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TRUSTEE'S POWER: THE POWER TO SELL INCLUDES THE POWER TO OPTION

*Michael H. Dessent**

The interpretation of a trust instrument executed decades earlier raises a problem for trustees and courts that is common to other areas of the law, of balancing an early rationale with contemporary economic realities.¹ Less dramatic than the well-publicized changes in criminal-constitutional law and torts, but of substantial financial significance, is the question of whether a trustee, who has been given the power to sell trust real property, also has the power to option that property.² Even if the power to sell does carry with it the power to option, when may such an option be granted, and under what terms and conditions?

To establish a framework for such an analysis, let us take the following hypothetical language as a starting point:

The trustee shall have and retain possession of and title to all property of every description coming within the terms of this trust and shall control, manage, sell, invest and reinvest and deal with the same in such manner and form as he shall deem advisable.³

I. EARLY APPROACH: RATIONALE AND CURRENT EFFICACY

Assume that a trustee was given the power to sell, as set out hypothetically above, and he granted an option for the purchase of trust real property. Early courts viewed this act as invalid because it was not an exercise of the power to sell but a surrender

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1. As examples, consider the trend toward strict liability in products liability cases and the abandonment of the privity rule, presaged by Prosser, *The Assault Upon the Citadel of Privity*, 69 YALE L.J. 1099 (1960), and the recent decisions of the United States Supreme Court in the criminal-constitutional law field. *E.g.*, *Escobedo v. Illinois*, 378 U.S. 478, (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. Many trust instruments, of course, do not provide the trustee with a power to sell or dispose of trust property. Given the strict interpretation of trust documents used by most courts, in such cases the power to option, if not specifically expressed, would not be implied.

3. Assimilated from the trust provisions involved in *Trogden v. Williams*, 144 N.C. 192, 56 S.E. 865 (1907); *Moore v. Trainer*, 252 Pa. 367, 97 A. 462 (1916); and *Cardons Estate*, 278 Pa. 153, 122 A. 234 (1923).

of it for the period of option.⁴ They reasoned that an option bound the trustee to sell for the price stated without exercising discretion at the time of sale; it disregarded a possible increase in value of the property between the beginning and the expiration of the option.⁵ The mere fact that consideration was paid for the option had no effect on the basic principle itself.⁶

Even a short-term 90 day option was struck down as being at least temporarily destructive of the power to sell.⁷ The reason was—during the 90 day period, the power to sell was suspended, and the trustee had no right to accept an offer to buy the land however advantageous it might be.⁸

This rationale was taken one step further in two recent cases. Both held that an option granted by trustees was invalid when they were given only the power to sell, regardless of whether the purchase price was set at the time the option was given or to be fixed by appraisal at the time it was exercised.⁹ The courts set forth the traditional reasons; the option suspended the power to sell during that period, and when the testator conferred the power of sale he contemplated that the trustee would exercise discretion at the time of sale and not at some prior moment.¹⁰ Similarly, courts have reasoned that where a trustee has a power to sell or lease trust property, he cannot properly give a lease accompanied by an option to purchase.¹¹

Perhaps the most definitive analysis of this problem was made by the court in *Equitable Trust Co. v Delaware Trust Co.*¹² In that case the trustee was not expressly given specific power to grant options. However, it proceeded to grant an option for the life of the optionee and for six months after her death, if exercised by the representative of her estate. After examining most of the

4. *Moore v. Trainer*, 252 Pa. 367, 97 A. 462 (1916); *In re Armory Board*, 29 Misc. 174, 60 N.Y.S. 882 (Sup. Ct. 1899).

5. RESTATEMENT (SECOND) OF TRUSTS § 190, comment k at 422 (1959) provides: "The reason is that when a power of sale is conferred it is usually contemplated that the trustee can exercise discretion at the time of the sale and not at some prior time."

6. *Trogden v. Williams*, 144 N.C. 192, 56 S.E. 865 (1907).

7. *Id.*

8. *Id.* at 203, 56 S.E. at 868.

9. *Adler v. Adler*, 216 Ga. 553, 118 S.E.2d 456 (1961); *Equitable Trust Co. v. Delaware Trust Co.*, 30 Del. Ch. 118, 54 A.2d 733 (Ct. of Ch. 1947).

10. *Id.*

11. *In re Armory Board*, 29 Misc. 174, 60 N.Y.S. 882, 888 (Sup. Ct. 1899); *Moore v. Trainer*, 252 Pa. 367, 97 A. 462 (1916).

