

## CONVEYANCING WITHOUT A SETTLED LAND ACT.\*

### 1. *Origins and effect of the Settled Land Act.*

The Settled Land Act 1892 of Western Australia, repealed by the Trustees Act 1962, was substantially a copy of several English Acts passed between 1856 (Leases and Sales of Settled Estates Act) and the Settled Land Act of 1882 and its amending statutes passed in 1884, 1887, 1889, and 1890. The need for the English legislation grew out of the mediaeval restrictions on the alienation of land which were relaxed only slightly during the following centuries and the realization that the full benefits of free alienation could not be obtained unless a limited owner of land could alienate, not only his own estate, but those of other persons. This right, which at first may have appeared rather revolutionary, was, however, justified by the needs of the restricted owner and vindicated by the condition that he must act honestly for the benefit of all parties concerned in the interest sought to be alienated. The matter then became, simply, the imposition of safeguards.

The already restrictive state of the law was added to by the conservatism of settlors and the complicated forms of family settlement introduced by the conveyancers of the Civil War and carried through to the nineteenth century. True, powers were frequently conferred on the trustees of the settlement—persons naturally and proverbially disinclined to undertake responsibility according to Jenks<sup>1</sup>—and were often subject to approval of the courts but they did little to facilitate the general disposition of limited interests.

The Settled Land Act of 1882, however, brought about sweeping changes. Jenks refers to it as "The great statute . . . conceived on bold and successful lines." As it regarded all limited owners in possession, including infants, as virtually entitled to full control, they were given almost complete powers of management and administration of the land and the form of investment of the settled capital. They were empowered to sell, exchange, partition, lease, and effect permanent improvements by dispositions binding, not merely on themselves, but on all persons having collateral or subsequent interests arising out of the settlement and, moreover, the exercise of the powers was in the absolute discretion of the "tenant for life" except in a few cases where the consent of the trustee or the court was required. Most important

\* *A paper read at the 1963 Law Summer School of the University of Western Australia.*

<sup>1</sup> HISTORY OF ENGLISH LAW, 251.

of all, no expression or device in the settlement, direct or indirect, could deprive the tenant for life of his statutory powers or even restrict his exercise of them. In addition to this, although the tenant for life had no absolute right to any moneys resulting from the exercise of his powers, he had, within the provisions of the Act, control over the reinvestment of the moneys produced by such conversion to the exclusion of the trustee and if a conflict arose between the respective powers of the trustee as conferred by the settlement and the statutory powers of the tenant for life those of the latter prevailed.

## 2. *Repeal.*

The Settled Land Act 1892 and its amending Act of 1909 have been repealed *in toto* by the Trustees Act 1962. By virtue of section 16 of the Interpretation Act 1918, however, the repeal probably does not affect then existing powers under the Settled Land Act. The material parts of the Interpretation Act read

16. (1) Where any Act repeals . . . a former Act . . . then, unless the contrary intention appears, such repeal . . . shall not—

(c) Affect any . . . power . . . exercisable . . . prior to such repeal . . .

While there is some evidence in the repealing Act which might be construed as an indication of a “contrary intention”, it is not strong and it is submitted that the statutory powers of a tenant for life under a settlement as defined by the Settled Land Act continue unaffected.

A new tenant for life, however, has none of the statutory powers of his earlier counterpart. Except for a relatively minor right of being able to require certain things to be done for his benefit, the new life tenant must look to the trustee, on whom the new Act, with slight variations and considerable additions, has conferred all the powers formerly given to a tenant for life.

## 3. *Effect on settled land.*

Although the definition of property in the new Act includes both real and personal property it should be remembered, in comparing the repealed Act with the Trustees Act, that the former dealt with land only. It is, therefore, only with the effect of the new Act on land that this paper will deal.

(a) Powers of disposal of land.

Every life tenant was entitled to sell, exchange or concur in

partitioning the settled land. He could also lease, accept surrenders of leases if onerous, dedicate streets, mortgage the settled land for certain purposes, and enter into and vary contracts.

The Trustees Act by section 27 confers these powers on the trustee in almost identical form, the main difference being that a letting may not be for longer than one year or from year to year and a lease (other than a building lease) may not exceed 10 years (21 years under the Settled Land Act). The permissible period for a building lease remains unchanged at 30 years.

(b) Investment of capital moneys.

While a trustee now has numerically more statutory powers of investment of trust funds than were ever possessed by a life tenant with respect to the capital moneys, three rights (including a very important one) have not been repeated. The new Act confers on a trustee the Settled Land Act powers of investment in government funds (section 16 (a)), improvements (section 30 (i) (e)— limited, however, to £5,000 except by leave of the Court), equality of exchange, and the payment of costs and charges (section 42 (c)) but does not grant power to buy land, except a dwelling for a beneficiary (section 17), or to purchase the reversion of any part of the settled land being leasehold land or to purchase mines.

