid and the trustee could not consent after the settlor's death. The reason given was that the settlor could have chosen, at any time before the trustee's consent was given, to change his mind and it would be wrong in principle for the trustee to be permitted to continue with it.

In the second case,[36] the amendment was delivered to the trustee but the trustee did not consent as they were concerned about the settlor's capacity. It was held that, provided the settlor had done everything she needed to do (including delivery to the trustee) the trustee could consent after settlor's death.

Obtaining advice

Another fairly common pre-condition is that of obtaining legal or other professional advice prior to exercise—even where the advice would have approved the proposed exercise of the power, the exercise is still void if the advice was not obtained.[37]

Endorsement

It is also quite common to see a requirement for a notice of changes of trustees to be endorsed on the trust instrument itself. Normally, these types of provisions are drafted as a separate obligation, so do not affect the validity of the exercise, but if it is drafted as a requirement for the exercise of the power, it will be invalid if it is not complied with.

In a Jersey case dealing with an English law trust, there was a provision in the trust deed conferring a power on the trustees to add beneficiaries " *... by deed ... endorsed on ...* " the trust deed. It was held that the power had been validly exercised, but only by virtue of an English statute,[38] which provided that a deed executed in the presence of two witnesses was validly executed even if the power had additional requirements.[39] Without that statutory provision (and the two witnesses), it would have been invalid.

Is the correct person exercising the power?

One obvious point is, of course, that the correct person must exercise the power.

In *Re Hare*,[40] the trust instrument provided that a trustee wishing to retire must serve notice on the protector, who had the power to appoint trustees, but if the protector had not appointed a replacement in 14 days, the retiring trustee had the power to appoint. The retiring trustee purported to appoint a successor but had not served notice on the protector. The appointment was void and the retiring and new trustees had to bear the costs of the court application to resolve the issue.

Issues can also arise where provisions are included where you wouldn't ordinarily expect to find them. For example, I have seen a provision in a trust deed stating: "*The Trustees have the power of appointing new trustees*," where a provision tucked away in a schedule stating that "*Notwithstanding any other provision of the trust deed, the Protector has the power to appoint trustees*." Another timely reminder to read the whole trust instrument!

Overlapping powers

Where two or more powers can be used to achieve the same effect (such as powers of appointment and amendment) and one is subject to a pre-condition (such as protector consent) but the other is not, it is possible that the pre-condition applies to both.

Where there is a more specific power subject to a precondition (eg a power of sale subject to professional advice) and a more general power (eg a provision conferring all the powers of an absolute owner) it is likely that the more general power also requires compliance with the precondition. It is a matter of construction in each case, but the safer course if there is any doubt is of course to comply with the pre-condition when exercising the power that does not, on the face of it, require it.

It may also be an improper purpose to exercise the power that does not require compliance with a pre-condition with the intention of avoiding the pre-condition.[41]

Statutory requirements

There may also be requirements that are not specified in the trust instrument, such as the statutory requirements applying to appointments and retirements of trustees in some jurisdictions. For example, where the trust is governed by Cayman Islands law, the default position is that there must be either a trust corporation or two individuals remaining in office to discharge a retiring trustee and to be a "trust corporation", a company must have a Cayman Islands trust license under the Banks and Trust Companies Act. In England, where there is a similar provision,[42] the appointment of a trust company that is not a trust corporation does not meet the requirement,[43] nor does the appointment of two trust companies that were not trust corporations (a company is normally a "person," but not an "individual").[44]

The appointment of a non-Cayman trustee (even one that is regulated in another jurisdiction) of a Cayman law trust often creates problems, as the non-Cayman trustee will not normally be a trust corporation for the purposes of Cayman Islands law.

The position has been modified in Cayman by statute: the rule does not apply to trusts established on or after 11 May 1998, if only one trustee was originally appointed or there is a

35 *Smith Barney v Cebreros* [2006] CILR 517.
36 *In re the Ophelia Trust* (Cayman Islands Grand Court, unreported, Clifford J, 28 October 2016.)
37 *Walker Morris Trustees Ltd v Masterson* [2009] EWHC 1955 (Ch); [2009] Pens. L.R. 307
38 Section 159(1) Law of Property Act 1925 (UK).
39 *Re Nedgroup Trust (Jersey) Limited* [2014] JRC 126A.
40 *Re Hare* (2001) 4 ITELR 288.
41 *Lewin on Trusts*, at 29-072 (Preconditions to exercise).
42 Trustee Act 1925, s 37(1)(c).
43 *London Regional Transport v Hatt* [1993] Pens. L.R. 227.
44 *Jasmine Trustees v Wells & Hind* [2008] Ch 194; the Trustee Act in England has since been amended to refer to two 'persons'.

contrary intention in the trust deed, so it is much less likely to be a problem for post-1998 trusts.[45] The trustees can also extend, by deed, the application of the amended rule to pre-11 May 1998 trusts.