12. 30 Del. Ch. 118, 54 A.2d 733 (Ct. of Ch. 1947).

cases on this subject, the court found that generally a fiduciary with a mere power of sale is not authorized to grant an option to buy the property even though the price is to be fixed by subsequent appraisal.¹³ The court remarked that the prevailing rationale for this view was that since the fiduciary is usually expected to use his best judgment and discretion with respect to the adequacy of price at the time of the exercise of the power of sale, he cannot do so at some prior time when values might have been quite different.¹⁴

Nevertheless, the Delaware court held itself open to evidence which might have shown some economic advantage accruing to the trust estate and to the beneficiaries from the granting of an option.¹⁵ Specifically, the court held that the option to purchase realty was not binding on the trustee in its case because it was not shown that any substantial economic gain passed to the trust estate from the option contract.¹⁶

This was the first judicial expression of an awareness of the changing economic factors present in the purchase of real property, particularly for commercial purposes.¹⁷ When coupled with certain earlier decisions discussed below, the reasoning in *Equitable Trust Co.*, though dealing with a long term option, actually presents a persuasive argument for a modern court to hold that the power to sell may carry with it the power to option, at least for a short period of time.¹⁸

II. MODERN TREND: REASONING AND RELATIONSHIP WITH THE EARLY APPROACH

In advocating the presence of a modern trend on this question, it must be admitted that there are only a relatively few cases¹⁹ that have considered whether or not the power to sell trust

13. *Id.* at 125, 54 A.2d at 736.

14. *Id.* at 126, 54 A.2d at 737.

15. *Id.*

16. *Id.* at 127, 54 A.2d at 737.

17. Even as late as 1959, however, the RESTATEMENT (SECOND) OF TRUSTS § 190, comment k (1959) read as follows:

Where by the terms of the trust a power of sale is conferred upon the trustee, it is ordinarily not proper for the trustee to give an option to purchase the property, whether the purchase price is fixed at the time of giving of the option or is to be fixed by appraisal at the time of the exercise of the option.

18. See *Cozad v. Johnson*, 171 N.C. 637, 89 S.E. 37 (1916) (dictum that a trustee may give a 60-day option despite an express power to option).

19. See *Bernheim v. Stark*, 9 Ohio App. 40 (1918), for an unusual interpretation of an early case.

property carries with it the power to option.²⁰ Those cases that have dealt with the problem, however, have explored arguments on both sides of this issue with careful reasoning, and have laid the framework for a new approach based upon current economic realities in the purchase and sale of real property.²¹

The court in *Loud v. St. Louis Union Trust Co.*²² was confronted with language which is similar to the hypothetical trust provision set forth above. Based upon this power the trustees granted a three and one-half month option to purchase a large quantity of stock. The beneficiary sought to invalidate the option. The court evaluated the approach of earlier courts, but drew a careful distinction between an option that is simply incidental to a long term lease and a short term option that is the only advantageous way to effectuate a sale of trust property.²³ In most of the earlier cases, reasoned the court, the option was simply an ancillary part of a long term lease of trust real property. Further, in most of those early cases, the trustee's chief purpose in giving an option was not to bring about a sale of the property, nor was giving an option the only way in which a sale could have been brought about.²⁴ In the previous cases, the option was given incident to a long term lease, thereby tying up the property for an extended period of time.²⁵ With this precedent, a trustee with only the power to sell could consider a series of factors in determining whether or not an option to purchase real property would be held valid.²⁶ One of the primary factors was whether or

20. See, e.g., *Loud v. St. Louis Union Trust Co.*, 313 Mo. 552, 281 S.W. 744 (1926); *Meek v. Bennie*, N.Z.L.R. 1 (1940); *Crown Co. v. Cohn*, 88 Ore. 642, 172 P. 804 (1918). These cases form the basis for comment k to RESTATEMENT (SECOND OF TRUSTS) § 190 (1959) which reads: "Under some circumstances, however, it may be proper for the trustee to give such an option, as where it is prudent to do so and the sale could not otherwise be advantageously made."

21. Two early cases stating the general rule have been distinguished on this question by *Loud v. St. Louis Union*, 313 Mo. 552, 281 S.W. 744 (1926). The court stated: "*Moore v. Trainer* seems to have been somewhat shaken by the later case of *Cardons Estate*, 278 Pa. 153 (1923)." *Id.* at 599, 281 S.W. at 755. On the basis of *Cozad v. Johnson, Trogden v. Williams*, was not an absolute rule.

