1. - Definition

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 21 - Definition and Classification of Trusts

Section 1. - The Core Case of the Trust

1. - Definition

(a) General features.

21-001 The general feature of an English trust is that a person in whom property is vested (called the "trustee") is compelled in equity to hold the property for the benefit of another person (called the "beneficiary"), or for some legally enforceable purposes other than his own. In the case of an express trust arising from a settlor's intentions, the conscience of the trustee is bound to give effect to the entitlements of the beneficiary or to carry out the purposes for which the property was vested in him. In the case of many trusts arising by operation of law, the trust is imposed upon the trustee to prevent him from benefiting unconscionably from his ownership of the property. [1]

In explaining the nature of a trust it is simplest to begin with the core example of a private express settlement of property. Some of the important variants on that example may then be introduced.

(b) Equitable rights enforceable against trustee and trust property.

21-002 The effect of a trust is to divide the incidents of ownership of the property between the trustee and the beneficiary. The legal ownership vests in the trustee. As legal owner, the trustee enjoys the usual powers of enjoyment and disposition that are incidents of property of that kind. The trustee may, for example, transfer or charge the property as effectively in law as if he had been the entire owner of it. The trustee has the general liberty of a legal owner to deal with the property as he wishes, subject to the restraints of statute and the general law. He generally has the same freedom as any other legal owner to deal with his property as he wishes without having to account for his reasons or purposes in dealing with it.

But when a person holds property as trustee he is treated in equity as taking it subject to the beneficiary's equitable rights, as defined by the general law and stipulated in the trust instrument. The existence of this feature is generally sufficient for the relationship to be defined as a trust. [2] Since historically those entitlements would only have been recognised in equity, the division in the incidents of ownership is explained as a split in the legal and equitable title to the property.

(c) Content of equitable title.

21-003 The beneficiary's equitable title consists in the totality of his equitable rights against the trustee and third parties in respect of the trust property. Since some of the beneficiary's rights are binding on third parties, his title to the trust property is analysed as a proprietary interest.

Against the trustee, the beneficiary's most important right is to hold the trustee accountable for his management of the trust fund and to require the trustee to administer it according to the terms of the trust. [3] The beneficiary can compel the trustee to distribute the economic benefits derived from the trust assets according to the terms of the trust. The beneficiary also has a limited right to control the reasons or purposes that inform the trustee's discretions in dealing with the property. [4]

Against third parties, however, the beneficiary cannot enforce the full range of duties that the original trustee owed to him. Those duties are only binding on the person who assumes the office of express trustee to the beneficiary. His right against a third party consists in a power to make him reinstate the trust property to the trustee if the trustee has transferred it without proper authority under the trust. [5]

(d) Source of beneficiary's equitable rights.

21-004 The beneficiary's equitable rights are defined in the trust instrument and the general law. [6] They determine the trustee's equitable powers and duties over the trust property. These powers and duties may, however, best be analysed as equitable limitations on the trustee's legal ownership of the property. [7] The reason is that if the trustee entered into a transaction that exceeded his equitable powers, then the transaction would be void in equity and possibly a breach of trust. The beneficiary might then have an equitable action to recover the property or a claim against the trustee to make good any losses resulting from his breach. [8] But the invalidity of the transaction in equity would not affect its validity at law. The trustee would have the legal power to enter into the transaction owing simply to his status as the legal owner of the trust property.

The main source of the trustee's powers and duties is the trust instrument. It defines the terms of the "trust bargain" between the settlor and the trustee, and the nature of the beneficiary's interest in the trust fund. [9] The general law is relevant where the trust instrument is silent or where it provides mandatory rules that override the provisions of the trust instrument.

(e) Irreducible core.

21-005 An express trustee owes an "irreducible core" of duties under the general law. [10] The settlor cannot modify or exclude these duties if the institution he seeks to create is nonetheless to be recognised as a trust. These include a duty not to act fraudulently towards his beneficiary; to be legally accountable to him for this management of the trust assets; and to preserve the integrity of the trust property as a fund separate from the trustee's own assets. The settlor cannot include terms in the trust instrument that conflict with the irreducible core of trustee duties. If he does, then the term is either void (because it is incompatible with the settlor's purported intention to create a trust) or it indicates an intention to enter into a transaction that the court will not give effect to as a trust.

(f) Trust property.

21-006 An essential feature of a trust is that there should be property vested in the trustee. This feature is often sufficient to distinguish the office of trustee from that of agent. [11] There are some situations, however, where a person who has neither received nor is in possession of property may be called a "constructive trustee". An example is where a third person incurs liability to the principal in a fiduciary relationship by assisting the fiduciary to breach his duties. [12] The description of such a person as a trustee is strictly inaccurate. He may not have received any relevant property which belonged to the beneficiary. The description of the

defendant as a trustee is merely a formula to describe his equitable liability to account for the losses caused by his wrongful conduct. [13] Accordingly, such a person will not be described as a trustee in this book. [14]

The beneficiary has an equitable proprietary interest in the trust property. The effect is to segregate the property that the trustee holds for the trust from other property that he holds beneficially for himself. The trust property operates as a separate patrimony which is not liable to the debts incurred by the trustee in his personal capacity. [15] The trustee's personal creditors have no claim to the trust property if the trustee becomes insolvent. The beneficiaries may trace and recover trust property that has been paid to a third party in excess of the trustee's equitable powers. The effect is to reconstitute the original fund of trust property. [16]

Although every beneficiary of a private trust may be said to have an equitable interest in the trust property, the content of that interest in may, in some instances, be highly attenuated. For example, the potential beneficiary of a discretionary trust has no vested interest any ascertainable part of the trust fund before the trustee makes an appointment to him. [17] His only right is to be considered by the trustee for a discretionary appointment from the fund. The beneficiary's interest is proprietary only in the limited sense that it would entitle the beneficiary to restrain the trustee from making an unauthorised application of property from the fund. The beneficiary would also have a sufficient title to require any third party who wrongfully received the property to reinstate it to the trustee.

The trustee does not always have the legal interest in the property. His interest may be equitable only, as where a beneficiary under a settlement creates a trust of his interest while the legal ownership is still in the hands of the trustees of the settlement, or where for some other reason the legal estate is outstanding. The effect is to create a sub-trust. [18] As a matter of law the intermediate beneficiary remains a party to the former settlement and a trustee to the ultimate beneficiary. But where the sub-trust is a bare trust the trustees of the original settlement may find it more convenient to deal directly with the beneficiary of the sub-trust. [19]

Footnotes

1 *Westdeutsche v Islington LBC [1996] A.C. 669* at 705, 709; *Guardian Ocean v Banco do Brasil [1994] 2 Lloyd's L.R. 152*. It has been said that since the existence of the trust depends on the trustee's conscience being affected, a person cannot be a trustee of property if and so long as he is ignorant of the facts alleged to affect his conscience: *Westdeutsche v Islington LBC* at 705, 709. This may be questioned in the case of resulting trusts, which depend for their creation on presumptions about the settlor's intentions, not the trustee's: See *P.J. Millett (1998) 114 L.Q.R. 399 at 412*.

2 *Westdeutsche v Islington LBC [1996] A.C. 669* at 707; *Don King Productions v Warren [2000] Ch. 291* at 317, per Lightman J; affirmed by the CA; cf. *Hardoon v Belilios [1901] A.C. 118* at 123, per Lord Lindley. See also *R. v Chester Legal Aid Office, Ex p. Floods [1998] 1 W.L.R. 1496* at 1500, per Millett LJ describing this as raising a "semantic question"; and *P.J. Millett (1998) 114 L.Q.R. 399 at 403–404*.

3 *Target Holdings Ltd v Redferns (a firm) [1996] A.C. 421* at 434; *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58* at [64].

4 See para.10-017 below.

5 See para.30-050 below.

6 The most important statutory sources of trustees' powers are the Trustee Act 1925 and Trustee Act 2000.

7 See *R.C. Nolan (2006) 122 L.Q.R. 232*; and *(2006) 1 J. of Eq. 18*.

8 See Ch.30.

9 See *J. Langbein (1995) 105 Yale L.J. 625*.

10 *Armitage v Nurse [1998] Ch. 241*; D.J. Hayton, Ch.3 in A.J.Oakley (ed), Trends in Contemporary Trust Law (Clarendon Press: Oxford, 1996).

11 See para.21-036 below.

12 See para.30-077.

13 *Paragon Finance Plc v Thakerer & Co [1999] 1 All E.R. 400* at 408–409; *Dubai Aluminium Co Ltd v Salaam [2003] 2 A.C. 366; [2002] UKHL 48* at [38]–[42].

14 See further para.26-004 below.

15 *G.L. Gretton (2000) 49 I.C.L.Q. 599 at 608–617*; *K.G.C. Reid (2000) 8 European Review of Private Law 427*.

16 See para.30-050.

17 See para.22-005.

18 See, e.g. *Gilbert v Overton (1864) 2 H. & M. 110*. For "sub-trusts", see P. Matthews, Scott on Trusts, 4th edn (Aspen Publishers, 2006) para.10.7; *[2005] P.C.B. 335*.

19 *Nelson v Greening & Sykes (Builders) Ltd [2007] EWCA Civ 1358; [2008] 1 E.G.L.R. 59*.

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2. - Parties to Trust Relationship

21-007 The key parties to the express trust relationship are the trustee, the beneficiary, and the settlor or testator. Sometimes a trust may also have a protector.

(a) Trustee.

21-008 The trustee is the person who generally owns the trust property. [20] He manages and deals with the trust assets for the beneficiary according to his limited equitable powers. The trustee's interest in the trust assets is described as a "bare title" since he is generally barred by the equitable limits on his ownership of the trust assets from deriving any economic benefit from them.

(b) Beneficiary.

21-009 The beneficiary is the legal person for whose benefit the trustee administers the trust assets. [21] He has equitable rights to make the trustee account to him for the economic benefits derived from the trust assets, whether individually or collectively with the other beneficiaries. He is the beneficial owner of those assets only to the extent of his entitlements defined in the trust instrument or under the general law. The residue of beneficial ownership is in the trustee to the extent that it is not defined to be in the beneficiary. This follows from the trustee's legal ownership of the trust property.

(c) Settlor or testator.

21-010 The settlor or the testator is the person who creates the trust. He defines the terms of the trustee's powers and duties and constitute the trust by vesting the trust assets in the trustee. The word "settlor" is used for a person who creates a trust in an inter vivos transaction. It is not used of a person who creates a trust by will. The usual term "testator" or "testatrix" is used for such a person.

(d) Protector.

21-011

Some trusts also have a protector.[22] This person, who is neither a trustee nor generally a beneficiary of the trust, has limited powers defined in the trust instrument to oversee the trustee's administration of the fund. These may include the power to give essential consents to the effective exercise of the trustee's powers, to appoint or remove trustees, or to approve the trustee's remuneration. The distinct office of protector is now formally recognised in some offshore jurisdictions.[23] But even in English law, functions like those of a protector have long been exercised by people who have been authorised to take a part in administering a trust.

Footnotes

20 The exception is where the trustees enter into a custodianship or custodian trusteeship arrangement. The trust property or any documents of title may be deposited with a custodian or vested in a custodian trustee. The management of the trust property or exercise of any trustee powers remains in the managing trustees: Trustee Act 2000 s.17; Public Trustee Act 1906 s.4.

21 The beneficiary must be a human being. A trust for an animal is a purpose trust since the animal lacks the standing to enforce the trust.

22 *D. Harnett and W. Norris [1995] P.C.B. 109*; *A. Duckworth [1996] P.C.B. 169, 245, 328*.

23 For example Trustee Act 1998 (Bahamas) ss.3, 81; Trustee Ordinance 1961 (British Virgin Islands) s.86

3. - Variants on Core Case

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Section 1. - The Core Case of the Trust

3. - Variants on Core Case

21-012 Not all trust relationships involve trustee powers and duties arising from an express transaction and actionable by a beneficiary.[24] Outside the core case of the private express trust, either of these features may be absent.

(a) Trust arising by operation of law.

21-013 Not all trusts arise through the express intention of a settlor or testator to create a trust. Some trusts arise by operation of law once certain facts have happened. These are constructive trusts and resulting trusts. The distinction between express trusts and those arising by operation of law can be a fine one. For example, a constructive trust often arises to give effect to an informal agreement between the trustee and the beneficiary.[25]

(b) No equitable powers.

21-014 A trustee may sometimes hold property for a beneficiary without having any equitable powers of management over it and without owing any fiduciary duties to the beneficiary in respect of it. An example is a constructive trust imposed on a person to strip him of the benefits of his fraud against the claimant.[26] This relationship, though called a trust, is a really device to give effect to the claimant's entitlement to a proprietary remedy to recover the proceeds of the fraud.

(c) Trust for purpose without beneficiary.

21-015 Some trusts do not have a beneficiary. A trustee may hold property to give effect to some purpose defined by the trust instrument or by the general law. In general, the only kind of valid purpose trust recognised in English law is the charitable trust.[27] In the absence of beneficiaries, the Attorney General or the Charity Commissioners have standing to enforce the trustee's equitable duties. Although there are no beneficiaries with equitable interests in the trust property, the property is nonetheless ring-fenced from the claims of the trustee's personal creditors.

Footnotes

24 *P.J. Millett (1998) 114 L.Q.R. 399 at 403–406.* cf. *Westdeutsche v Islington LBC [1996] A.C. 669* at 705–707.

25 See Ch.24.

26 See para.26-011.

27 See Ch.23. For the approach offshore, see para.22-034.

4. - Functional Approach to Ownership of Trust Property

21-016 If, for example, T holds income from property on trust for B, it may be difficult to say who is the "real owner" of the income. Either B is to be regarded as the real owner of the income as it accrues (subject to T's right to deduct expenses), [28] or T is to be regarded as the real owner with B merely having a right to compel T to account to him for the balance due. [29]

But to ask who is the "real owner" may oversimplify the relationship: the question presupposes a universally applicable conception of ownership and a single conception of trust. It is better to approach the question in functional terms. The incidents of ownership are split between the trustee and the beneficiary according to the terms of the particular trust. The nature and extent of their entitlements cannot be determined in the abstract without referring to the terms of the trust instrument. [30]

The relevant conception of ownership may also depend on the purpose of the question. In determining, for example, whether an express trustee is the real owner of property, it may be more productive to ask whether, and to whom, he is accountable for his management of the property, and whether he owes a fundamental duty not to act dishonestly. [31] If he does, it can be said, at least negatively, that the trustee is not the "real" owner of the property. The beneficial incidents of the property may be divided among many different trust claimants or held in suspense. [32] The terms of tax legislation, rather than any abstract conception of ownership, may determine whether a beneficiary is to be treated as having a sufficient interest in the trust to be liable to tax. [33] Similarly, the terms of company or insolvency legislation may require a court to inquire whether a trustee or beneficiary is entitled to exercise the voting rights or voting power attaching to shares held on trust. To ask who is the "real owner" of the shares without considering the purpose and context of the question would be simplistic. [34]

Footnotes

28 *Baker v Archer-Shee [1927] A.C. 844* (B the real owner for income tax purposes); *Corbett v Commissioners of Inland Revenue [1938] 1 K.B. 567* at 577; *Nelson v Adamson [1941] 2 K.B. 12*.