Possible solutions

Where something has gone wrong with the exercise of a power, there may still be a relatively easy solution. I am now going to discuss three possible remedies starting with the implied exercise of powers doctrine, which is a very useful one.

Implied exercise of powers doctrine

This doctrine applies in a situation where trustees or other power-holders have purported to exercise a power ("the first power") to achieve a particular result; it was not possible to do what they wanted to do using the first power, but it would have been possible to achieve it if they had exercised a different power ("the second power").

Requirements

There are three requirements for the application of the doctrine:

- there is an intention to achieve a particular result;
- there is nothing to exclude the intention to achieve that result by the second power which is available[46]; and
- any formalities or pre-conditions for the exercise of the second power have been complied with.

A good example of the implied exercise doctrine is the *London Regional Transport v Hatt*[47] case. It concerned a deed of appointment of trustees that did not comply with section 37(1)(c) of the Trustee Act 1925 (the English law equivalent of the Cayman legislation[48] discussed above which provided at the time that a trustee shall not be discharged unless there will be either a "trust corporation" or at least two individuals to act as trustees to perform the trust.)

The new intended trustee—a corporate trustee but not a trust corporation—was neither.

However, the trust deed contained a power of amendment that was wide enough to permit an amendment to the trust deed that allowed a single corporate trustee to discharge a retiring trustee. That was the result clearly intended by the deed of appointment, there was no indication of any intention not to exercise it and it was executed as a deed (the only formality required for a valid exercise of the power of amendment). Therefore, the deed of appointment was treated as a direct exercise of the power of amendment, even though the parties to the deed of appointment did not in fact intend to exercise the power of amendment at the time and gave it no thought at all.

This doctrine has been applied by the Royal Court in Jersey (in relation to an English law trust) where the requirement for consent to the retirement of a trustee by the other trustees was found as the other trustees had entered into a subsequent transaction that could only have been effective if they had consented to the retirement.[49] It has also been accepted in one case in Guernsey that it applies under Guernsey law[50] although in the end it was not applied in that case.

Exceptions

It is not a panacea, however, and there are two important exceptions to the doctrine.

The first is that it will not apply if the document was executed for a different purpose. Where a beneficiary's consent to an investment was required, that consent was not validly given where the beneficiary was a party to a deed of appointment and retirement of trustees that recited the investment.[51]

The second exception is where the exercise of the implied power would have required the consideration of materially different factors from those relevant to the power being exercised. The trustees cannot be deemed to have exercised the implied power if there is any doubt whether, after a proper examination, they would have exercised it.[52]

Defective exercise of powers doctrine

The second remedy is known as the defective exercise of powers doctrine.[53] This applies to an exercise of a dispositive power that would otherwise be invalid due to a failure to comply with the necessary formalities. It is less commonly invoked than the invalid exercise of powers doctrine, but can sometimes come to the rescue of an exercise of a power that would otherwise be invalid. There are three requirements.

The first is that there must be an intention to exercise the relevant power. The second is that the person invoking the jurisdiction is within one of four privileged categories. The first category comprises children and dependents (ie where the power-holder has a legal or moral obligation to provide for them). The Jersey court has held that this category includes a former co-habitant.[54] The other categories are purchasers, creditors and charities.[55]

The third requirement is that the defect is a purely formal one. The doctrine does not apply if the required formality is "of the essence." For example, in one old English case, the court held that it could not ignore the requirement for two witnesses where there was evidence that the requirement for those witnesses was intended to protect a woman against her overbearing husband.[56]