22. 313 Mo. 552, 281 S.W. 744 (1926).

23. *Id.* at 598, 281 S.W. at 755.

24. *Id.*

25. *Id.*

26. The court in *St. Louis Union Trust* examined the major terms and conditions of the sale before it and held:

While the question is not entirely free from doubt, nevertheless, after an exhaustive review and analysis of the many cited authorities dealing thereon, we have arrived at the conclusion that the defendant, under the powers

not the giving of an option was a technique to accomplish a sale of the property or whether it was simply incidental to a long term lease. The duration of the option was a significant factor in determining whether or not the motive of the trustee was to sell or simply tie up the property through an extended tenancy.²⁷ In addition, the trustee could evaluate whether or not an option was the only way in which a sale could have been brought about.²⁸ It is this factor which has primary significance in view of the economic and legal studies which must be made by a buyer in a modern purchase of real property.

III. CONTEMPORARY ECONOMIC REALITIES

The first eight and a half years of this decade have been characterized, in part, by an expansive and rapid development of large tracts of real estate throughout the country. Commercial parcels are purchased in quantities of dozens of acres for development as vast regional shopping centers. Residential acreage is used for thousands of homes constructed as autonomous communities under such appealing names as Whispering Palms, La Jolla Shores Heights and Del Mar Hills. Yet the development of these vast parcels is preceded by a period of economic investigation which in many cases is equal to and often exceeds the period from construction to occupancy.

As an initial proposition, the promoters or syndicates which are developing a particular area must arrange their financing, both interim and take-out. The construction loan is placed, almost universally, with a lending institution different from that which is making the permanent loan for the property; the negotiations with each lender are lengthy and complex.

Before the loans can be arranged, the promoters must be sure that the proposed use of the land conforms to existing zoning

conferred upon it under the Blanke Will had the mediate right and power to give the Walker option.

Id. at 603, 281 S.W. at 757.

27. "Under such circumstances, we believe that the defendant was justified in resorting to the ordinary and usual method of giving an option for a comparatively short time and at an apparently then reasonable price . . ." *Id.* at 603, 281 S.W. at 757.

28. This test was examined by Scott in his treatise, 2 A. SCOTT, LAW OF TRUSTS § 190.8 (2d ed. 1950), in the following language: "This is not, however, an absolute rule and may be departed from when the circumstances justify such a departure. Thus where the sale could not otherwise be advantageously made, it has been held proper to give such an option."

ordinances and other regulations. Frequently zoning variances must be obtained to permit the intended use. Exchanges of zoning classifications of different properties, for example, from residential to commercial and vice versa, are not uncommon. Hearings before planning commissions and committees must be held; in many cases appearances before city councils are necessary in order to obtain the right to proceed with construction as planned.

The promoters must begin arranging for the furnishing of utility services and roads, and perform preliminary grading, offsite and engineering work. A subdivision map must be prepared and filed with the county recorder to comply with the appropriate statutes.

Concurrently with these investigations, the promoters must engage in marketing research to determine the appropriate methods of construction, types of homes or nature of stores if it is a shopping center. Negotiations must be initiated with prospective shopping center tenants. In most cases, leases with large commercial institutions take a substantial period of time from the period of negotiation to final execution and approval by the home office. Several months may be involved simply in waiting for house counsel and committees to give final approval to the lease document. Moreover the promoters must plan their advertising and public relations well in advance of construction, in the face of heavy competition.

With these economic realities in mind, there are two methods by which the purchase of trust real property for commercial purposes could be accomplished. The proposed buyer could give separate consideration for an option agreement, giving him time to make the necessary investigations, and perform the preliminary work.²⁹ Alternatively, he could enter into a purchase and sale agreement and carry out its terms by means of an escrow.³⁰

Essentially the escrow provides the buyer with the same basic features as the option agreement.³¹ The buyer would place a small deposit into the escrow at its inception.³² Both of these agreements

29. *Berman v. Kenner*, 85 N.Y.S.2d 483 (Sup. Ct. 1948); *McGuire v. Andres*, 259 Ala. App. 109, 65 So. 2d 185 (1953).

30. *Wilkinson v. Lanterman*, 314 Mich. 568, 22 N.W.2d 827 (1946); *McEnaney v. Spedick*, 13 N.J. Super. 37, 80 A.2d 237 (1951).