29 *Schalit v Joseph Nadler Ltd [1933] 2 K.B. 79* (B not entitled to distrain for rent due under lease of trust property granted by T).

30 *CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53; (2005) 79 A.L.J.R. 1724*.

31 D.J. Hayton, Ch.3 in A.J. Oakley (ed), Trends in Contemporary Trust Law (1996); *Armitage v Nurse [1998] Ch. 241*.

32 Purpose trusts illustrate the possibility that a trustee may hold property without any other person having beneficial rights to it (see para.21-015 above). To suspend the beneficial ownership may be the very reason why the settlor vested the property in the trustee: *D.J. Hayton (2001) 117 L.Q.R. 96*; and P. Matthews, Ch.1 in A.J. Oakley (ed), Trends in Contemporary Trust Law (1996).

33 *Gartside v IRC [1968] A.C. 553 at 617–618*, per Lord Wilberforce; *CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53; (2005) 79 A.L.J.R. 1724*. See generally *D.M.W. Waters (1967) 45 Can. Bar Rev. 219*.

34 For example *Re Kilnoore Ltd (in liquidation) [2005] EWHC 1410 (Ch); [2005] 3 All E.R. 730*.

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Section 2. - Classifications

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Chapter 21 - Definition and Classification of Trusts

Section 2. - Classifications

21-017 Trusts may be classified in various ways. None of these classifications is absolute or mutually exclusive. Any one trust may be open to more than one classification, depending on the aspect of the relationship that is in issue. So, for example, it will be seen that a trust may be categorised as “constructive” in that it arises by operation of law, irrespective of the intentions of the owner of the property, and at the same time as “bare” in that it imposes no active duties of management on the trustee. An express trust, which arises through the intention of the settlor to create it, may either be public or private in its purposes. This section describes the more important forms of classification.

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1. - Express, Resulting and Constructive Trusts

21-018 A classification of trusts in these terms refers to the degree to which the trust arises through the expression of a settlor's actual intention to create it, or by operation of law and irrespective of the settlor's intentions. The distinction is often a fine one, and depends on a close analysis of the relevant transaction. [35]

(a) Express trust. [36]

21-019 An express trust is created by the actual intention of the person in whom the property is vested, as where A declares himself a trustee of Whiteacre for B, or conveys it to C on trust for B. The intention may be apparent from the express use of the words "trust" in the relevant instrument or gathered by inference from A's words or conduct.

(b) Resulting trust. [37]

21-020 A resulting trust arises by operation of law, though in response to a legal presumption about the intentions of the person who transfers the property which becomes subject to the trust. If A transfers property to B when it is unclear whether A intends B to have the beneficial interest in it, then B may hold the property on resulting trust for A. The trust arises by operation of law to give effect to a presumption that A did not intend B to take the property beneficially.

(c) Constructive trust.

21-021 A constructive trust is imposed by operation of law, rather than through the express or presumed intention of the owner of the property to create a trust or to retain any beneficial interest for himself. The trust may even arise contrary to the actual intentions of the owner, as where a person in a fiduciary position makes an unauthorised profit for himself, which equity then requires him to hold on constructive trust for his principal. [38] In other cases, the distinction between constructive and express trusts is less clear. So a constructive trust may be imposed on property to give effect a person's intention to make a gift to another or to act as an express trustee, but where the formalities necessary to give effect to the gift or the express trust have not been fully complied with. [39]

(d) Significance and practical limits of distinction.

21-022 The distinction between trusts which are express on the one hand, and resulting and constructive on the other, may be important in two main ways.

First, the formal requirement that a trust of an interest in land must be evidenced by signed writing only applies to express trusts. Since resulting and constructive trusts arise by operation of law, they may be enforced in the absence of writing. [40]

Secondly, the duties of an express trustee are typically more extensive than those of a resulting or constructive trustee. The office of express trustee is intentionally undertaken by the trustee. He should therefore enjoy the range of administrative powers and duties defined by the general law that are incidents of his office. [41] He should also be bound by fiduciary duties in exercising those primary powers. [42]

The duties of a resulting or constructive trustee are minimal. He is often no more than a bare trustee so that his only duty is to convey the property as the beneficiary directs. However, this is not necessarily the case. Statute defines the powers and duties of trustees of land, whether express, resulting or constructive, bare or active. [43] A constructive trustee who has intentionally assumed his office, such as a secret trustee, but whose undertaking is not directly enforceable for want of formality, may have the same range of powers and duties as an express trustee. [44]

Footnotes

35 See, e.g. *Cook v Fountain (1676) 3 Swans. 585*; *Soar v Ashwell [1893] 2 Q.B. 390*; *Re Llanover SE [1926] Ch. 626*; G.P. Costigan (1914) 27 Harv.L.R. 437.

36 See Chs 22, 23.

37 See Ch.25.

38 For fiduciaries, see Ch.7, and for trusts arising from wrongs, see Ch.26.

39 See para.24-005.

40 LPA 1925 s.53(1)(b), (2).

41 Trustee Act 2000.

42 *P.J. Millett (1998) 114 L.Q.R. 399 at 405*.

43 Trusts of Land and Appointment of Trustees Act 1996 s.1(2).

44 See para.24-023. See *Paragon Finance Plc v DB Thakerar & Co [1999] 1 All E.R. 400* at 409, per Millett LJ.

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2. - Kind of Legal Event Creating the Trust

21-023 A trust may be classified according to the distinction between rights arising through an actual intention, wrongful conduct and other events. In this way, it corresponds in part to the organisation of private law obligations into those arising by consent, wrongs, unjust enrichment and other events. [45]

(a) Intention and wrongs.

21-024 This distinction between trusts arising through intent and through wrongs does not correspond perfectly to the distinction between express trusts on the one hand, and resulting and constructive trusts on the other. It has been seen that express trusts and resulting trusts arise through the expression of the settlor's intention or through default rules about a person's intention when he transfers property to another. Moreover, some kinds of constructive trust give effect to informal expressions of a person's intention to make a gift of property or to create an express trust which would otherwise be void or unenforceable. [46]

Trusts that arise through a person's wrongful conduct tend to be classified as constructive. A constructive trust commonly arises where it would be unconscionable for the owner of property to assert his own beneficial ownership in the property and deny the beneficial interest of another. [47] The effect of the trust is to make the defendant give restitution of property that he had acquired by an equitable wrong, as where a trustee makes a profit in breach of fiduciary duty to his beneficiary, [48] or where a person acquires property by committing a fraud against the claimant. [49]

(b) Unjust enrichment and resulting trusts.

21-025 It has been argued that resulting trusts arise to reverse unjust enrichment: in the situations where a recipient of money is liable in a personal action at common law for unjust enrichment, such as mistake or failure of consideration, the payer does not intend to pass his beneficial interest in the money to the recipient. It has been argued therefore that a resulting trust should arise in those situations. [50] The decided cases have not accepted this view, and it is not relied upon to explain the classification of trusts in this book. In many instances, a person may intend to pass the beneficial interest in money even though the payment is made by a mistake or for a failed consideration. [51] The recipient of the money could therefore rebut any presumption that a resulting trust arose for the payer.

(c) Significance and practical limits of distinction. [52]

21-026 The distinction between legal events is not absolute. A classification based on different types of legal event is only useful if it is treated as a general description of many particular instances of trusts. Since the reasons for recognising the existence of a trust are pragmatic rather than conceptual, any one trust may show features of more than one category of legal event. So a secret trust of property may give effect to the testator's informal intention to make a devise or bequest on death. But it also serves the policy of preventing the secret trustee from fraudulently relying on the informality of the testator's gift to take a personal benefit which the testator did not intend him to have. [53]

Footnotes

45 See A.S. Burrows (ed), English Private Law, 2nd edn (OUP, 2007), vol.1 pp.xxxvii–xliii. P. Birks, The Classification of Obligations (Clarendon Press, 1997), Ch.1.

46 See paras 24-005, 24-041.

47 *Paragon Finance Plc v Thakerer & Co [1999] 1 All E.R. 400* at 408–409, per Millett LJ.

48 See para.7-057.

49 See para.26-011.

50 See R. Chambers, Resulting Trusts (1997); *P.J. Millett (1998) 114 L.Q.R. 399 at 408–411*.

51 *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at 708–709, per Lord Browne-Wilkinson. See para.25-002 below.

52 P. Jaffey, Private Law and Property Claims (2007) Ch.1.

53 See para.24-030.

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3. - Bare and Special Trusts

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Part 5 - Trusts

Chapter 21 - Definition and Classification of Trusts

Section 2. - Classifications

3. - Bare and Special Trusts

(a) Bare trust.

21-027 A bare (or simple)[54] trust is one where property is vested in one person on trust for another, but where the trustee owes no active duties arising from his status as trustee. His sole duty is to convey the trust property as the beneficiary directs him. An example is where property is transferred to T "on trust for B absolutely". In such a case, T's sole duty is to allow B to enjoy the property and to obey any direction he may give as to how the property should be disposed of.

(b) Special trust.

21-028 A special trust, on the other hand, is one where the trust itself imposes duties of active management on the trustees, e.g. a trust for sale, or a trust for a life tenant and remainderman. The great majority of express trusts are thus "special". Such trusts may be either fixed or discretionary. In a fixed trust the settlor defines in the instrument the entitlements of the beneficiaries. In a discretionary trust, the settlor defines a range of potential objects of the trust but allows the trustee a discretion to select which of them should receive property from the trust.

(c) Significance and practical limits of distinction.

21-029 Although the defining feature of a bare trust is that the trustee owes no active duties as trustee, he may nonetheless owe active contractual duties to him. This would happen, for example, where a solicitor employed under a contract of retainer holds money for his client on a bare trust.[55] Despite their apparent similarities, the features of a bare trust are strictly distinguishable from the rights of a beneficiary under the rule in *Saunders v Vautier*.[56] The beneficiaries of an active trust may give binding directions to their trustee about the disposition of the trust assets provided that they are all sui juris and collectively entitled to the entire beneficial interest.

Many constructive trusts arising in response to a person's wrongful conduct are bare trusts. The effect of imposing a bare trust on the wrongdoer is that the claimant may compel the trustee to restore the proceeds of his wrong to him.[57] A custodian trustee[58] is not a bare trustee, as he is not a mere name or "dummy" for the managing trustees or for the beneficiaries.[59]

Footnotes

54 See generally *P. Matthews [2005] P.C.B. 266, 335*; and *Re Cunningham and Frayling [1891] 2 Ch. 567* at 572; *Tomlinson v Glyns Executor and Trustee Co [1970] Ch. 112* at 125, 126; *Herdegen v Federal Commissioner of Taxation (1988) 84 A.L.R. 271*.

55 *Target Holdings Ltd v Redferns [1996] A.C. 421*. For the significance of this distinction in insolvency, see *P. Matthews [2005] P.C.B. 266 at 269*.

56 *Saunders v Vautier (1841) 4 Beav. 115; affirmed Cr. & Ph. 240*. See para.29-030 below.

57 See Ch.26.

58 Trustee Act 2000 s.17.

59 *IRC v Silverts Ltd [1951] Ch. 521*.

4. - Private and Public Trusts

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Section 2. - Classifications

4. - Private and Public Trusts

21-030 Trusts may also be divided according to the extent of the benefit they confer. The distinction is between private and public trusts. A trust is private if it is for the benefit of an individual or class with standing to enforce the trustee's duties. It is immaterial that the trust also confers an incidental benefit on the public at large. The only public trusts that are valid in English law are those which are charitable, according to the legal definition of charity. [60] It must also promote the public welfare, even if incidentally it confers a benefit on an individual or class. A charitable trust is enforced by the Attorney General or the Charity Commission.

Footnotes

60 f*Morice v Bishop of Durham (1804) 9 Ves. Jun. 399*; Charities Act 2006 ss.2(1)(b); 3. See Ch.23.

5. - Executed and Executory Trusts

5. - Executed and Executory Trusts [61]

21-031 This distinction refers to the degree of precision with which the trust instrument defines the beneficiaries' interests in the trust property. So an instrument which declares the full extent of the beneficiaries' entitlements under the trust is said to be executed. An instrument which defines a trust in a general way but which contemplates some further instrument to specify their interests in detail is said to be executory.

Footnotes

61 See below para.22-026.

6. - Completely and Incompletely Constituted Trusts

6. - Completely and Incompletely Constituted Trusts [62]

21-032 This distinction, though sometimes drawn, is not actually about different categories of trust. It refers to whether all the relevant formal steps have been completed which are necessary to vest the trust property in the intended trustee of an express trust. Where the property has not been properly vested, the trust is said to be incompletely constituted. Such an arrangement may not give rise to any trust at all, or at least not the trust that the parties intended to create in the transaction. The intended trustee may have no title to the property, and it is only in special circumstances that the intended beneficiary would be entitled to an order compelling the settlor to complete the vesting of the property in the intended trustee. [63]

Footnotes

62 See below para.22-041.

63 See below paras 22-047, 24-006–24-007.

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Section 3. - Trusts Compared With Other Relationships

21-033 In a number of ways trusts resemble certain other legal relations, notably bailments, agency, fiduciary relationships generally, contracts and powers.[64] The execution of a trust also has a marked affinity with the administration of the estate of a deceased person. This section considers the similarities and differences between trusts and these other legal relationships.