[45] Trusts Act (2021 Revision) ("Trusts Act"), ss. 6(c), 8(3), 113(2).
[46] *Mogridge v Clapp* [1892] 3 Ch 382, at 388. See also *Lewin on Trusts* at 29-078 (Other Indications—implied exercise); *Thomas on Powers* (2nd edn) at 7.145; *Davis v Richards & Wallington* [1990] 1 WLR 1511.
[47] [1993] Pens. L.R. 227.
[48] Trusts Act (2021 Revision), s.6(c).
[49] *Re Epona Trustees Ltd* [2008] JRC 062.
[50] *Re C* (Judgment 17/2013).
[51] *Wiles v Gresham* (1854) 2 Drew. 258.
[52] *Re Gleeds Retirement Benefits Scheme* [2015] Ch 212, at [95]; *Lewin on Trusts* at 29-079.
[53] Also known as the or defective *execution* of powers doctrine.
[54] *Re Shinorvic Trust* [2012] JRC 081.
[55] *Sayer v Sayer* (1849) 7 Hare 377.
[56] *Thackwell v Gardiner* (1851) 5 De G & Sm. 58.

Retrospective validation of invalid actions

The third remedy is in relation to the retrospective validation of past invalid actions (also referred to as the perfection of an imperfect act). This issue most commonly arises where there has been a defective change of trustees, and the trust has been administered for some time without the trustees realising that they were not the trustees. It can cause havoc to the administration of the trust, as any actions taken by the persons who think they are the trustees (who will be *trustees de son tort*) are likely to have been invalid.[57]

The first step to take when the problem comes to light is usually to ensure the intended trustees and only the intended trustees are validly appointed. That can normally be done by way of a confirmatory deed or instrument, exercising the powers of appointment, retirement and removal of trustees as necessary, although occasionally, that may require the assistance of the court.

What is often more problematic is dealing with past actions that may be invalid. The trustees may apply to the court to have the steps they have taken as trustees confirmed, but there are limits on the powers of the court to ratify past actions of the trustees. Ratification or confirmation in these circumstances can be broken down into three different categories.

Perfection of an imperfect act

As a general rule, where an act done by one person ("the agent") purportedly on behalf of another ("the principal") who has no actual authority to perform that act, the principal can ratify an unauthorised act of the agent.[58] A common example is where a board of directors ratifies a previously unauthorised act on behalf of a company. This normally takes effect retrospectively. The problem is that it is not normally available to trustees in the same way, and the Royal Court in Jersey has held[59] that the Court has no general jurisdiction to validate invalid exercises of powers by trustees de son tort. It is thought that must be the position in Guernsey, Cayman and BVI as well.[60]

The Court can, however, under its inherent jurisdiction, ratify administrative acts, but not dispositive ones. The issue with ratification of dispositive powers is that it involves varying the beneficial provisions of the trust, which the Court has no general power to do under its inherent jurisdiction.[61]

Replacement of an invalid transaction by an effective one with a similar effect

The second type of confirmation is the replacement of an invalid transaction by a valid one with a similar effect.

For example, if a power of appointment was exercised to make a distribution to a beneficiary and the power remains exercisable, it can be confirmed. This type of confirmation is not retrospective, so if a distribution is confirmed in this way, it will in principle be treated as taking place on the date of the fresh exercise of the power, which may have different tax or other legal consequences from a retrospective ratification, which the trustees must take into account in deciding whether to confirm the exercise.

Non-intervention

The third type of confirmation is confirmation by non-intervention. Again, taking the example of a distribution to a beneficiary, the Court can direct the trustee not to seek to recover that distribution and such an order will allow the trustee to administer the trust going forward on the basis that the distribution was validly made.[62]

Retrospective amendments

The second and third remedies will be sufficient in most cases, but where it is important for the invalid acts to be ratified retrospectively, there is another option to consider. The reason for the court's inability to retrospectively validate invalid exercises of dispositive powers is that the court has no inherent jurisdiction to alter beneficial interests under a trust. But *trustees* usually do have wide dispositive powers that can be used to alter beneficial interests. It is sometimes assumed that trustees cannot exercise dispositive powers with retrospective effect, but is that correct?