31. *Zora Realty Co. v. Green*, 60 N.Y.S.2d 440 (Sup. Ct. 1946); *Watts v. England*, 168 Ark. 213, 269 S.W. 585 (1925).

32. Called by various names, e.g. good faith deposit, earnest money, commitment fee. Each term, however, has somewhat different legal implications.

would be subject to contingencies which permitted the purchaser to withdraw from the transaction if investigations revealed that the purchase would be uneconomical.

From the point of view of the trust, an escrow problem is presented when the buyer decides not to complete the transaction; most courts would not enforce the claim made by the trustees for the money which the buyer had deposited. Retention of this deposit by the seller is ordinarily considered to be a forfeiture and is unenforceable.³³

Accordingly, if money were deposited in an escrow and the buyer decided not to complete the purchase, the trustees would have done a disservice to the trust; they would have entered into a transaction in which they could not retain this money, yet lose the right to sell the land during the period of the escrow. Based upon existing law, if the trustees open an escrow with a buyer, because of their fear that an option would not be enforceable, they would have to return the deposit when the buyer cancels. This would subject them to suit by the beneficiaries to surcharge or remove the trustees.

On the other hand, the use of an option permits the trustees to retain the money if the buyer does not wish to complete the sale.³⁴ The money paid to the seller is solely in consideration for granting the option.³⁵ Thus, the trustees would be acting in the best interest of the trust estate by asking for an option since they would at least be entitled to retain the initial deposit under that form of agreement.

The power to option is also an important business tool for the trustees because it gives the buyer of commercial real property time to employ engineers and surveyors to compute the exact number of net usable acres in the tract. Acreage computation in many states is based upon the surveys made in the 1800's, and buyers have found from examining large tracts of land in many states that surveying techniques employed prior to 1900 often resulted in errors in computation of acreage. If there is no recent survey of the property, it is essential for the buyer to obtain a more accurate survey of the parcel.

33. Metz v. Kennedy Inv. Co., 118 Fla. 708, 160 So. 5 (1935); Greenbach Bros., Inc. v. Burns, 245 Cal. App. 2d 767, 54 Cal. Rptr. 143 (1966).

34. Jones-Short Motor Co. v. Bolin, 153 Wash. 198, 279 P. 395 (1929); Ritucci v. Brandt, 134 Conn. 364, 54 A.2d 728 (1948).

35. Fruhling v. Ellis, 143 Colo. 162, 352 P.2d 656 (1960); Lanham v. Reimann, 177 Ore. 193, 160 P.2d 318 (1945).

The economic feasibility of the purchase also depends upon the availability of outside credit and financing for the project. Based upon these preliminary examinations by engineers and surveyors, the financial backers of the project would be presented with evidence upon which to make their investment decision.

These economic realities have been recognized only once by a court, in *Meek v. Bennie*.³⁶ But the reasoning expressed in that decision has a general application today.³⁷ In *Meek*, the trustees had been given powers such as those phrased in the hypothetical language above. The plaintiff trustees granted a series of options to the defendants, totalling eight and one-half months. The trustees sued to enforce the terms of the option, and were immediately confronted with the charge that the transaction was invalid.

The court began with the basic proposition that the trustees have a duty to get the best price for the trust estate, and must sell the property under such conditions as would secure the optimum return.³⁸ The court found that the earlier cases were not authority for the proposition that the granting of an option to purchase by a trustee is wrong in every case.³⁹ If that were so, it reasoned, then an option from a trustee for one day or one week would be invalid even if it were impossible to sell the property unless a prospective purchaser had time to inspect the property or arrange his financing.⁴⁰

Certainly the experience of trustees in administering large pieces of commercial property gives them a considerable expertise in the requirements for bringing about a sale of that land.⁴¹ The court recognized this point and concluded that it is common experience that the prospective purchaser of commercial property must arrange financing (incurring considerable expense for plans, drawings and other preliminary work) and nobody is willing to undertake that risk without an option.⁴²

36. Having heard the evidence from the trustees that an option was the only means by which a sale of their commercial property could be effectuated, the court in *Meek v. Bennie*, [1940] N.Z.L.R. 1 concluded: "If such be the position, and the case so states, then the only reasonable course for the plaintiffs to take would be to give an option for such a time as would enable the purchaser to satisfy himself that it would be profitable to acquire the property and arrange his finance."

37. *Id.*

38. *Id.* at 6.

39. *Meek v. Bennie*, [1940] N.Z.L.R. 1.

40. *Id.*

41. *Id.*

42. *Id.* at 7.