Footnotes

64 See, e.g. *Re Nanwa Gold Mines Ltd [1955] 1 W.L.R. 1080* (whether debt, bailment, or trust).

1. - Bailment

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 21 - Definition and Classification of Trusts

Section 3. - Trusts Compared With Other Relationships

1. - Bailment [65]

21-034 To some degree, a bailment (e.g. a deposit of a chattel) is similar to a trust, [66] since the bailee holds the chattel subject to duties towards the bailor. But the differences are more marked. The duties of the bailee are recognised at common law, whereas the duties of a trustee and the rights of the beneficiary to the trust property are only enforceable in equity. Only personal chattels can be bailed, whereas any property may be held in trust. Further, the trustee of an asset has the general ownership of it at law, subject to the beneficiary's equitable entitlements. A bailee, however, merely has a possessory interest in the chattel and the general ownership of it remains in the bailor. An unauthorised sale by a trustee will accordingly confer a good title upon a bona fide purchaser who acquires the legal interest without notice of the trust, whereas such a sale by a bailee usually confers no title to the legal ownership of the property as against the bailor.

Footnotes

65 See F.W. Maitland, *Equity* (1909) Lecture IV.

66 They were even defined by the Court of Appeal in terms of trust in *Rosenthal v Alderton & Sons Ltd [1946] 1 All E.R. 583* at 584 (omitted from [1946] K.B. 374).

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2. - Fiduciary Relationships

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Part 5 - Trusts

Chapter 21 - Definition and Classification of Trusts

Section 3. - Trusts Compared With Other Relationships

2. - Fiduciary Relationships [67]

21-035 The relationship of express trustee and beneficiary is one of a number of relationships generally described as fiduciary. A fiduciary relationship arises where one person has undertaken to act for another in a particular matter in circumstances giving rise to a relationship of trust and confidence. Some of the common categories of fiduciary relationship are agent and principal, solicitor and client, and director and company. The distinguishing feature of such a relationship is the fiduciary's duty of loyalty to this principal. He must act in good faith, not profit from his position, and not place himself in a position where his duty and his interest may conflict.

But not all fiduciary relationships can properly be described as trusts. A fiduciary is a trustee only if he has vested in them a fund of property or a power of disposal over it. [68] Not all trusts involve fiduciary duties. A fiduciary duty must arise from the voluntary conduct of the person bound by it. [69] Accordingly, a person who becomes a trustee by operation of law and has not voluntarily undertaken the office may not owe any fiduciary duties in respect of the trust property. An example is the trust imposed on a person to strip him of the benefits of his fraudulent conduct. [70] The trust merely gives effect to the equitable right of the claimant to hold the defendant personally liable to account for his profit, or to recover the property specifically. It is also open to the settlor of an express trust to modify or exclude the operation of the trustee's fiduciary duties under the general law. [71]

Footnotes

67 See Ch.7.
68 See *Paragon Finance v DB Thakerar & Co [1999] 1 All E.R. 400* at 416.
69 See generally *P.J. Millett (1998) 114 L.Q.R. 214*.
70 *Paragon Finance v DB Thakerar & Co [1999] 1 All E.R. 400* at 414–415.
71 See above para.7-016.

End of Document

3. - Agency

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 21 - Definition and Classification of Trusts

Section 3. - Trusts Compared With Other Relationships

3. - Agency

21-036 An agent and a trustee resemble each other in that each is typically subject to fiduciary obligations towards his principal or beneficiaries, but there are many differences. Trusts are the exclusive creature of equity, whereas the basic incidents of agency arise at common law. In most trusts, there is no contractual relationship between the trustees and the beneficiaries. But apart from agents of necessity, agency normally arises by contract between principal and agent, and generally does not give rise to a trust. [72] Usually a trustee has property vested in him. His legal powers to deal with it and make contracts affecting it arise from his status as owner. Since a trustee contracts in his own right, he cannot make his beneficiaries directly liable on any transaction that he concludes with a third party. An agent, however, does not own the property that his principal authorises him to dispose of. His power to do so generally depends on the terms of the authority from his principal. An agent can make his principal directly liable on the contract that he concludes. [73]

Footnotes

72 See *Kingscroft Insurance v HS Weavers [1993] 1 Lloyd's Rep. 187*.

73 See generally *H. Tjio (2005) 19 T.L.I. 75*; and *Ingram v IRC [2000] A.C. 293* at 305.

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4. - Contract

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Part 5 - Trusts

Chapter 21 - Definition and Classification of Trusts

Section 3. - Trusts Compared With Other Relationships

4. - Contract

(a) The distinction.

21-037 It is sometimes difficult to determine whether a debt obligation arises out of a trust or a contract. The difference may be important. If a fund is vested in T, who is insolvent, B will be paid if T was a trustee for him, but B can only claim in T's bankruptcy if T was merely B's debtor. [74] Contract and trust are distinct legal concepts. Contract was developed by the common law courts and involves the enforcement of purely personal obligations between the parties. Trust was developed in the courts of equity and involves the enforcement of personal obligations owed by the trustee and third parties in relation to a specific fund of assets. The beneficiaries' rights to the trust assets are proprietary in effect. [75]

(b) Bare trust behind contract.

21-038 The same transaction may involve both contract and trust. One example is a Quistclose trust. [76] Here a lender advances money on the understanding that it must only be applied for certain purposes or to pay certain persons. As a matter of contract at common law, the borrower is a debtor to the lender. In equity, the borrower is a trustee to the lender, who retains a beneficial interest in the money. [77] Another example is a bare trust of money existing concurrently with a contract of agency or retainer. So a solicitor who receives funds from his client to be applied in a conveyancing transaction holds the funds on bare trust for the client. The trust attaching to the funds is discharged once the solicitor applies them according to the client's contractual instructions. If the solicitor should misapply the funds, then the terms of the contract may determine whether he is concurrently liable in equity for the breach of trust. [78]

(c) Trust of benefit of contract.

21-039 The trust concept has frequently been imported into contractual transactions to get round the general rule that only a party to a contract may sue upon it. The Contracts (Rights of Third Parties) Act 1999 now provides that a contract may confer the right to enforce a term of the contract on a person who is not a party to it, [79] and these trust exceptions to the privity rule have become less important than they once were.

A person entitled to the benefit of a contract may subsequently set up a trust of that benefit for third parties either by declaring himself a trustee of it or by assigning it to trustees for them. [80] A person may also contract as trustee for a third party so that in equity the third party is entitled to the benefit of the contract ab initio. If the contract is not performed, the trustee can take

proceedings in his own name [81] to enforce it for the benefit of the third party and, if the trustee refuses to do so, the third party can sue, joining the trustee as a defendant. [82] The declaration of trust often has effects similar to an outright assignment of the benefit of the contract, particularly where the contract is for payment of a simple debt.

The main difficulty in these cases is to discover what test the courts will apply in deciding whether the party intended to contract as trustee or to hold the benefit of his contract as a trustee. The inquiry plainly involves the construction of the contract and the special circumstances in which it is entered into. Beyond this generalisation, it is hard to draw clear principles from the authorities. [83] A prohibition on direct assignment of a contract does necessarily prevent a declaration of trust over the benefit of it. A trust of the proceeds of a contract claim would not necessarily entitle the beneficiary to interfere in the operation of the underlying contract. There is therefore no special reason to suppose that it would be inappropriate to find a declaration of trust. [84]

A trust of the benefit of a contract may also be imposed by statute, as where a person effects an insurance policy that is expressed to be for the benefit of his spouse or children. [85]

Footnotes

74 See *Re Kayford [1975] 1 W.L.R. 279*; *Re Farepak Food and Gifts Ltd (In Administration) [2006] EWHC 3272 (Ch); [2008] B.C.C. 22*.

75 See above para.2-003.

76 See below para.25-033.

77 *Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567*; *Twinsectra Ltd v Yardley [2002] 2 A.C. 164; [2002] UKHL 12*.

78 *Target Holdings Ltd v Redferns (a firm) [1996] 1 A.C. 421*.

79 Contracts (Rights of Third Parties) Act 1999 s.1.

80 See the surveys by *A. L. Corbin (1930) 46 L.Q.R. 12*; and *J. G. Starke (1948) 21 Austr.L.J. 382 at 422, 455*; *F. E. Dowrick (1956) 19 M.L.R. 374 at 386*.

81 As, e.g. in *Gregory and Parker v Williams (1817) 3 Mer. 582*; *Lloyd's v Harper (1880) 16 Ch. D. 290*. In *Les Affreteurs Reunis Societe Anonyme v Leopold Walford (London) Ltd [1919] A.C. 801* the trustee was not a party but the defendants agreed to treat the case as if they were.

82 *Vandepitte v Preferred Accident Insurance Corp of New York [1933] A.C. 70* at 79. See, e.g. *Harmer v Armstrong [1934] Ch. 65*.

83 Contrast *Lloyd's (1880) 16 Ch.D. 290*; *Harmer's [1934] Ch. 63*; *Walford's [1919] A.C. 801*; *Gregory and Parker's (1817) 3 Mer. 582* cases above; *Fletcher v Fletcher (1844) 4 Hare 67*; *Gordon, Re Lloyds Bank v Lloyd [1940] Ch. 851*; *Royal Exchange Assurance v Hope [1928] Ch. 179*; *Re Webb [1941] Ch. 225*; *Re Foster's Policy [1966] 1 W.L.R. 222* where the court found a trust with *Vandepitte 's case [1933] A.C. 70*; *Re Engelbach's Estate [1924] 2 Ch. 348*; *Re Sinclair's Life Policy [1938] Ch. 799*; *Re Foster (No.1) [1938] 3 All E.R. 357*; *Green v Russell [1959] 2 Q.B. 226*; *Re Cook's ST [1965] Ch. 902* (appeal compromised: *The Times, 7 November 1964*); *Beswick v Beswick [1966] Ch. 538* (in the House of Lords the point was abandoned: *[1968] A.C. 58 at 95*); *Swain v The Law Society [1983] 1 A.C. 598*; and *Southern Water Authority v Carey [1985] 2 All E.R. 1077* where the court found none. See generally *A.L. Corbin (1930) 46 L.Q.R. 12*.

84 *Re Turcan (1888) 40 Ch. D. 5*; *Don King Productions Inc v Warren [2000] Ch. 291*; *Barbados Trust v Bank of Zambia [2007] 1 Lloyd's Rep. 495* (noted *P.G. Turner [2008] C.L.J. 23*).

85 Married Women's Property Act 1882 s.11. See also Civil Partnership Act 2004 s.253.

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5. - Power

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 21 - Definition and Classification of Trusts

Section 3. - Trusts Compared With Other Relationships

5. - Power

21-040 A trust must be distinguished from a power. A power is an authority vested in a person (called a "donee") to deal with or dispose of property that is not his own. [86] It can take a number of forms. A power of attorney is simply a special type of agency which allows another to act on behalf of the principal in dealing with property. Administrative powers are powers to manage particular items of property. Finally, and most significantly for the distinction with trusts, are powers of a dispositive nature. These are powers of appointment that authorise the creation or grant of beneficial interests in property.

(a) Legal or equitable.

21-041 Trusts are necessarily equitable, whereas powers may be legal. Thus a power of attorney may authorise the conveyance of a legal estate, and a mortgagee of freehold land has a statutory power to convey the legal fee simple when he exercises his power of sale. [87] After 1925, however, all powers of appointment have necessarily been equitable. [88]

(b) Imperative or discretionary.

21-042 The substantial distinction is that a trust for the disposition of property is imperative, while a mere power of appointment is discretionary. Even with a discretionary trust (sometimes called a "trust power") the trustee holding the power of distribution has an obligation to make distributions from the fund though the trustee may select which of the potential objects is to receive them. Thus if A holds £10,000 upon trust to divide in his discretion among a certain class of persons, A has no option in the matter, but is bound to carry out the trust. If A fails to do so, the court will see that the property is duly divided according to its understanding of the settlor's intention. If the class of beneficiaries is small, such as immediate members of the settlor's family, the court may order equal distribution of the fund. [89] In the case of a large class of beneficiaries, each with varying needs and claims on the settlor, the court may prepare a scheme of distribution. [90]

If, on the other hand, A is given a mere power to appoint the £10,000 among the members of the class, he cannot be compelled to exercise the power. If A fails to do so, whether from accident or design, the members generally have, in the absence of some improper purpose, no claim to make A pay them the money. It will pass to the persons entitled in default of appointment. [91]

(c) Marginal cases.

21-043

The distinction between trusts and powers of appointment can become blurred, particularly where the donee of a power owes fiduciary duties to the objects. First, an instrument which initially appears to confer a mere power of appointment over a fund may, on its proper construction, create a trust for distribution of the fund. Secondly, the duties governing the way a discretionary trustee and a fiduciary donee of a power of appointment are very similar. Thirdly, the interests of a beneficiary of a discretionary trust or fiduciary power of appointment are enforceable against third parties in the same way. In effect, therefore, the difference between a trust and a power of appointment is often more a distinction of degree than of type.

(1) Construction.

21-044 In construing a gift as creating either a trust for distribution of a fund or a power of appointment, the first thing to consider is whether there is a gift over in default of appointment. If there is, the power is a mere power [92] ; if there is not, it will probably be a discretionary trust. [93] But the absence of a gift over is not conclusive. [94] The main question is whether the donor has shown an intention that, in any event, the property shall go to the objects of the power. The presence of a power to accumulate undistributed income from a fund is not inconsistent with the construction of the gift as a trust of the income. [95] Also, a gift that appears to be a primary power may actually be a primary trust subject to a secondary power to alter the interests under the trust. In *Burrough v Philcox*, [96] a testator gave property to his two children for their lives, and empowered the survivor of them to dispose of the property by will

> "amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper."

It was held that a primary trust was created in favour of the testator's nephews and nieces, subject to a power of selection and distribution in his surviving child. As the surviving child had failed to exercise the power, the property was divided equally between the objects.

(2) Duties.

21-045 The donee of a fiduciary power of appointment owes similar duties in exercising it to a discretionary trustee. These include a duty to survey the class of potential objects; to group them into different categories; and then to prioritise those categories according to their needs. [97] The survey made by a donee of a mere power need not be as rigorous as that made by a discretionary trustee who has a duty to distribute the fund.

(3) Interest.

21-046 The interest of the beneficiary of a discretionary trust or equitable power would be enforceable against a third party who received property that the trustee or donee did not have authority to transfer to him. Either kind of interest would give the beneficiary standing to follow or trace the property. [98] The priority of the power affecting the property would be preserved if the person holding the property became insolvent. [99] But the beneficiary's only right would be to have the asset or its proceeds reinstated to the trustee or donee. [100] The beneficiary could not compel the third party to transfer the asset directly to himself since this would give him a greater equitable right against the third party than he had against the trustee or donee.