In a recent pension trust case before the Court of Appeal in England, the Court construed the following power of amendment:

> *" … the Trustees may … with the consent of [the employer] … by … deed executed by the Trustees and the [employer] or … writing … alter or modify all or any of the provisions of the Scheme … "*

The Court of Appeal held that there is no reason in principle why a power of amendment cannot be exercised with retrospective effect, provided that it is not precluded by the wording of the power itself.[63] The Court drew a distinction between "impermissible" re-writing of history and merely giving effect to what was in fact done.[64] It was held that there was nothing objectionable in the retrospective validation of invalid acts because:

> *" … it enables effect to be given to what, as a matter of historical record, was in fact decided and done."*[65]

So, it is not possible to retrospectively validate a breach of trust that was at the time outside the scope of the trustees' powers and was deliberate,[66] but:

> *"The position [is] different if … the action previously taken by the trustees … fell within the scope of their existing*

[57] See *Lewin on Trusts* at 42-106 (Exercise of administrative or dispositive powers or discretions).
[58] *Bowstead and Reynolds on Agency* (23rd edn, Sweet & Maxwell, 2024) at 2-047 ("Bowstead and Reynolds").
[59] *Re Z Trust* [2016] JRC 048 para 64; effectively reversing *In the Matter of the Representation of BB* [2011] JLR 672 (also known as *Re D Retirement Trust*) with regard to the power of the Court to effect a retrospective ratification (ie under category (a)); confirmed in *Representation of Link Trustee Services (Jersey) Limited re the B Trust* [2018] JRC 043.
[60] See, for example, *Lewin on Trusts* at 42-109 (Confirming acts of trustees de son tort).
[61] *Re Z Trust*, at [74]; *Chapman v Chapman* [1954] AC 429, HL (followed in *Re IMK*).
[62] *Re Z Trust*, at [80]; see also *In the matter of the C Trust* [2019] SC (Bda) 44 App (22 July 2019) para 25.
[63] *BIC UK Ltd v Burgess* [2019] Pens. L.R. 17 [53] to [58].
[64] *Shannan v Viavi Solutions UK Ltd* [2016] EWHC 1530 (Ch); [2016] Pens. L.R. 193, at [67].
[65] Ibid, at [40], citing the judge at first instance with approval.
[66] *Dalriada* [2012] Pens. L.R. 15; *BIC v Burgess*, at [67].

> *powers, and their breach of trust in failing to exercise those powers effectively was inadvertent. In such a case, I can see nothing objectionable about the trustees taking remedial action by a further exercise of their powers of amendment."*[67]

As an English Court of Appeal decision, *BIC V Burgess* is of persuasive authority in trust jurisdictions that derive their trust law from English common law, including Jersey, Guernsey, Cayman and BVI and there seems no reason in principle why it would not be followed in those jurisdictions. There is therefore a good argument that a typical form of overriding power of appointment (or a power of amendment) could be exercised retrospectively to validate any invalid changes of trustees. For example, if the change of trustees was invalid because it was exercisable by deed and an instrument in writing not executed as a deed was used, the trust can be amended with effect from the date immediately before the invalid change of trustees to the effect that an appointment of trustees can be effected by any instrument in writing. As a result of the amendment, any actions subsequently taken by the trustees are then validated. I am not aware of any case law on this point in a family trust context and it does not seem to have been considered in any of the cases, but there seems to be no good reason why this principle should apply to pension trusts and not to family trusts.

There are, however, two important provisos to add to that, so trustees will need to tread with care.

First, it is doubtful whether the trustee can effect a blanket ratification—they ought to consider the decision afresh in light of the current circumstances. Conceivably, it might be better for the beneficiaries (eg for tax reasons) if the original invalid exercise of the powers remained invalid.

Secondly, the trustee has a personal interest in ensuring the validity of past actions so it will not be open to potential breach of trust claims: it is not open to the properly constituted trustees to exercise powers merely so as to save the trustee de son tort from liability.[68] It is important that the trustees recognise their inherent conflict of interest and take appropriate steps to manage it. If it is not possible to manage the conflict adequately, it may be necessary to seek the blessing of the court.

AUTHOR BIOGRAPHY

Tony Pursall is a Consultant in the International Trusts and Private Client practice at Mourant. He has over 30 years' experience advising trustees, beneficiaries, protectors, banks and high-net-worth individuals on a wide range of trust and private client matters. Email: tony.pursall@mourant.com

[67] *BIC V Burgess*, at [67].
[68] See *Lewin on Trusts* at 42-109 (Confirming acts of a trustee de son tort).

© The Author(s) (2025). Published by Oxford University Press. All rights reserved.
Trusts & Trustees, 2025, 31, 1–7
https://doi.org/10.1093/tandt/ttaf001
Article