IV. TEST FOR THE TRUSTEE'S CONDUCT AND THE BURDEN OF PROOF

Most states have statutes which set forth the standard to be used for determining whether or not conduct by a trustee in the use of trust property is proper.⁴³ Those who challenge the conduct of a trustee have the burden not only of going forward with the evidence but of proving that the trustee acted in bad faith or fraudulently.⁴⁴

As a general proposition, the courts have stated that a trustee has all the authority necessary to carry out the objects and purposes of the trust.⁴⁵ This is true even though the instrument creating the trust may not directly confer upon him such power.⁴⁶ Certainly the exercise of discretionary power by a trustee is subject to control by the courts if it is not reasonably exercised. In applying this control, however, the courts will not substitute their own judgment for that of the trustee or interfere with the exercise of his power except on a showing of an abuse of discretion.⁴⁷

The philosophy used by a court, in examining abuse of discretion by a trustee who exercises a specifically designated trust power, is that it will not invalidate the decision of the trustee without a showing of fraud, collusion or bad faith. In determining whether or not the trustee acted in bad faith or fraudulently, it has been held that poor business judgment is not the equivalent of bad faith.⁴⁸ The reason for this approach is obvious. Courts generally lack the expertise and economic information concerning the particular property involved or the nature of the investigations that a buyer must undertake, particularly in purchases of large amounts of realty, before he is certain that his proposed use of the property can be accomplished.⁴⁹

43. See, e.g., CAL. CIVIL CODE § 2261 (West 1954):

In investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, a trustee shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affair. . . .

44. *In re Canfield's Estate*, 180 Cal. App. 2d 443, 451, 181 P.2d 732, 737 (1947).

45. In the context of a trustee's grant of an option to buy trust property, see *Union Savings Bank & Trust Co. v. Alter*, 103 Ohio St. 188, 132 N.E. 834 (1921) for this proposition.

46. *Craven v. Dominquez Estate Co.*, 72 Cal. App. 713, 237 P. 821 (1925).

47. RESTATEMENT (SECOND) OF TRUSTS § 187 at 402.

48. *Estate of Canfield*, 80 Cal. App. 2d 443, 181 P.2d 732 (1947).

49. *Union Savings Bank & Trust Co. v. Alter*, 103 Ohio St. 188, 132 N.E. 834 (1921).

V. ALTERNATIVES FOR THE COURTS

The general rule that the express power to sell does not imply a power to option must be tempered by the exigencies of modern economic realities. This rule was developed in cases in which the option was incidental to a long term lease.⁵⁰ The primary purpose of the option was not to effectuate a sale but to induce the making of the lease.⁵¹ The cases which have made this distinction exhibit a technique of analysis by which the validity of the option is evaluated according to its economic merits rather than by a dogmatic application of the general rule.⁵²

A trustee who is unable to grant an option for a short period is precluded from exercising a vital business device for the transfer of property.⁵³ It is precisely because buyers of large amounts of real property must undertake sophisticated economic, legal and financial studies before knowing whether or not to carry out the purchase that an option is necessary. If the trustee cannot give the buyer this time, he has lost the possible sale. If the trustee is unable to sell the property by other means, he faces the threat of surcharge or dismissal by the beneficiaries for wasting trust assets because he failed to take advantage of the offers which were made in the form of options.

It may be possible for a trustee to obtain the consent of all of the beneficiaries to the proposed transaction. In many cases, this is not feasible due to the vast number of beneficiaries and the provisions of the trust benefiting those yet unborn. Certain states allow a trustee to petition for instructions to undertake a certain type of transaction not specifically provided for in the

50. The current use of the general rule is discussed in G. BOGERT, TRUSTS AND TRUSTEES § 741 (2d ed. 1960).

English legislature gave a trustee in a trust for sale the power to give an option to purchase. It is believed that American courts should hold the grant of an option to buy within the terms of a power to sell, where reasonably necessary to effect a sale at an advantage. Ordinarily probably the grant of an option is not requisite to the employment of the power of sale, and held invalid but, if the choice is between a practical inability to sell at all and the giving of an option to buy which may produce a sale at a fair figure, the courts will construe the power to sell to include the option element.

51. *In re Armory Board*, 29 Misc. 174, 60 N.Y.S. 882 (Sup. Ct. 1899); *Trogden v. Williams*, 144 N.C. 192, 56 S.E. 865 (1907); and *Moore v. Trainer*, 252 Pa. 367, 97 A. 462 (1916).