Footnotes

86 See *Freme v Clement (1881) 18 Ch. D. 499* at 504.

87 See para.39-034.

88 LPA 1925 s.1(7).

89 *Re Arnold, Wainwright v Howlett [1947] Ch. 131* (grandchildren taking per capita equally with children). The relevant maxim is "Equality is equity".

90 *McPhail v Doulton [1971] A.C. 424* at 451, 457.

91 *Brown v Higgs (1803) 8 Ves. 561* at 570; *McPhail v Doulton [1971] A.C. 424* at 456, 457. Exceptionally, the court has assumed the execution of a fiduciary power of appointment over a pension fund surplus where the donee was faced with an irreconcilable conflict of interest: *Mettoy Pension Trustees Ltd v Evan [1990] 1 W.L.R. 1587*. Statute has now removed this situation: Pensions Act 1995 s.25(2).

92 See, e.g. *Re Mills [1930] 1 Ch. 654*; and see *Re Gestetner Settlement [1953] Ch. 672*; see *(1953) 69 L.Q.R. 309*.

93 *Re Llewellyn's Settlement [1921] 2 Ch. 281*; *Re Weekes' Settlement [1897] 1 Ch. 289*; *Re Combe [1925] Ch. 210*; *Re Perowne [1951] Ch. 785*.

94 *Re Weekes' Settlement [1897] 1 Ch. 289*; *Re Combe [1925] Ch. 210*; *Re Perowne [1951] Ch. 785*.

95 *McPhail v Doulton [1971] A.C. 424* at 448.

96 *Burrough v Philcox (1840) 5 My. & Cr. 72*; and see *Salusbury v Denton (1857) 3 K. & J. 529*.

97 *Re Manisty's Settlement [1974] Ch. 17* at 25; *Re Hay's Settlement Trusts [1982] 1 W.L.R. 202* at 209–210. See para.10-013.

98 See para.30-054.

99 *Mettoy Pension Trustees Ltd v Evan [1990] 1 W.L.R. 1587*.

100 *Gartside v IRC [1968] A.C. 553 at 617–618*; *Target Holdings Ltd v Redferns [1996] A.C. 421*.

6. - Administration

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Mainwork

Part 5 - Trusts

Chapter 21 - Definition and Classification of Trusts

Section 3. - Trusts Compared With Other Relationships

6. - Administration [101]

(a) Resemblances.

21-047 Trusts were the invention of the Chancellor, whereas the administration of the assets of a deceased person was regulated originally by the ecclesiastical courts. From early times, however, the Court of Chancery exercised a supplementary jurisdiction over the personal representatives, and their position has become more and more assimilated to that of trustees. Thus they must exercise the same degree of care as trustees in carrying out their duties. In general the provisions of the Trustee Act 1925 extend to them. [102]

(b) Distinctions.

21-048 There are, nevertheless, a number of distinctions between trusts and the administration of estates. Six may be mentioned here.

(1) Objectives.

21-049 In broad terms, the main function of personal representatives as such is to wind up the estate of the deceased, paying all debts and distributing the assets to those entitled to them or to trustees on their behalf. Trustees, on the other hand, are normally intended to hold the trust property and administer it in accordance with the trusts which bind them. In a phrase, the function of personal representatives is to wind up, and the function of trustees, at least in cases of special trusts, is to hold.

(2) Property.

21-050 Until they assent, personal representatives usually have the whole ownership of the property of the deceased vested in them; the beneficiaries have no beneficial interest in any particular asset but merely the right to compel the due administration of the estate. Under a fixed trust, the beneficiaries may have an equitable interest in a specific trust assets and possibly even the right to compel the trustee to transfer it to them. [103] But the distinction is less clear where the beneficiaries have interests under a discretionary trust.

(3) Limitation.

21-051 An action by a beneficiary to recover trust property or in respect of any breach of trust is, in general, barred after six years, [104] whereas the period in respect of claims to the personal estate of a deceased person is 12 years. [105] Neither limit applies in the case of fraud or property retained by the trustee or personal representative or converted to his own use. [106]

(4) Joint and several authority.

21-052 One of several personal representatives may dispose of pure personalty, [107] whereas trustees must act jointly.

(5) Receipt of sole trustee or representative.

21-053 Unlike a trustee, a sole personal representative acting as such may give a valid receipt for capital money arising on a trust of land, even though he is not a trust corporation. [108]

(6) New trustees.

21-054 The Trustee Act 1925 gives wide powers of appointing new trustees. [109] These powers do not apply to personal representatives unless and until they are holding as trustees. [110] Personal representatives as such can be appointed only by will or by the court.

(c) Dual status.

21-055 Despite these distinctions the dividing line between trustees and personal representatives tends to become blurred, so that a person may at the same time be both a trustee and a personal representative. [111] A will may set up certain trusts and appoint the same persons to be both executors and trustees. Once appointed, a personal representative remains a personal representative for the rest of his life [112] unless the grant is limited or is revoked, or unless he is removed from office by the court. Further, on an intestacy the personal representatives are constituted express trustees. [113]

It follows that no general test can be laid down; the distinction can be drawn only in relation to the particular assets in question. If the personal representatives have no duties to perform beyond the collection of assets, payment of creditors and distribution of the estate, they will remain personal representatives [114] (even if they have stated that they are trustees [115]) until assenting, [116] or, if the legatees are infants, until availing themselves of the power to appoint trustees of the gifts to the infants. [117] This will be so even where the payment of the legacy is postponed. [118] However, where they are directed to hold the estate or some part of it upon certain trusts (e.g. for persons in succession [119] or upon trust for sale and division [120]) they will become trustees when the administration is complete, [121] though in the case of land not, it has been held, until they sign a written assent in their own favour. [122] The moment of transition from administration to trusteeship depends on the circumstances, [123] although

when the personal representatives bring in their residuary accounts, [124] or exercise a power of appropriation, [125] there is a presumption that the trusteeship has begun. The mere existence of an outstanding mortgage does not prevent the residue from being ascertained. [126]

Footnotes

101 See generally below section VI.
102 Trustee Act 1925 s.68(17); see also AEA 1925 ss.33, 39.
103 See *Corbett v IRC [1938] 1 K.B. 567* at 577; and see above para.29-029.
104 Limitation Act 1980 s.21(3).
105 Limitation Act 1980 s.22(a).
106 See generally below para.30-035.
107 See below para.31-019.
108 See LPA 1925 s.27(2); compare above para.4-014.
109 See below para.27-012.
110 See *Re Ponder [1921] 2 Ch. 59*; *Re Pitt (1928) 44 T.L.R. 371*; *Re Yerburgh [1928] W.N. 208*; *Re Cockburn's WT [1957] Ch. 438*.
111 See *Re Timmis [1902] 1 Ch. 176* at 182; and see generally *B. S. Ker (1955) 19 Conv. (NS) 199*.
112 *Attenborough v Solomon [1913] A.C. 76* at 83; *Re Timmis [1902] 1 Ch. 176* at 183.
113 AEA 1925 ss.33(1), 46(1); and see *Toates v Toates [1926] 2 K.B. 30*.
114 *Re Richardson, Pole v Pattenden [1920] 1 Ch. 423*; *Harvell v Foster [1954] 2 Q.B. 36*; disapproving dicta *Re Ponder [1921] 2 Ch. 59*.
115 *Re Mackay, Mackay v Gould [1906] 1 Ch. 25*; *Re Rowe (1889) 58 L.J.Ch. 703*.
116 *Attenborough v Solomon [1913] A.C. 76* at 83; and see *Re Aldhous [1955] 1 W.L.R. 459*.
117 *Harvell v Foster [1954] 2 Q.B. 36*; *Re Davis, Evans v Moore [1891] 3 Ch. 119*: *Re Mackay, Mackay v Gould [1906] 1 Ch. 25*.
118 *Re Barker [1892] 2 Ch. 491*.
119 *Re Bowden, Andrew v Cooper (1890) 45 Ch. D. 444*; *Re Swain [1891] 3 Ch. 233*; *Re Timmis [1902] 1 Ch. 176*; *Re Oliver, Theobald v Oliver [1927] 2 Ch. 323*.
120 *Re Claremont [1923] 2 K.B. 718*.
121 See *Re Cockburn's WT [1957] Ch. 438* at 440; and see *Lilley v Public Trustee of the Dominion of New Zealand [1981] A.C. 839*.
122 *Re King's WT [1964] Ch. 542*. Sed quaere: see *RRA Walker (1964) 80 L.Q.R. 328*; *J.F. Garner (1964) 28 Conv.(NS) 298*.
123 *Attenborough v Solomon [1913] A.C. 76* at 82, 83.
124 *Re Claremont [1923] 2 K.B. 718*.
125 *Phillipo v Munnings (1837) 2 My. & Cr. 309*.
126 *IRC v Smith [1930] 1 K.B. 713*.

7. - The Crown

(a) Trustee.

21-056 There is nothing to prevent the Crown acting as trustee. [127] But a trust does not arise in every case where money or property is held by the Crown and used for the benefit of others. The Crown may simply be administering the property in exercise of governmental functions. [128] These public duties are sometimes called "trusts in the higher sense" but do not give rise to an equitable relationship enforceable in the courts. [129]

(b) Beneficiary.

21-057 The Crown can be a beneficiary under a trust but it has been held that where a minister or other public servant acting in his public capacity takes property on behalf of the Crown, there is no trust and the Crown and the minister are considered as one. [130]

Footnotes

127 *Civilian War Claimants Association Ltd v The King [1932] A.C. 14* at 27; *Nissan v Attorney General [1970] A.C. 179* at 223.

128 *Tito v Waddell (No.2) [1977] Ch. 106*.

129 *Tito v Waddell (No.2) [1977] Ch. 106* at 216, per Megarry VC.

130 *Town Investments Ltd v Department of the Environment [1978] A.C. 359*; see *(1977) 93 L.Q.R. 321*.

1. - Fixed Trusts

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 1. - Varieties of Express Trust

1. - Fixed Trusts

(a) Nature of the beneficiary's interest.

22-001 A fixed trust is one where the beneficiary's interest in the trust fund is defined by the settlor at the outset in the settlor's declaration of the trust. The trustee has no discretion to vary the beneficiary's interest in the fund or the benefits received from it.

The settlor may provide, for example, that T is to hold "on trust for A and B absolutely in equal shares", or that T is to hold "for A for life remainder to B". A beneficiary's interest may be fixed even if it is uncertain whether they will in fact derive any benefit from it. So an interest subject to a condition precedent, such as "to A absolutely on attaining the age of 25", is fixed although it is uncertain whether A's interest will vest in interest. An interest may also be fixed if it is uncertain whether the beneficiary will continue to enjoy the benefit of the interest in the future. So an interest which is determinable when a future event occurs or which divests when a condition subsequent occurs is fixed even though the duration of the interest is uncertain.

If all the beneficiaries of a fixed trust are sui juris, and individually or collectively they have an absolute entitlement to the trust fund, then they may resort to the rule in *Saunders v Vautier*.[1] They may elect to terminate the trust and direct the trustee to convey the trust property to themselves.

(b) Alienability of interest.

22-002 An interest under a fixed trust is generally liable to the normal incidents of property. The beneficiary has the usual owner's rights to alienate it to another person, who then becomes entitled to receive the benefits from the trust.[2] It will also form part of his bankrupt estate if they become insolvent.[3] But in all cases, the incidents of the beneficiary's interest depend on the settlor's drafting of the trust instrument.[4] The settlor may seek to limit the alienability of the beneficiary's interest. He may in this way guard against the risk that the beneficiary will rashly seek to alienate his interest, or that his creditors will benefit from it if they become insolvent.

The settlor's freedom to limit the alienability of the beneficiary's interest is subject to certain limits imposed by the general law in the interests of public policy. So an attempt to limit the beneficiary's interest by a direct condition or proviso against alienation would be void, as would a forfeiture of his interest on bankruptcy. The power to alienate is regarded as a necessary incident of property so a limitation of this sort is regarded as repugnant to the very interest conferred on the beneficiary.[5] But the same objection does not apply if the settlor gives the beneficiary a determinable interest under a fixed trust, or an interest under a discretionary trust.[6] A protective trust combines the advantages of a determinable interest and a discretionary trust.[7]

(c) Determinable interest.

22-003 A determinable interest is one where the bounds of the interest are limited from the outset. An example is where the beneficiary has a life interest until he attempts to alienate it. It is to be distinguished from a complete life interest subject to a condition which operates to defeat the interest before it attains its proper limit, such as a life interest subject to a condition against alienation. An attempt to limit an interest by a direct condition or proviso against alienation is void as is the forfeiture of an interest on bankruptcy. [8]

Some public policy controls apply even to determinable interests. A person cannot use the rules governing determinable interests to defeat the bankruptcy laws as regards his own property. [9] If X settles his own property on a determinable trust for himself, then on his bankruptcy his interest will vest in his trustee in bankruptcy [10] free from any liability to determination by subsequent events [11] ; in other respects, however, the provision for determination will be effective. [12] Had the settlement been made by X merely joining in the exercise of a joint general power of appointment in his own favour, his trustee in bankruptcy would have had no claim; for there would have been no settlement by X of property which was his own. [13]

Footnotes

1 *Saunders v Vautier (1841) 4 Beav. 115; affirmed Cr. & Ph. 240*. See para.29-029 below.

2 For the necessary formalities, see para.22-035 below.

3 *Brandon v Robinson (1811) 18 Ves. 429*; *Re Dugdale (1888) 38 Ch. D. 176*.

4 See para.21-004 above.

5 *Rocheford v Hackman (1852) 9 Hare 475* at 479. Offshore statutes have modified this principle and now permit certain restraints on the alienation of trust interests to protect beneficiaries' entitlements: see G. Thomas, Ch.6 in J. Glasson and G. Thomas (eds), The International Trust (Jordan Publishing Ltd, 2006).

6 See para.22-004 below.

7 See para.22-006 below.

8 *Rocheford v Hackman (1852) 9 Hare 475* (life interest); *Re Leach [1912] 2 Ch. 422* (fee simple); *Trusts of the Scientific Investment Pension Plan [1998] 3 All E.R. 154* (accrued entitlements under pension scheme).

9 See the cases collected in *Mackintosh v Pogose [1895] 1 Ch. 505*.

10 *Re Brewer's Settlement [1896] 2 Ch. 503*; *Re Burroughs-Fowler [1916] 2 Ch. 251*.