4. *Effect on the parties.*

Except for the residual powers left by the Trustees Act in the tenant for life and other limited owners who would have qualified as such under the Settled Land Act,<sup>2</sup> the general effect of the change on trustees and tenants for life has been simply a transfer of powers. Other than the loss of the privilege of being able to exercise such powers personally it cannot be anticipated that the tenant for life will be prejudiced. If the trustee exercises his powers and carries out his duties properly it is submitted that there is only one instance in which the limited owner may be worse off now than before and that is in his liability for repairs. Whatever may have been his duties at common law to keep improvements in repair, the Settled Land Act (section 37) only required him to keep in repair and to insure against damage by fire any improvements effected by the spending of capital moneys. Section 30 (i) (a) of the Trustees Act, however, empowers a trustee to expend money on the repair, maintenance, upkeep or renovation of property generally, and paragraph (b) authorizes the apportion-

<sup>2</sup> See *infra*, at 115-116.

ment of the cost of such work between capital and income "subject to the rules of law applicable in such cases and to any direction of the Court to the contrary." By force of this provision a tenant for life could well be responsible for costs for which he would not have been responsible before the change.

#### 5. *Residual powers of tenant for life.*

As mentioned above, the tenant for life has not been wholly bereft as certain safeguards have been written into the new Act which give him a degree of control.

##### (a) *Sale of land.*

Section 27 (4) provides that where the trust includes land the trustee shall exercise his power of sale if so required in writing by the person or all the persons at that time beneficially entitled to an interest in possession.

##### (b) *Renewal of leaseholds.*

Under section 36 (1) a trustee of any renewable leaseholds for lives or years may, if he thinks fit, and shall, "if thereto required by any person having any beneficial interest . . . use his best endeavours to obtain from time to time a renewed lease of the same hereditaments . . ." But where, by the terms of the instrument (if any) creating the trust, the person in possession for his life or other limited interest is entitled to enjoy the lease without any obligation to renew or to contribute to the expense of renewal, the section does not apply unless the consent in writing of that person is obtained to the renewal.

##### (c) *Power of Court to authorize dealings with trust property.*

By virtue of section 89, where, in the opinion of the Court, certain dispositions of property such as sale and the like are expedient in the management or administration of any property vested in a trustee but it is inexpedient, difficult or impracticable to effect the disposition, without the assistance of the Court, or if they cannot be effected by reason of absence of power, the Court may confer the necessary power and give directions. Subsection (4) of the section states that application to the Court may be made by the trustees or any of them or by any person beneficially interested under the trust. Although this right reposed in a beneficiary does not correspond exactly to any power of a life tenant under the Settled Land Act it is, nevertheless, a right which compensates somewhat for his lost authority.

##### (d) *Application to Court to review acts and decisions of trustee.*

The last refuge of the life tenant is found in section 94 which

provides that any person who has, directly or indirectly, any interest, whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee in the exercise of any power conferred by the Act, or has reasonable grounds to apprehend any such act, omission or decision by which he will be aggrieved, may apply to the Court for relief. It is submitted that there can be two criticisms of this section. The first is that it extends only to powers conferred by the Act. Presumably, therefore, if the powers are conferred by the instrument creating the trust the Court cannot act unless it considers that, where powers conferred by the instrument coincide with powers given by the Act, the latter gives it jurisdiction. The obvious answer to this is that, if it is desired to deprive a person of the right to seek relief under section 94, the instrument need only set out the desired powers in terms slightly different from the wording of the corresponding powers in the Act. The second doubt is as to the full effect of the word "omission." Does it, for instance, include a failure to act under a power which it is obvious a trustee should exercise? Perhaps the answer lies in the knowledge that if the section has not gone far enough further remedies lie in Order 55 of the Supreme Court Rules.

#### 6. *Conclusions.*

Whatever the motives of the draftsman may have been it is submitted that the change is for the better. Perhaps trustees are more benign these days or perhaps they are more conscientious but the need to confer powers on a tenant for life certainly does not exist today to the extent which appears to have justified the series of acts which, for this State, culminated in the Settled Land Act 1892. Indeed, one has found that it was usually only in those cases in which the trustee lacked power to do what the tenant for life desired that it was necessary to invoke the powers under the Act. It was seldom because the trustee was defiant.

As for changes which might be required in drafting settlements and wills and the like, there seems to be little need for alteration by reason alone of the repeal of the Settled Land Act. As the process of change is fundamentally a transfer rather than a change of powers the only real need is to consider if those powers, which the tenant for life formerly possessed and which have not been given to the trustee by the new Act, should be included in the instrument creating the trust, *i.e.*,

- (a) Power to redeem or discharge encumbrances on property out of proceeds of sale of other capital assets.

(b) Purchase of reversion.

(c) Purchase of land (*i.e.*, wider power than is contained in section 17).

It goes without saying, of course, that if it is intended that the life tenant or other limited owner should have all or any of the powers which a life tenant formerly enjoyed, and they are not covered by the new Act, they must be expressly conferred by the instrument.

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