52. *Nelson v. American Trust Co.*, 104 N.J. Eq. 594, 146 A. 460 (Ct. of Ch. 1929); *Northwestern Ice & Cold Storage Co. v. E. Henry Wemme Endowment Fund*, 159 Ore. 415, 80 P.2d 881 (1938).

53. *Crown Co. v. Cohn*, 88 Ore. 642, 172 P. 804 (1918).

instrument.⁵⁴ Nevertheless, such a suggestion does not avoid the basic conflict between the traditional restrictive interpretation of trust powers to prevent the trustee from speculating with trust assets, and the right of the trustee to engage in economic transactions necessitated by modern conditions.

It would be the court's decision whether or not the trustee possessed the power to option by the terms of the trust instrument, and if so, whether or not he should have exercised it. Certainly this method of determining the trustee's power is undesirable, and is detrimental to the trustee and the trust estate. Litigation between the beneficiaries and trustee may occur if the trustee, having only a power to sell, concludes that he cannot grant an option, and opens an escrow. If the buyer cancels the purchase, and the trustee is unable to retain the deposit as a forfeiture, the estate has lost this money and has been prevented from selling to anyone else during the escrow period.⁵⁵ The disadvantages to the trust estate which result if the trustee is unable to exercise the power to option seriously outweigh the threat of an abuse of power by a trustee who may attach an option as an incident to a long term lease.

A court which was unwilling to make a determination that the economic realities involved in the modern purchase of real estate demand that the granting of an option by a trustee is prudent and reasonable, could take the larger step by upholding such a transaction on the ground that the express powers of sale and disposition contained in the trust instrument imply a power to grant options in all cases.⁵⁶ A trustee having a power of sale conferred by the trust instrument may be considered to have the right to grant an option to purchase as one of the ordinary methods of sale. In virtually all cases, a trustee has been given general power to perform and act in the best interests of the estate. It can be argued that the settlor intended to give his trustee all authority which is necessary for carrying out these purposes.⁵⁷

54. See, e.g., CAL. CIVIL CODE § 2261(4) (West 1954).

55. *Crawford v. Allen*, 189 N.C. 434, 127 S.E. 521 (1925); *Schwartz v. Levy*, 337 Ill. App. 293, 85 N.E.2d 859 (1949).

56. *Ingalls Iron Works Co. v. Ingalls*, 177 F.Supp. 151 (S.D. Ala. 1959) upheld the validity of a 14-month option granted by trustees to buy corporate stock on both grounds. The court said that the express powers imply a power to grant options and that the economic realities of the situation called for the granting of an option. The operative provisions of the trust instrument were similar to the hypothetical language above. *Id.* at 164-66.

57. After holding that the power to sell implied a power to option, the court in *Ingalls*

Accordingly, the power to option can be considered an ordinary and usual method of business operation falling within the scope of the general powers in the trust.⁵⁸

The language in most trust instruments, such as that hypothetically set forth above, will go beyond giving a power to sell, and also will grant a power such as "to deal with the same in such manner and form as he in his discretion shall deem advisable."⁵⁹ While these words may be considered surplusage by some courts, the more reasonable approach would be to consider that the settlor had in mind broadening the powers of the trustee by their use.⁶⁰

Obviously the court must construe the trust instrument in accord with the settlor's intent.⁶¹ In doing so, it should read all parts as portions of an integrated whole, in attempting to give effect to it as a harmonious document. Words such as "deal with the same in such manner and form as he in his discretion shall deem advisable" can be considered to authorize and include the power to do additional acts in connection with the power to sell.⁶² To hold otherwise would take away from such words any meaning or force, and would relegate their purpose to nothing more than a restatement of the power to sell. It is reasonable to infer that the settlor would not have included this additional language had he not intended them to have some vitality.⁶³ It is submitted that by permitting trustees to option trust property when they have a power to sell, would be carrying out the settlor's intent had he lived.

stated: "The general rule advanced by the (plaintiff) assumes a lack of express power to grant an option, and is not an absolute one, and may be departed from when the circumstances justify such departure." *Id.* at 166.

58. *Loud v. St. Louis Trust Co.*, 213 Mo. 552, 281 S.W. 744 (1926).

59. See note 3, *supra*.

60. On this point, the court in *Loud v. St. Louis Union Trust Co.*, 313 Mo. 552, 281 S.W. 744 (1926) stated:

Opposing plaintiff's contention, defendant maintains that where the authority is general to perform and carry out a particular object, a resort to the ordinary and usual methods or means comes within the scope of the power, and it will always be inferred that a testator intended to give his trustee every authority which is necessary for his declared purpose. Defendant's contention in this request seems to be amply supported by authority (citing cases).