11 *Re Burroughs-Fowler [1916] 2 Ch. 251*.

12 *Brooke v Pearson (1859) 27 Beav. 181* (voluntary alienation); *Re Detmold (1889) 40 Ch.D. 585* (seizure in execution); *Re Johnson Johnson [1904] 1 K.B. 134*.

13 *Re Ashby [1892] 1 Q.B. 872*.

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2. - Discretionary Trusts

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 1. - Varieties of Express Trust

2. - Discretionary Trusts

(a) The trustee's duty.

22-004 In a discretionary trust, the beneficiaries have no right to any defined part of the income or capital of the trust fund. The settlor defines a class of beneficiaries and gives the trustee a power to select which of them should receive appointments from the fund and what the amount should be.[14] The discretionary trust differs from a power of appointment in that the trustee must exercise his power of selection. He must generally distribute the income as and when it becomes available.[15] If he does not make the distribution at the due time, the power is not extinguished so that he can distribute later.[16] He has no power to bind himself for the future.[17]

(b) Nature of the beneficiary's interest.

22-005 The beneficiary's only right is to be considered for the exercise of the trustee's discretion and to compel due administration of the trustee's duties.[18] The beneficiary has no more than a hope that the discretion will be exercised in his favour.[19] Except for any money that the trustee has already appointed to the beneficiary,[20] he therefore has no interest that his creditors or assigns could claim against.[21] His interest is not alienable to another person.

But the beneficiary's interest is nonetheless proprietary in character since it gives him a stronger equitable title to the trust property than any third party with no entitlement to it at all. He would have a sufficient interest to trace and recover any money that the trustee transferred in breach of trust.[22] But his only right would be to compel the third party to reinstate the misapplied money to the trust fund. He could not require the third party to pay the money directly to him since that would give the beneficiary a stronger right against the third party than he had against the trustee himself.[23]

Taken collectively, all the potential beneficiaries of the trust are absolutely entitled to the trust property since the trustee has a duty to distribute it to one or other of them. If all the potential beneficiaries of the trust are sui juris, they can agree to direct the trustee about how he should dispose of the trust assets.[24]

Footnotes

14 *McPhail v Doulton [1971] A.C. 424*.

15 But see *Re Gulbenkian's Settlements (No.2) [1970] Ch. 408* (postponement in special circumstances justified). See generally *A. J. Hawkins (1967) 31 Conv. (N.S.) 117*.

16 *Re Locker's ST [1977] 1 W.L.R. 1323*.

17 *Re Vestey's Settlement [1950] 2 All E.R. 891* at 895 (not reported on this point at *[1951] Ch. 209*).

18 He may surrender his right to be considered: *Re Gulbenkian's Settlements (No.2) [1970] Ch. 408*.

19 The preceding words in this paragraph were cited with approval in *Re Munro's ST [1963] 1 W.L.R. 145* at 148 per Wilberforce J; and in *Gartside v IRC [1968] A.C. 553* at 574, per Salmon LJ (the decision in the latter case was reversed but not on grounds affecting these principles: see *[1968] A.C. 553* at 614, per Lord Wilberforce).

20 *Re Smith, Public Trustee v Aspinall [1928] Ch. 915* at 919.

21 *Twopeny v Peyton (1840) 10 Sim. 487*.

22 *Gartside v IRC [1968] A.C. 553* at 617; *Sainsbury v IRC [1968] A.C. 553* at 617. See generally *R.C. Nolan (2006) 122 L.Q.R. 232 at 256–257*. The analogy is with the beneficiary of a deceased estate in the course of administration: *Commissioner of Stamp Duties (Queensland) v Livingston [1965] A.C. 694*.

23 *Target Holdings Ltd v Redferns [1996] A.C. 421*; *Re Diplock [1948] Ch. 465*; and see below para.30-015.

24 *Re Smith, Public Trustee v Aspinall [1928] Ch. 915*; applying the rule in *Saunders v Vautier (1841) 4 Beav. 115, affirmed Cr. & Ph. 240*; and see below para.29-029.

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3. - Protective Trusts

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Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 1. - Varieties of Express Trust

3. - Protective Trusts [25]

(a) General.

22-006 The term "protective trust" is usually applied to trusts which combine the advantages of determinable interests with those of discretionary trusts. Under such a trust, the interest of the principal beneficiary is made determinable on bankruptcy, attempted alienation and the like. At that point a discretionary trust arises in favour of the principal beneficiary and certain other persons. [26] Such trusts may, of course, be created by setting out the terms expressly, but since 1925 it has become increasingly common to take advantage of s.33 of the Trustee Act 1925.

(b) Trustee Act 1925 s.33.

22-007 Under this section, certain terms are implied in any trust if any income is directed to be held "on protective trusts" for the benefit of any person ("the principal beneficiary") for the period of his life [27] or for any less period. *Income* includes an annuity or other periodical income payment, [28] and also uncertain income, such as income paid from time to time under a discretionary trust. [29] The section does not validate any trust which would otherwise be invalid, [30] but merely avoids the necessity of setting out the trusts in detail.

In such a case, subject to any modification by the instrument creating the trust, [31] during this period ("the trust period") the income is held:

(a)upon trust for the principal beneficiary until he:

> "does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, [32] whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof" ;

and thereafter;

(b)upon trust for the application thereof for the maintenance or support or otherwise for the benefit of all, or any one or more, of the following persons;

(i)the principal beneficiary and his or her spouse and issue; or if there is no spouse or issue;

(ii)the principal beneficiary and the persons who would be entitled to the trust property or the income if the beneficiary were dead;

as the trustees in their absolute discretion [33] think fit. [34] An appointment on protective trusts made under a special power of appointment will normally be invalid. It not only delegates authority to the trustees [35] but also authorises payment (under the second limb of the protective trusts) to persons who will usually not be objects of the power. [36] Further, a direction to hold income "on protective trusts" for a class at the discretion of the trustees does not bring s.33 into effect as no one is named as the principal beneficiary. A simple discretionary trust is created. [37]

(c) Operative and inoperative events.

22-008 A variety of events may determine the primary beneficiary's interest and bring the discretionary trust into existence. These include the bankruptcy of the principal beneficiary, even if this is already existing when the trust first takes effect [38]; the execution by the principal beneficiary of a deed of variation giving up his right to part of the income in certain events [39]; the sequestration of the income [40]; the impounding of part of the income by the trustees to make good sums paid to the principal beneficiary in breach of trust [41]; and the vesting of a right to income in the Custodian of Enemy Property under the Trading with the Enemy Act 1939. [42]

Events that will not cause the primary beneficiary's interest to determine include: an assignment merely of income already accrued in the hands of the trustees [43]; or of income which never materialises [44]; nor if an attorney or agent is appointed merely to receive the income on behalf of the principal beneficiary [45]; nor if an order of the court is made varying the effect of the trusts [46]; but such an order will not prevent subsequent events (e.g. some act or omission by the principal beneficiary) from causing a determination. [47] However, an order which extinguishes the rights of the principal beneficiary "as if he were already dead" brings to an end the discretionary trusts as well as the determinable interest. [48] When the discretionary trust arises, there is no apportionment of the income then accruing due, and the trustees cannot withhold any part of the income subsequently received, but are bound (within reasonable limits) to apply the whole of it for the purposes named. [49]

Footnotes

25 For surveys of a ways of protecting trust assets from the claims of creditors, see M. O'Sullivan, Asset Protection (2000); G. Thomas, Ch.6 in J. Glasson and G. Thomas (eds), The International Trust (2006).

26 For the possible use of protective trusts in series, see the comment at *(1958) 74 L.Q.R. 182* on *Re Richardson's WT [1958] Ch. 504*.

27 See *Re Wittke [1944] Ch. 166*.

28 Trustee Act 1925 s.33(1).

29 *Re Isaacs (1948) 92 S.J. 336*.

30 Trustee Act 1925 s.33(3); consider, e.g. a settlement by a person on himself in an attempt to avoid the bankruptcy laws; para.22-058.

31 Trustee Act 1925 s.33(2.).

32 But for these words, such an advance would perhaps work a determination: *Re Stimpson's Trusts [1931] 2 Ch. 77*. Sed quaere: see *Re Hodgson, Weston v Hodgson [1913] 1 Ch. 34*. *Re Shaw's Settlement [1951] Ch. 833*; *Re Rees, Lloyds Bank Ltd v Rees [1954] Ch. 202*. For the statutory power see below para.28-036.

33 Consider *Re Powles [1954] 1 W.L.R. 336*.

34 Trustee Act 1925 s.33(1).

35 See above para.11-021.

36 *Re Boulton's ST [1928] Ch. 703*; *Re Morris's ST [1951] 2 All E.R. 528*; *Re Hunter's WT [1963] Ch. 372*.

37 See *Re Trafford's Settlement [1985] Ch. 32*.

38 See *Trappes v Meredith (1871) 7 Ch. App. 248*; *Re Public Trustee v Evans [1920] 2 Ch. 304*; *Re Walker, Public Trustee v Walker [1939] Ch. 974*; and see *Re Forder [1927] 2 Ch. 291*, on the effect of an annulment of the bankruptcy.

39 *Re Dennis's ST [1942] Ch. 283*; see *(1942) 58 L.Q.R. 312*.

40 *Re Baring's ST [1940] Ch. 737*.

41 *Re Balfour's Settlement [1938] Ch. 928*; and, see *Re Richardson's WT [1958] Ch. 504*; *Edmonds v Edmonds [1965] 1 W.L.R. 58* (orders of divorce court).

42 *Re Gourju's WT [1943] Ch. 24*. For further detail see the 31st edition of this work at para.20-54.

43 *Re Greenwood, Sutcliffe v Gledhill [1901] 1 Ch. 887*.

44 *Re Longman [1955] 1 W.L.R. 197* (dividend passed).

45 *Re Tancred's Settlement [1903] 1 Ch. 715*; *Re Oppenheim's WT [1950] Ch. 633*; and see *Re Westby's Settlement [1950] Ch. 296*.

46 *Re Mair [1935] Ch. 562* (under TA 1925 s.57); *General Accident Fire and Life Assurance Corp Ltd v IRC [1963] 1 W.L.R. 1207* (under JA 1925 s.192, subsequently Matrimonial Causes Act 1973 s.24).

47 *Re Salting [1932] 2 Ch. 57*.

48 *Re Allsopp's Marriage ST [1959] Ch. 81*.

49 *Re Gourju's WT [1943] Ch. 24*.

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4. - Pension Trusts

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Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 1. - Varieties of Express Trust

4. - Pension Trusts

(a) General.

22-009 A trust may be used to secure the benefits payable to the members of a pension scheme. The terms of the scheme are a complex mixture of trust and contract law. The members have the usual equitable rights to hold the scheme trustees accountable and to require the scheme to be administered according to its terms. [50] But the members also have contractual rights against their employer. Their entitlements under the scheme have been promised to them in their contracts of employment. Since pension schemes play an important social role in providing for people in their retirement, they are also subject to a greater degree of statutory control and regulatory oversight than other private trusts. [51] Much of the statutory control is mandatory, and cannot be excluded by the express provisions of the scheme.

(b) Defined benefit and defined contribution pension schemes.

22-010 Pension schemes may be either "defined benefit" or "defined contribution" schemes. [52] The difference depends on whether the members are promised any defined level of benefit from the scheme when they retire.

A defined benefit scheme combines a tripartite contract linking the employer, the members and the trustees with segregated fund of trust assets. [53] These are managed by the trustees to pay for the members' pension benefits. When members retire they have a mixed contractual and trust right to be paid a pension equal to a defined proportion of their salary. Most schemes now take the members' final salary as the base for calculating their pension. The proportion depends on the number of years of their pensionable service. The investment risk on the scheme assets is borne by the employer. The members are entitled to receive their full entitlements even if the scheme assets are insufficient to fund them and the employer bears the balance of cost of operating the scheme. If the scheme fails to meet its funding objectives, then the trustees and the employer must agree a recovery plan that will eventually bring it back into balance. [54]

With a defined contribution scheme (sometimes called a "money purchase scheme") the scheme rules do not define any particular level of benefit that the members are entitled to receive when they retire. The members' benefits depend on the investments which have been bought using the contributions made to the scheme. Since the members are not promised any defined level of benefit, there is a direct relationship between the value of the assets held in the members' account and the value of the scheme's liabilities to them. [55] The members bear the investment risk on the scheme assets. A defined contribution scheme cannot go into deficit so there is no balance of cost that the employer has a residual liability to fund.

(c) Comparison with donative trusts.

22-011 The main advantage of using a trust to hold pension scheme assets is to separate the scheme assets from the claims of the employer [56] and the fund manager's personal creditors. [57] The purpose of many of the rules of trust law is to facilitate the management of assets on behalf of others who own them beneficially. A trust is therefore well suited to delivering benefits under a pension scheme.

Unlike the beneficiaries of a traditional donative trust, the members of a pension scheme give consideration for the benefits promised them under the scheme by working for their employer. [58] This explains some of the differences between them and traditional donative trusts. For example, the trustees' general law duty of care in managing the scheme assets cannot be excluded by the scheme rules [59]; and the power of the employer or trustees to vary the terms of the scheme may be restricted so as to prevent them from reducing the value of the members' subsisting rights under the scheme. [60] The entitlements of members of a defined benefit scheme are partly guaranteed against the risk of the employer's insolvency. They may qualify for compensation from the Pensions Protection Fund if their pension scheme is in deficit when the employer becomes insolvent. [61]

Unlike a conventional settlor under a traditional donative trust, the employer keeps an active role in the administration of the scheme. It commonly nominates a proportion of the scheme trustees. [62] It may retain express powers under the scheme, such as the power to amend the scheme rules. It must exercise its powers in good faith with a view to avoiding serious damage to the relationship of confidence and trust between itself and the employees. [63]

For other purposes, some of the general rules of trust law apply to pension schemes without special modification. The trustees must exercise their discretions in good faith and for the proper purposes of the scheme as a whole. [64] They do not have a duty to treat the different classes of members equally. They may have regard to the employer's financial interests and its business reasons for setting up the pension scheme. [65] Under general trust law, pension trustees are under no greater duty to disclose their reasons for exercising their discretions than the trustees of donative trusts. [66]

The oversight of pension schemes by the Pensions Ombudsman sometimes has the consequence of modifying these general law standards. The Ombudsman is authorised to investigate complaints about "maladministration" in pension scheme. [67] The definition of "maladministration" is broader than the grounds of review that would be available to a member under the general law. [68] The Pensions Ombudsman may require trustees to disclose their reasons. [69]

Footnotes

50 See para.21-003 above.

51 The main controls are provided in the Pension Schemes Act 1993, the Pensions Act 1995, the Pensions Act 2004, and in the statutory instruments made under them. For oversight by the Pensions Ombudsman, see Pension Schemes Act 1993 Pt X; by the Pensions Regulator, see Pensions Act 2004 Pt 1; and by the Pensions Protection Fund, see Pensions Act 2004 Pt 2.

52 See generally *Aon Trust Corp Ltd v KPMG [2005] EWCA Civ 1004; [2006] 1 All E.R. 238* at [26]–[32].

53 *Harris v Shuttleworth [1992] O.P.L.R. 151* (HHJ Moseley QC); varied on different grounds not affecting this point: *[1994] I.R.L.R. 547 CA*.

54 Pensions Act 2004 ss.222–223, 226.

55 *Aon Trust Corp Ltd v KPMG [2005] EWCA Civ 1004; [2006] 1 All E.R. 238* at [167], per Jonathan Parker LJ.

56 Investment of the pension assets in the employer's business is severely restricted: Pensions Act 1995 s.40; Occupational Pension Schemes (Investment) Regulations 2005 (SI 2005/3378) regs 11–16.

57 See para.21-006 above.

58 *Imperial Group Pension Trust v Imperial Tobacco Ltd [1991] 1 W.L.R. 589* at 597.

59 Pensions Act 1995 s.33(1).
60 Pensions Act 1995 ss.67–67H.
61 Pensions Act 2004 Pt 2.
62 But at least one third of trustees must now be nominated by the scheme members: Pensions Act 2004 s.241(1), (2).
63 *Imperial Group Pension Trust v Imperial Tobacco Ltd [1991] 1 W.L.R. 589* at 597.
64 *Edge v Pensions Ombudsman [2000] Ch. 602*
65 *Edge v Pensions Ombudsman [2000] Ch. 602* at 627; upholding *[1998] Ch. 512* at 537.
66 *Wilson v Law Debenture Trust Corp [1995] 2 All E.R. 337*.
67 Pension Schemes Act 1993 s.146(1)(a).
68 *Miller v Stapleton [1996] 2 All E.R. 449* at 462.
69 *Allen (Determination of the Pensions Ombudsman) [2002] P.L.R. 333*.

Section 2. - Certainty in Defining the Essential Elements of the Trust

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Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 2. - Certainty in Defining the Essential Elements of the Trust

22-012 A private express trust arises through the settlor's declaration of an intention to enter into a transaction that would, by the standards of the general law, be recognised as creating a trust. If the trust is to operate, its essential elements must be defined clearly enough to enable the trustee, or the court in default, to execute the trustee's duties. [70]

There are therefore three main ways in which an express trust must be sufficiently certain [71] :

(i)the settlor must intend to impose legally enforceable duties of trusteeship on the owner of the property;

(ii)the subject-matter of the trust must be certain; and

(iii)the objects or persons intended to have the benefit of the trust must be certain.

Footnotes

70 *Re Gulbenkian [1970] A.C. 508* at 524.

71 *Knight v Knight (1840) 3 Beav. 148* at 173.

1. - Intention to Create Trust

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Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 2. - Certainty in Defining the Essential Elements of the Trust

1. - Intention to Create Trust

(a) Construction of the settlor's intention.

22-013 No particular form of expression is necessary for the creation of a trust if, on the whole, it can be gathered that a trust was intended. [72] It is unnecessary for the settlor to use the word "trust": the court construes the substance and effect of the words used, against the background of any relevant surrounding circumstances. [73] Indeed, the settlor need not even understand that his words or conduct have created a trust if they have this effect on their proper legal construction. [74] Conversely, it is not enough that the settlor describes the transaction as a trust if on its proper construction the transaction was not intended to operate as a trust. [75]

The settlor's intention must be clear on two main questions: (1) that they intended the trustee to owe legally enforceable duties rather than duties of a merely social or moral nature; (2) that if they intended to create a legal relationship, it was to involve trust duties as distinct from some kind of legal relationship, such as a simple relationship of debtor and creditor.

(b) Trusts and duties arising from precatory words.

22-014 A testator may give property to another in his will using words of wish, hope, desire or confidence that the donee will dispose of the property in a particular way. The question is whether these "precatory words" only impose a social or moral obligation on the donee to comply with the testator's wishes, or whether they are intended to impose the legal duties of trusteeship.

In the past it was common for the court to construe precatory words in a testamentary bequest as imposing a legally enforceable trust. [76] This practice of construction arose from a feature of the old law of inheritance. Any personal estate that the testator did not expressly dispose of by will was treated as belonging beneficially to his executor. To avoid this result, the courts construed precatory words as imposing a trust on the donee. But by the time of *Lambe v Eames* [77] in 1871, after the reform of the inheritance laws, [78] this practice was generally reversed. It was recognised that the imposition of a trust on the residuary beneficiary of a will, where none was probably intended, often caused hardship. [79]

Since *Lamb v Eames* the strong tendency has been against construing precatory words as creating a trust. [80] The question now is whether the instrument as a whole indicates an intention to create a trust, unaided by any presumption from the precatory words. [81] It is difficult to reconcile this approach (which seems correct in principle) with the view expressed *Re Steele's Will Trusts*. [82] That case held that if there is a reported decision that a particular form of wording creates a trust, [83] then the use of identical expressions today will also create a trust. This would be so even if the earlier case was decided before the modern view of precatory words developed. The solution is simple: the draftsman should state expressly in the will that the precatory words are not to create any trust or legally binding obligation.

(c) Trust behind a contract debt.

22-015 If A pays money to B, B may become a debtor at law for the amount of money owed to A. It is a separate question whether B holds the legal title to a fund of money on trust for A. If so, then A may claim as the beneficiary of a trust to recover the money in specie if B becomes insolvent. The question is whether the court will construe the transaction as indicating that B intended to declare himself a trustee for A, or that A intended B to hold as a trustee upon receipt of the money.

It has been said that there is a "general disinclination of the courts to see the intricacies and doctrines connected with trusts introduced into everyday commercial transactions". [84] The imposition of a trust, without strong evidence of an intention to declare one, would upset the usual proportionate distribution of assets in insolvency. So a simple advance payment of money for a particular purpose is generally not enough to indicate that the recipient was intended to hold on trust for the payer. It has been held that the relationship between a wine merchant and a customer did not create a trust of the moneys that the customer provided for a wine purchase. [85] Nor were moneys paid to a bank in anticipation of a refinancing deal which did not materialise held on trust. [86] (The disappointed payer may have a personal claim for failure of consideration but that does not give rise to a constructive trust over the proceeds of his payment.) [87]

If it can be shown that either party intended that the recipient should not have the free disposal of the money and that it should be applied solely for a specified purpose, then it may be impressed with a trust. [88] An intention that the recipient was to hold the money unmixed as a separate fund is strong evidence to this effect. [89] This rule is the foundation of the so-called "*Quistclose* Trust" considered later. [90]

In insolvency, it may be important to know whether the payer or the recipient had the relevant intention to declare a trust of the funds that created the debt. A recipient's declaration of trust for the payer may amount to an unlawful preference in the payer's favour. [91] The trust would be voidable as against the person administering the recipient's insolvent estate.

Footnotes

72 *Page v Cox (1852) 10 Hare 163* at 169, per Turner VC; *Dipple v Corles (1853) 11 Hare 183* at 184; *Re Kayford Ltd [1975] 1 W.L.R. 279* at 282; *Re Multi Guarantee Co Ltd [1987] B.C.L.C. 257*; *Re Branston & Gothard Ltd [1999] Lloyds Rep. Banking 251*; *TXU Europe Group Plc (In Administration) [2004] Pens. L.R. 175*; *Re Farepak Food and Gifts Ltd (In Administration) [2006] EWHC 3272 (Ch); [2008] B.C.C. 22*.

73 For example *Bath and North East Somerset Council v HM Attorney General [2002] EWCA 1623; [2002] W.T.L.R. 1257*.

74 *Paul v Constance [1977] 1 W.L.R. 527*.

75 See para.22-069 below.

76 For example *Harding v Glyn (1739) 1 Atk. 469; 5 Ves. 501*; *Palmer v Simmonds (1854) 2 Drew. 221*.

77 *Lambe v Eames (1871) 6 Ch. App. 597*.

78 Executors Act 1830 (11 Geo 4 & 1 Will 4, cap 40).

79 *Lambe v Eames (1871) 6 Ch.App. 597* at 599, per James LJ.

80 See *Re Adams and the Kensington Vestry (1884) 27 Ch. D. 394*; *Re Diggles (1888) 39 Ch. D. 253*; *Re Hamilton, Trench v Hamilton [1895] 2 Ch. 370*; *Re Williams, Williams v Williams [1897] 2 Ch. 12*; *Hill v Hill [1897] 1 Q.B. 483*; *Re Oldfield [1904] 1 Ch. 549*; *Re Conolly [1910] 1 Ch. 219*; *Re Hill, Public Trustee v O'Donnell [1923] 2 Ch. 259*; *Re Johnson, Public Trustee v Calvert [1939] 2 All E.R. 458* ("request"); *Re Stirling [1954] 1 W.L.R. 763*. To the contrary: *Re Burley [1910] 1 Ch. 215*; *Re Jevons (1911) 56 S.J. 72* (contrast *Re Green, Shears v Lloyds Bank Ltd [1935] W.N. 151*); *Re Blackwood [1953] N.I. 32* ("in accordance with my wishes").

81 *Re Hamilton, Trench v Hamilton [1895] 2 Ch. 370* at 373, per Lindley LJ.

82 *Re Steele's Will Trusts [1948] Ch. 603*.

83 The earlier decision in point was *Shelley v Shelley (1868) L.R. 6 Eq. 540*.

84 *Neste Oy v Lloyds Banks Plc [1983] 2 Lloyds Rep. 658* at 665; and see *Westdeutsche Bank v Islington LBC [1996] A.C. 669* at 704.

85 *Re Ellis, Son & Vidler [1994] B.C.C. 532*.

86 *Guardian Ocean v Banco do Brasil [1994] 2 Lloyd's Rep. 152*.

87 *Re Goldcorp Exchange Ltd [1995] 1 A.C. 74*.

88 *Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] A.C. 164* at [73]–[76].

89 *Henry v Hamilton [1913] 2 K.B. 515*; *Cohen v Cohen (1929) C.L.R. 91*; *Re English & American Insurance [1994] 1 B.C.L.C. 649*; *Re Fleet Disposal Services [1995] 1 B.C.L.C. 345*; *Re Farepak Food and Gifts Ltd (In Administration) [2006] EWHC 3272 (Ch); [2008] B.C.C. 22*.

90 See para.25-033.

91 *Re Farepak Food and Gifts Ltd (In Administration) [2006] EWHC 3272 (Ch); [2008] B.C.C. 22*; casting doubt *Re Kayford [1975] 1 W.L.R. 279*.

2. - Definition of Subject-Matter of Trust

22-016 The trust instrument must define with sufficient certainty the assets which are to be held on trust and the kind of interest that the beneficiaries are to take in them. The definition will be sufficiently certain if it enables the trustee or court to execute the trust according to the settlor's intentions.

(a) Trust assets.

22-017 The assets to be held on trust must be certain. As a necessary minimum, the assets must exist as a specific fund. A duty to pay a sum of money cannot give rise to any trust over the payer's assets if the payer was not required to discharge the liability to pay from any particular fund of money. [92] If the settlor declares that only part of an entire fund of assets is to be held on trust, they must identify that part clearly. So a declaration of trust as to "the bulk of my said residuary estate" cannot be executed as a trust. [93] The intended trustee cannot ascertain what part of the residuary estate he is free to dispose of as beneficial owner and what part he must account for as a trustee. The problem may be cured if the wording of the gift is general enough to allow the court to apply the maxim "[e]quality is equity" to ascertain the parts of the entire fund bound by the trust. [94] A trust creating proportionate beneficial shares over an entire fund is sufficiently certain although it may not identify the precise assets in the fund. [95] The trustee's duties relate to the whole fund.

(b) Trust of fungible property.

22-018 More problematic is an inter vivos trust [96] over a certain number of unascertained units in a larger fund of fungible property. Examples are a trust of 50 out of the settlor's 950 shares in a company, [97] or a certain number of unascertained bottles of wine contained in a larger bulk of similar bottles. [98] The trust of the shares has been held valid on the questionable ground that, since the shares are intangible property, there were no relevant differences among them to justify specifying the shares that were subject to the trust. [99] The result may be justified if it was the settlor's intention that the trustee should maintain a minimum balance of 50 shares in the fund. The shares subject to the trust could be identified by a process of exhaustion. [100] In principle, the same construction might also apply to a trust of tangible fungibles, such as bottles of wine. But the possibility that the bottles might have relevant differences among them would make this construction of the settlor's intention unlikely. [101]

(c) Beneficial interest.

22-019 The beneficiaries' interests in the fund must be certain. Thus, if a testator devises all his houses to trustees but leaves it uncertain which of the houses, or how many, each beneficiary is to have, the trust fails. [102] But the use of general words defining the value of a beneficiary's interest (such as a "reasonable income") will not cause the trust to fail if the court can use extrinsic evidence to ascertain the amount the settlor would have intended. [103] Similarly, it may be enough that the assets bound by the trust will be specifically ascertained in the future provided that the formula for identifying them is clearly defined when the settlor creates the trust. The beneficiary's interest "floats" in the meantime. [104]

In some cases, the uncertainty in the beneficiary's interest is only apparent. So a discretionary trust for distribution within a class of objects does not involve any uncertainty in the beneficial interest. This is so despite the uncertainty about what asset, if any, may be appointed to the object. The beneficiary's only right is to be considered for the exercise of a discretion in his favour. [105] There may also be uncertainty about the interest of one beneficiary but not another. If the whole of the beneficial interest is given to one beneficiary, subject to the right of other beneficiaries to an uncertain part of it, then the direction as to the uncertain part fails and leaves the first beneficiary entitled to the whole. [106]

(d) Beneficial interest or charge.