61. RESTATEMENT (SECOND) OF TRUSTS § 164 at 341 (1959).

62. See *Andrews v. Auditor*, 5 Ohio N.P. 123 (1897).

63. Another rule states that the trust document will be read together so that all of its parts make sense and will effectuate the intent of the testator. *Brock v. Hall*, 33 Cal. 2d 885, 206 P.2d 360 (1949).

Intellectually, the application of the general rule to a short term option to purchase commercial property would completely ignore the distinctions between long term leases accompanied by options and short term direct sale options.⁶⁴ Practically speaking, it would place trustees in jeopardy of litigation by beneficiaries for surcharge, or dismissal for failing to sell trust assets.

VI. LEGISLATIVE EFFORTS

To avoid these pitfalls and to expedite the usually lengthy process of waiting for individual courts to reach a decision on this question, several states have enacted statutes authorizing a trustee to grant options, even though he only has been given an explicit power to sell. The relevant sections of the statutes of Oklahoma and Florida read, in part: "[T]he trustee of an express trust is authorized: to grant options and to sell real property. . . ."⁶⁵

The statutes of Oklahoma and Florida give the trustee unlimited power to option and provide that the power to sell carries with it this additional power. The basis for these statutes seems to be a legislative recognition that the express power of sale contained in the trust instrument implies a power to grant options.⁶⁶

The New York legislature has recently enacted a statute which appears to be based upon a recognition of the economic realities involved in the sale of trust real property today. That statute provides, in part, that: "Every fiduciary is authorized: to grant options for the sale of property for a period not exceeding six months."⁶⁷

Before enacting this statute, the New York legislature examined the complex problems facing purchasers of real estate and the need for trustees to have powers to participate in these

64. RESTATEMENT (SECOND) OF TRUSTS § 190, comment k (1959) adds, in addition to the words set forth in note 24, *supra*:

Under some circumstances, however, it may be proper for the trustee to give such an option, as where it is prudent to do so and the same could not otherwise be advantageously made.

If a trustee has power to sell and lease trust property he may make a lease and give an option to purchase where the property could not otherwise be advantageously leased or sold.

65. 60 OKL. GEN. STAT. § 175.24(b); THE ANNOT. STAT., CH. 691.03(2).

66. *Williams v. Nylund*, 268 F.2d 91 (10th Cir. 1959); *Morris v. City of Oklahoma*, 299 P.2d 131 (Sup. Ct. Okla. 1956).

67. N.Y. E.P.T.L. ART. 11-1.1(b)(7) (McKinney 1967).

modern transactions.⁶⁸ The essential function performed by this section of the statute is to consolidate the powers that every fiduciary possesses by virtue of his designation, whether or not such powers are expressly conferred upon him by a will or a trust agreement. However, the legislature was careful to point out that this section is not intended to make the list of fiduciary powers exhaustive.⁶⁹ Thus, New York has recognized that trustees should have the flexibility to respond to the complexities of selling real estate without having a blanket power to dispose of trust property.

New York has based its statute upon a recognition of the economic problems of the buyer, although the legislative history indicates that the statute is also based in part upon a recognition of the general principle that the power to sell implies a power to option.⁷⁰

The six month maximum period for the option appears to be a balanced and workable duration in view of today's economic realities. It provides the trustee with much needed flexibility; at the same time it protects the beneficiary from substantial losses to the estate from market changes which are inherent in options for longer periods. More important, the legislature stated that this subparagraph authorizing a fiduciary to grant options overrides the sole judicial precedent in New York which had held the grant of such an option by a trustee void.⁷¹

In 1959, the state of Washington adopted a trust act giving the trustee of express trusts created thereafter (but not retroactively) the power to purchase or exercise options.⁷² The problems inherent in such a provision are obvious since it is not retroactively applied to the vast bulk of trusts created before that date.

Independent of the efforts of these states has been the work of the National Conference of Commissioners on Uniform State Laws, which drafted the Uniform Trustee's Powers Act in 1964.⁷³ The Act was later adopted by the American Bar Association. This statute specifically gives a trustee whose trust instrument is silent

68. See Hoffman, *Practice Commentary*, N.Y. E.P.T.L. ART. 11-1 at pp. 9-16 (McKinney 1967).

69. *Id.* at 9.