22-020 There is a fine line between a trust of a certain amount of money in a larger fund and a charge for that amount secured on the fund. The distinction is important in insolvency. If the interest is characterised a charge over the assets of a company, it will be void against a liquidator, administrator or creditor of the company. [107] Where there is no underlying contract debt between the alleged trustee and beneficiary, then the characterisation of the claimant's interest in the fund as a beneficial interest under a trust is relatively straightforward. [108] Where the claimant's interest secures an underlying debt and is defeasible on payment of that debt, then it may be more natural to characterise it as a charge. [109] But where by constituting the alleged trust over the fund of money, the debtor discharges his underlying debt to the creditor/beneficiary, then the court may characterise the arrangement as a trust rather than a charge to secure the debt. [110]

Footnotes

92 *Fortex Group v Macintosh [1998] 3 N.Z.L.R. 171*. But the benefit of a debt can be the subject-matter of a trust as where funds in a bank account are held on trust. A payment of money received by one who is already a trustee may become immediately subject to trust even before they have transferred it to a specific fund: *Lehman Brothers International Europe (In Administration) v CRC Credit Fund Ltd [2012] UKSC 6; [2012] Bus L.R. 667*.

93 *Palmer v Simmonds (1854) 2 Drew. 221*. Contrast *Bromley v Tryon [1952] A.C. 265*.

94 *Salusbury v Denton (1857) 3 K. & J. 529*.

95 *Re London Wine Co (Shippers) Ltd [1986] P.C.C. 121* at 137–138.

96 The question is less problematic in a testamentary trust since an executor has the power to appropriate assets in the estate to the bequests in the will: cf. *Re Clifford [1912] 1 Ch. 29* discussed in *Hayton (1994) 110 L.Q.R. 335 at 338*.

97 *Hunter v Moss [1994] 1 W.L.R. 452*.

98 *Re London Wine Co (Shippers) Ltd [1986] P.C.C. 121*.

99 *Hunter v Moss [1994] 1 W.L.R. 452*; *Re Harvard Securities [1997] 2 B.C.L.C. 369*; *Re CA Pacific Finance Ltd [2000] 1 B.C.L.C. 494*. See also *Hayton (1994) 110 L.Q.R. 335*; *McKendrick (1994) 110 L.Q.R. 509*; *[1994] L.M.C.L.Q. 449*; *Worthington [1999] J.B.L.1*.

100 *White v Shortall [2006] NSWSC 1379; (2006) 206 F.L.R. 254* at [210]–[213]; affirmed on other grounds: *[2007] NSWCA 372*.

101 It would also conflict with the rules for the passing of legal title in sales of unascertained goods: *Re Goldcorp Exchange Ltd [1995] 1 A.C. 74*.

102 See *Boyce v Boyce (1849) 16 Sim. 476*; and see *Re Moore, Prior v Moore [1901] 1 Ch. 936*.

103 *Re Golay's Will Trusts [1965] 1 W.L.R. 969*.

104 *Birmingham v Renfrew (1936) 57 C.L.R. 666*; *Ottaway v Norman [1972] Ch. 698*.

105 See para.22-005 above.

106 *Curtis v Rippon (1820) 5 Madd. 434*; *Lassence v Tierney (1849) 1 Mac. & G. 551*; *Palmer v Simmonds (1854) 2 Drew. 221*; *Hancock v Watson [1902] A.C. 14*.

107 Companies Act 2006 ss.860, 874.

108 For example *Hunter v Moss [1994] 1 W.L.R. 452*. Since the claimant is the beneficial owner of the amount, they would generally be entitled to their share of any interest accruing on it unless settlor had a different intention: *Kauter v Hilton (1953) 90 C.L.R. 86*.

109 *Tatung (UK) Ltd v Galex Telesure Ltd (1989) 5 B.C.C. 325* at 333; *Re Weldtech Equipment Ltd [1991] B.C.C. 16* at 17; *Compaq Computer Ltd v Abercorn Group Ltd [1991] B.C.C. 484* at 495.

110 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In Liquidation) [2000] HCA 25; (2000) 202 C.L.R. 588* at [33]–[47].

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3. - Definition of Objects of Trust

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Mainwork

Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 2. - Certainty in Defining the Essential Elements of the Trust

3. - Definition of Objects of Trust [111]

22-021 A trust will fail if its beneficiaries or objects are uncertain. It must be possible to ascertain the beneficiaries who have the standing to enforce the trustee's duties under the trust. The test for certainty therefore varies according to the kind of trust at issue and the nature of the duties owed by the trustee. In considering whether the objects are sufficiently certain, a distinction is drawn between "conceptual" uncertainty on the one hand and "evidential" or "factual" uncertainty on the other. Conceptual uncertainty refers to the difficulty of construing the trust instrument to elicit the settlor's intentions about which objects they intended to benefit from the trust. Evidential or factual uncertainty refers to the difficulty of proving whether a particular person does in fact belong to the class of objects defined in the trust instrument. [112]

(a) Fixed trust.

22-022 A fixed trust for equal division of a fund cannot be administered unless the trustee can ascertain the maximum number of objects of the trust. The trust would fail if the words defining the class of objects were conceptually uncertain or if the evidence was not available to allow all the beneficiaries to be identified. [113] So in a trust for equal division among "my old friends", both "old" and "friends" are words with so many shades of meaning that it is impossible to say whom the settlor intended to include. The trust is void for uncertainty. [114] But the same words would not be fatal if the settlor intended to create a fixed trust of a series of individual gifts where the burden was on each potential object to prove that they satisfied the condition for taking the gift. [115] It would be unnecessary to identify all potential members of the class before the gifts took effect. The court generally leans against holding a trust or any other provision void for uncertainty [116] but it cannot impose a construction on the words used regardless of the settlor's intentions. [117]

(b) Discretionary trust.

22-023 Where the trustee has a discretion to appoint within a class of potential objects, the trust will only fail if the words defining the class of objects are conceptually uncertain. The meaning of the words must be clear enough for it to be said of any given individual whether they would or would not be a member of the class. [118] It does not matter that every potential member cannot in fact be identified by evidence, [119] since a discretionary trustee need not identify every potential object of the trust before they make appointments. His only duty is to make an adequate survey of the class before he begins the selection process. [120] This is the same rule as applies to fiduciary powers of appointment. [121]

The test for ascertaining whether any given individual falls within the class is applied generically rather than to particular individuals. It is not enough to make the trust valid that one person would fall within any conceivable meaning that could be

attached to the words defining the class of objects. The trustee's duty is to survey the entire field, not simply to consider the claims of the small group of persons who may be clearly within the class of potential objects. [122]

(c) Relevance.

22-024 The legal tests for certainty of objects are now much diminished in their relevance and can be avoided by careful drafting of the trust instrument. A settlor who wanted to establish a trust for his "old friends" would nowadays establish a primary trust for a small class of potential objects with a power to add beneficiaries to it. [123] In exercising the power the trustee could be guided by a letter of wishes from the settlor, which might indicate a preference for "old friends". [124] Since the letter is not legally binding, the arrangement would not fail for uncertainty.

Footnotes

111 See *J.W. Harris (1971) 87 L.Q.R. 31*; *C.T. Emery (1982) 98 L.Q.R. 551*.

112 *Re Gulbenkian [1970] A.C. 508* at 519; *McPhail v Doulton (the Baden case) [1971] A.C. 424* at 457 (taking "all the residents of Greater London" as an example); *Brown v Gould [1972] Ch. 53* at 57 (a summary); *Re Baden's Deed Trusts (No.2) [1973] Ch. 9* ("relatives or dependants"); *Re Beckbessenger [1993] 2 N.Z.L.R. 362*.

113 *Re Gulbenkian [1970] A.C. 508* at 524. But the trust would not fail if all the whereabouts of known beneficiaries could not be ascertained. The trustee would pay the share of the unascertained beneficiary into court: *Re Gulbenkian*.

114 *Brown v Gould [1972] Ch. 53* at 57; *Re Gulbenkian [1970] A.C. 508* at 524. But see *L. McKay (1974) 38 Conv. (N.S.) 269*. The trust would not fail if one object, though proved by evidence to belong to the class, could not be located at the relevant time. The trustee would pay his share into court.

115 *Re Barlow's WT [1979] 1 W.L.R. 278*.

116 *Brown v Gould [1972] Ch. 53* at 57.

117 See *Re Baden's Deed Trusts (No.2) [1973] Ch. 9* at 21 (construction of "dependants").

118 *McPhail v Doulton [1971] A.C. 424* at 456; and see the divergences in *Re Baden's Deed Trusts (No.2) [1973] Ch. 9*, as to the meaning of this test.

119 *Re Gulbenkian [1970] A.C. 508* (power to appoint to a class including anyone employing X and anyone with whom X resides, whether in his house, in his company or under his care and control: valid); *McPhail v Doulton [1971] A.C. 424*; and *Re Baden's Deed Trusts (No.2) [1973] Ch. 9* (discretionary trust for staff and former staff of a company and their "relatives or dependants": valid); *Re Hay's ST [1982] 1 W.L.R. 202* (power to appoint to anyone except a handful of specified persons: valid).

120 *McPhail v Doulton [1971] A.C. 424*; overruling *IRC v Broadway Cottages Trust [1955] Ch. 20*. *Contrast P. Matthews [1984] Conv. 22*.

121 *Re Gulbenkian [1970] A.C. 508*.

122 *Re Gulbenkian [1970] A.C. 508* at 524. Quaere as to *Re Gibbard's WT [1967] 1 W.L.R. 42*.

123 *Re Manisty's Settlement [1974] Ch. 17*.

124 *Schmidt v Rosewood Trust Ltd [2003] 2 A.C. 709* at [35].

End of Document

4. - Failure of Certainty

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Mainwork

Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 2. - Certainty in Defining the Essential Elements of the Trust

4. - Failure of Certainty

22-025 The primary element in the trust is the asset that is to be its subject-matter. If this is not identified clearly enough, then the purported declaration of trust is a nullity. If that asset is sufficiently identified but the settlor's intention to create a trust over it is uncertain, then the person entitled to the asset holds it beneficially for himself and free of any trust.

If it is only the objects of the trust that are uncertain, then there is a resulting trust of the asset for the settlor. The settlor's intention that the holder of the asset was to take it as a trustee shows that he cannot have intended to give the holder a beneficial right to it. [125] A resulting trust also arises where there is uncertainty about the nature of a beneficiary's interest in the trust asset. But if a different beneficiary can establish a prior, valid, claim to the asset, then it will take effect and exclude the operation of a resulting trust. [126]

Footnotes

125 *Briggs v Penny (1851) 3 Mac. & G. 546* at 557, per Lord Truro LC.

126 This is suggested by analogy with *Palmer v Simmonds (1854) 2 Drew. 221*; *Hancock v Watson [1902] A.C. 14*.

1. - The Distinction

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Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 3. - Executed and Executory Trusts

1. - The Distinction

22-026 Although the objects of a trust must be certain, it is not essential that the instrument creating the trust should mark out precisely the interests which the objects are to take in the trust property. That can be done by a formal settlement prepared afterwards. For instance, an occupational pension scheme may be constituted in an interim trust deed, with the precise operation of the scheme only being provided later when the parties execute the scheme rules under the definitive trust deed. [127] Or when a husband and wife marry, they may agree that certain property would be settled on trust for them and their children without specifying the precise interests that each of them is to take. In these cases, although a valid trust is created, a further instrument is necessary to carry into effect the general intention expressed in the first instrument. The trust is said to be "executory". A trust is said to be "executed" when no further instrument is necessary but the trust is declared in its final form at the outset.

The expressions "executed" and "executory" are often misunderstood. They refer to the creation of the trust, not, as may be thought, to whether it has been completely performed. In a sense every trust is executory until it is fully performed. The test for determining whether it is executed or executory is, according to Lord St Leonards, [128] to ask whether the settlor has been his own conveyancer or draftsman, or whether he has left it to the court to make out from general expressions what his intention is.

Footnotes

127 For example *Davis v Richards & Wallington Ltd [1990] 1 W.L.R. 1511*.

128 *Egerton v Earl Brownlow (1853) 4 H.L.C. 1* at 210. And see *Sackville-West v Viscount Holmesdale (1870) L.R. 4 H.L. 543*.

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2. - Relevance of the Distinction

22-027 The relevance of the distinction between executed and executory trusts is now much diminished. [129] It once mattered to the proper approach to the construction of words of limitation in a trust instrument. With an executed trust, the court tended to take a stricter approach to the construction of words of limitation. With an executory trust, however, the court placed more weight on gathering the settlor's intention from the interim instrument than on the technical language that they used. [130] But this point ceased to be so important after the need to use words of limitation in creating a legal fee simple estate was abolished. [131] The use of marriage settlements, where executory trusts were once common, has declined in recent years.

The distinction is now mainly relevant in pension trusts. The question has arisen, for example, whether the rules of a pension trust were intended to be binding on the participating employers and members of the scheme before the parties executed the definitive trust deed. [132]

Footnotes

129 For more detail on the former relevance of the distinction, see the 31st edition of this work, paras 20-026–20-030.

130 *Glenorchy v Bosville (1733) Ca.t.Talb. 3*; *Sackville-West v Viscount Holmesdale (1870) L.R. 4 H.L. 543* at 565, per Lord Westbury; *Re Flavel's WT [1969] 1 W.L.R. 444*, where the intention was too vague.

131 Law of Property Act 1925 s.60.

132 The court's powers are not unlimited: see *Davis v Richards & Wallington Ltd [1990] 1 W.L.R. 1511* at 1532–1538, per Scott J.

1. - Need for Enforcement

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Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 4. - Enforcement of Trustee's Duties

1. - Need for Enforcement

(a) Accountability and enforcement.

22-028 The existence of legally enforceable duty to account is an irreducible element of trusteeship. [133] A trustee who was not liable to account to anyone for his dealings with the ownership of the trust assets would in substance be a beneficial owner of them. It follows that a trust is only valid if there is some legal person with standing to enforce the trustee's duty. Who that person should be varies from one kind of trust to another.

(b) Legal person as beneficiary.

22-029 The starting point in English law is that a private express trust is only valid if it has ascertained beneficiaries with legal standing to hold the trustee to account. Private trusts for carrying out abstract purposes are generally void since there is no person with standing to enforce them. They are sometimes known as trusts of "imperfect obligation" [134] : the trustee's obligations are only apparent since there is no one with a sufficient title to enforce them.

(c) Charitable trusts.