70. *Id.* at 12.

71. *In re Armory Board*, 29 Misc. 174, 60 N.Y.S. 882 (Sup. Ct. 1899).

72. WASH. STAT. CH. 124 (1959).

73. UNIFORM TRUSTEES' POWERS ACT § 3(c)(12). The exercise of such a power is specifically made subject to the standards of care discussed in the text.

on the question of an option, the power to grant an option involving the disposition of any trust asset. This statute has been adopted in a few states,⁷⁴ but its effect has not been felt in the larger states where most of the trust instruments are created and carried out.

VII. RECOMMENDATION AND CONCLUSION

The general rule that a trustee may not, in the absence of an express authority, grant options to buy trust real estate is predicated upon the proposition that the option prevents the trustee from deciding, at the time of the sale, whether or not such a transaction would be the most beneficial method of disposition of the trust property. This rule finds additional support in the facts that the terms of the sale, and particularly the price, are decided at a time when conditions may be considerably different from those which exist when the sale is completed.

This reasoning may be valid when applied to cases in which an option is not used as a business device to effectuate a sale, but is simply an ancillary part of a long term lease. It has no application, however, when one considers the modern economic realities involved in the sale of trust real estate, particularly for the purchase of large amounts of real property. Some form of option or short term escrow is necessary in order to permit the buyer to engage in various engineering studies, permit marketing research, conform to master planning, work out utility problems, obtain public relations, advertising commitments and secure the necessary financing.

Certain legislatures have made a judgment that a six month period is reasonable. The duration necessary to accomplish these and other economic studies is unclear. However, it seems logical that a short term cut-off point is a compromise solution, serving the interests of both the trustee, whose ability to dispose of the property is enhanced, and of the beneficiaries who are protected against having their estate tied up for long periods at a fixed offering price.

The immediate answer to this problem would seem to be to permit a short term escrow, thereby avoiding a decision on

74. IDAHO CODE § 68-106 (Bobbs-Merril (1949)); MISS. CODE ANN. § 672-123(c)(12) (Harrison 1966); GEN. STAT. N.C. § 32-37 (Michie 1965); WYO. STAT. § 4-38(10) (Michie 1957); 30 REV. CODE OF WASH. CH. 99 § 070(6) (1965).

whether or not the basic power to sell includes the power to option. But the courts will not enforce the claim of a seller who seeks to retain a so-called good faith deposit placed in escrow by the purchaser. Accordingly, it is in the best interests of the estate and the trustee to grant an option instead of opening an escrow, so that at least the option deposit money can be retained if the buyer decides not to complete the purchase.

The question whether or not a power to sell carries with it a power to option can be answered in the affirmative by two approaches. First, the legislatures and courts could conclude that the power to sell includes the power to option as one of its inherent characteristics. Trustees are generally given the power to take all steps which in their judgment and discretion seem necessary to protect and conserve the interests of the trust. The power to option in many circumstances can be viewed as an ordinary and usual business device falling within the scope of that power. It is logical that the settlor intended to give his trustee the authority which is necessary for the declared purposes in the trust, and the use of an option is necessary to complete many business transactions involving trust property.

Second, and not necessarily as a separate basis from the first, the courts and legislatures could decide that a trustee with the power to sell has the power to option in view of the economic realities involved in the disposition of trust property, particularly in the sale of large pieces of real estate. The New York legislature apparently has recognized both of these reasons in its recent statute.

The recognition that a power of sale carries with it a power to option in all cases, is, of course, a much larger step to take than to simply hold that in view of the economic realities of the situation at hand, the particular option granted was necessary. But to go only part way, deciding each case on an *ad hoc* basis, would place trustees in a precarious position; they must decide not only whether they have the power to option trust property, but also whether or not an option should be used in the particular case, even though in their view that transaction economically is the more favorable method of disposition. This would lead to the anomalous result of removing the burden of proof from those attacking the conduct of the trustee and placing the burden on the trustee to prove that the option was the most advantageous method of disposition as distinguished from any other type of

device. Trustees who refuse to assume that burden and use an option may be faced with a suit for surcharge or removal for failing to act in the best interests of the estate. To avoid this dilemma and to keep the burden of proof on those attacking the conduct of the trustees, where it belongs, it is submitted that the courts and legislatures should take the complete step and hold that when the trustee is trying to complete a sale, rather than a long term lease, the power to sell does carry with it the power to option, at least for some minimum duration.