22-030 A charitable trust, however, is valid even though it is a trust for carrying out a purpose and not to confer benefits on a person with standing to enforce it. Since charitable trusts confer a public benefit, they are enforceable by the Attorney General and are subject to the supervision of the Charity Commission. [135]

Footnotes

133 *Morice v Bishop of Durham (1804) 9 Ves. 399 at 404–405; affirmed (1805) 10 Ves. 522*; *Re Astor's Settlement Trusts [1952] Ch. 534* at 541, 547; *Re Denley's Trust Deed [1969] 1 Ch. 373*. See also para.21-005 above.

134 See *Hunter v Bullock (1872) L.R. 14 Eq. 45*; *Dawson v Small (1874) L.R. 18 Eq. 114*.

135 See Ch.23.

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2. - Purpose Trusts

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Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 4. - Enforcement of Trustee's Duties

2. - Purpose Trusts

(a) Generally void.

22-031 A private purpose trust is generally void. The terms of such a trust would require the trustee to apply the fund for an abstract purpose rather than to confer benefits on a defined class of persons with standing to hold the trustee to account. They therefore fail in the core requirement that a trustee be accountable for his management of the trust property. For this reason, trusts to promote "good understanding, sympathy and co-operation between nations" [136] or for religious, benevolent, or public purposes [137] of a non-charitable kind have all been held invalid.

(b) Anomalous instances.

22-032 In some anomalous cases, the courts have upheld testamentary trusts limited in duration to the perpetuity period [138] for the maintenance of individual animals, [139] or a tomb. [140] In all these instances the obligations of the trustee are imperfect since there is no human beneficiary to enforce them, unless perhaps a residuary beneficiary would have standing to do so. [141] They may not be saved by being construed as mere powers to carry out the specified purpose, subject to a resulting trust in favour of the settlor, residuary legatee or next-of-kin. [142] In English law, the existence of these anomalous cases has not been treated as a reason for the wider recognition of other kinds of purpose trust. [143]

(c) Private purpose trust for beneficiaries.

22-033 A trust for a purpose may be valid if it is directly or indirectly for the benefit of legal persons and is framed so as to give those persons the standing to apply to the court to enforce the trustee's duties. [144] The persons for whose benefit the trust is designed must be ascertained or capable or ascertainment at any given time. [145] The duration of the trust must be limited to a perpetuity period. [146] There is a fine distinction between this kind of trust and a trust for an abstract purpose. As a minimum condition, the beneficiaries may need to be named individually or designated as an ascertainable class. [147]

A purpose trust for beneficiaries must be also distinguished from a standard trust where the beneficiaries take beneficial interests in the trust property. Where the trustee's duty is to apply the property for the stipulated purpose, the beneficiaries or their deceased estates lose any entitlement once that purpose has been fulfilled. [148] Nor could they direct the trustee to wind up the trust under the rule in *Saunders v Vautier*. [149] Also, when a person pays a fund of money to another and stipulates a purpose

that he is to hold it for (such as paying the recipient's creditors), his main intention may be that the recipient is not to have the free disposal of the money as a simple contract debtor. The effect may be to make the recipient a trustee to the settlor rather than a trustee for carrying out that purpose. This principle explains the operation of the so-called "*Quistclose* Trust". [150]

(d) Offshore jurisdictions.

22-034 Many offshore trust jurisdictions have relaxed the rule that a private trust must have a beneficiary. They have enacted statutory forms of private purpose trust where the right to hold the trustee to account and to sue for a breach of trust vests in a nominated "enforcer". [151] Where the trust does have beneficiaries, the enforcer's right may exist alongside or instead of the beneficiaries' rights to enforce the trustee's duties. This development reflects the policy in some jurisdictions that a trustee is sufficiently accountable even if his duties are not enforced by a beneficiary with a direct economic stake in the proper administration of the trust fund. [152] Purpose trusts are often used as part of debt securitisation structures and may be used to facilitate the sale of an income stream generated by a package of debts. [153]

Footnotes

136 *Re Astor's Settlement Trusts [1952] Ch. 534*.

137 See respectively *Leahy v Attorney General for New South Wales [1959] A.C. 457*; *Morice v Bishop of Durham (1804) 9 Ves. 399; affirmed (1805) 10 Ves. 522*; *R. v District Auditor, Ex p. West Yorkshire DC (1985) 26 R.V.R. 24*.

138 *Re Clifford (1911) 106 L.T. 14* (omitted from [1912] 1 Ch. 29); *Re Wightwick's WT [1950] Ch. 260*.

139 *Re Dean (1889) 41 Ch.D. 552*; *Pettingall v Pettingall (1842) 11 L.J. Ch. 176*.

140 *Re Hooper [1932] 1 Ch. 38*; *Mussett v Bingle [1876] W.N. 170* (£300 to be applied in erecting monument to first husband of testator's wife held good though gift of interest of £200 to maintain it was admittedly bad for perpetuity); and consider *Re Conner [1960] I.R. 67*.

141 *Re Thompson, Public Trustee v Lloyd [1934] Ch. 342*.

142 *IRC v Broadway Cottages Trust [1955] Ch. 20* at 36; *Re Endacott* at 246. The overruling of *IRC v Broadway Cottages Trust* by *McPhail v Doulton [1971] A.C. 424* (above para.22-023) does not affect this dictum: purpose trusts were not there under consideration.

143 *Re Astor's Settlement Trusts [1952] Ch. 534*.

144 *Re Abbott Fund Trusts [1900] 2 Ch. 326*; *Re Denley's Trust Deed [1969] 1 Ch. 373*.

145 *Re Denley's Trust Deed [1969] 1 Ch. 373* at 386.

146 *Re Denley's Trust Deed [1969] 1 Ch. 373* at 386.

147 *Re Ernst & Young v Central Guaranty Trust Co (No.2) [2004] ABQB 389; (2004) 7 I.T.E.L.R. 69*.

148 *Re Abbott Fund Trusts [1900] 2 Ch. 326*. cf. *Re Sanderson's Trust (1857) 3 K. & J. 497* at 503, per Wood VC; *Re Andrew's Trusts [1905] 2 Ch. 48*; *Re Osoba [1979] 1 W.L.R. 247* (purpose construed as a motive for the gift and not as creating a binding trust).

149 *Hiranand v Harilela (2004) 7 I.T.E.L.R. 450*; cf. *Re Skinner's Trusts (1860) 1 John & H 102*; *Re Bowes [1896] 1 Ch. 507*; *Re Lipinski's Will Trusts [1976] 1 Ch. 235* (purpose construed as a motive for the gift and not as creating a binding trust).

150 See para.25-033 below.

151 For example Trusts (Special Provisions) Act 1989 Pt II (Bermuda); Purpose Trusts Act 1996 (Isle of Man); Trusts Law (2001 Revision) Pt VIII (Cayman).

152 For comments, see P. Matthews, Ch.1 in A.J. Oakley (ed), Trends in Contemporary Trust Law (Oxford, 1996); *D.J. Hayton (2001) 117 L.Q.R. 96*.

153 *J. Langbein (1997) 107 Yale L.J. 165, 172–173*.

Section 5. - Formalities

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Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 5. - Formalities

22-035 In general, a declaration of trust over property is valid and enforceable even if it is made informally. An oral declaration of trust of personal property is fully effective provided that the settlor's intention is clear.[154] But statute has long required the observance of certain formalities in other cases. A distinction is drawn between the formalities for the initial creation of a trust and those needed to make an effective disposition of an interest under a trust already in existence.

Footnotes

154 *Benbow v Townsend (1833) 1 My. & K. 506*; *Re Kayford Ltd [1975] 1 W.L.R. 279*; *Paul v Constance [1977] 1 W.L.R. 527*.

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1. - Declarations of Trusts of Land

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Mainwork

Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 5. - Formalities

1. - Declarations of Trusts of Land

(a) Writing.

22-036 By the Law of Property Act 1925 s.53(1)(b) [155] :

> "a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will."

This provision regulates the creation of express trusts of land, whether freehold or leasehold, [156] but does not affect the creation or operation of resulting, implied or constructive trusts. [157] An unwritten declaration of trust is valid but unenforceable by the beneficiary against the trustee. [158]

The exception for resulting and constructive trusts is significant: resulting trusts arise by operation of law to give effect to a presumption about the informal intentions of the parties to a transaction. [159] And many informal transactions involving property or declarations of trust may become binding by operation of law as constructive trusts. [160] These give effect to the parties' intentions and prevent the party who has the legal title to the property from benefiting wrongfully by the informality of the transaction. In terms of intention, the distinction between express, resulting and constructive trusts may be fine. But it is relevant to the formalities that need to be complied with if each kind of trust is to be enforceable.

(b) Evidence.

22-037 It is not essential that an express trust within this provision should be declared by writing from the outset. It is enough if it can be proved by some writing signed by the proper party. The date of the writing is immaterial so long as it is in existence when an action is brought to enforce the trust. [161] To create a trust the declaration must amount to a present irrevocable declaration of trust, [162] and the writing must contain all its terms. [163] The person creating the trust need not declare it orally, or indeed use the word "trust". The test is similar to that used in interpreting a commercial contract: whether a reasonable person, with all the background knowledge available to the settlor, would read the written documents relied on as evidencing the creation of a trust. [164] Where a trust is being declared of land already held in trust, the writing must be signed by the beneficial owner, not by the trustee in whom the legal estate is vested. [165]

(c) Wills.

22-038 Where a trust is intended to take effect only on the death of the owner of the property, and to be revocable until then, it must be created by a will or codicil duly executed by the owner in accordance with the Wills Act 1837. [166] This statute applies to all forms of property.

(d) Fraud.

22-039 These statutory provisions were intended to prevent fraud, and the court has not allowed them to be used as "an engine of fraud". It would be a fraud for a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land as his own. A person claiming land conveyed to another may therefore prove by parol evidence that it was conveyed on trust for the claimant, and may obtain a declaration that the grantee is a trustee for him. [167] The trust is constructive and enforceable through s.53(1)(c). [168] The rationale of this kind of constructive trust is considered in a later chapter. [169]

Footnotes

155 Replacing the Statute of Frauds 1677 s.7. See *T.G. Youdan [1984] C.L.J. 306*.

156 *Forster v Hale (1798) 3 Ves. 696; affirmed (1800) 5 Ves. 308*. Trusts of copyholds, too, were within the Statute of Frauds 1677: *Withers v Withers (1752) Amb. 151*.

157 LPA 1925 s.53(2), replacing the Statute of Frauds 1677 s.8. See *Oughtred v IRC [1960] A.C. 206*; *Neville v Wilson [1997] Ch. 144*.

158 *Gardner v Rowe (1825) Sim. & St. 346; affirmed (1827–1828) 5 Russ. 258* (real property held on informal trust not available as part of trustee's bankrupt estate).

159 See Ch.25.

160 See Ch.24.

161 *Forster v Hale (1798) 3 Ves. 696*; *Randall v Morgan (1806) 12 Ves. 74*.

162 *Re Cozens [1913] 2 Ch. 478*.

163 *Smith v Matthews (1861) 3 De G. F. & J. 139*. It is enough that the trust property is reasonably identifiable by reference to the signed writings. It need not be expressly identified along with the other trust terms: *Ong v Ping [2017] EWCA (Civ) 2069; [2017] W.T.L.R. 1365*.

164 *Ong v Ping [2017] EWCA Civ 2069; [2017] W.T.L.R. 1365*.

165 *Tierney v Wood (1854) 19 Beav. 330*; *Kronheim v Johnson (1877) 7 Ch. D. 60*. And see *Dye v Dye (1884) 13 Q.B.D. 147*.

166 Wills Act 1837 s.9, as substituted by Administration of Justice Act 1982 s.17.

167 *Bannister v Bannister [1948] 2 All E.R. 133*; *Rochefoucauld v Boustead [1897] 1 Ch. 196*; overruling *Bartlett v Pickersgill (1759) 1 Eden 515*; *Neale v Willis (1968) 19 P. & C.R. 836*; *Gilmurray v Corr [1978] N.I. 99*; and see *Hodgson v Marks [1971] Ch. 892*, reversed in CA above on grounds not affecting this point. See *J.D. Feltham [1987] Conv. 246*; *T.G. Youdan [1988] Conv. 267*.

168 *Bannister v Bannister [1948] 2 All E.R. 133*; *Rochefoucauld v Boustead [1897] 1 Ch. 196*; overruling *Bartlett v Pickersgill (1759) 1 Eden 515*; *Neale v Willis (1968) 19 P. & C.R. 836*; *Gilmurray v Corr [1978] N.I. 99*; and see *Hodgson v Marks [1971] Ch. 892*, reversed in CA above on grounds not affecting this point. See *J.D. Feltham [1987] Conv. 246*; *T.G. Youdan [1988] Conv. 267*.

169 See para.26-009 below.

End of Document

2. - Dispositions of interests under Trusts

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Mainwork

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Chapter 22 - Private Express Trusts

Section 5. - Formalities

2. - Dispositions of interests under Trusts [170]

22-040 By the Law of Property Act 1925 s.53(1)(c) [171] :

> "a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will."

This provision differs from the preceding provision in many respects. It applies not merely to land but to all property; the signature of an agent authorised in writing suffices [172] ; and the disposition must actually be in writing, and not merely be evidenced by writing. The disposition may be in two or more interconnected documents, only one of which is signed. [173]

"Disposition" has a wider meaning than "grants or assignments", the corresponding phrase in the Statute of Frauds 1677. It includes a direction given by the beneficial owner of property to the trustees to hold the property upon trust for others. [174] In such a case, however, the details of the trusts need not be in writing, and may be proved by extrinsic evidence. [175] The statute does not apply where instead of a mere transfer of an equitable interest there is a transfer of the legal and beneficial interest made by the trustees on the oral direction of the beneficiary. [176] Nor, it seems, does it apply where there is a revocable nomination of a contingent death benefit under a pension fund. [177] Further, the statute does not apply to the exercise of an option given to trustees by the settlor over property held by nominees on a resulting trust for the settlor where the effect is to transfer the beneficial interest from the settlor to the trustees. [178] Clear words would be required if the requirements of s.53(1)(c) were to be overridden by subsidiary legislation. [179]

Changes in stamp duty legislation have made it less important for people dealing with interests under a trust to try to circumvent the effect s.53(1)(c) by entering into oral transactions. A document evidencing a voluntary transfer of property for no consideration is no longer subject to stamp duty. [180] So a person who wanted to make a gift of an interest under a trust would nowadays make a written assignment of it.

Footnotes

170 See *G. Battersby [1979] Conv. 16* and *B. Green (1984) 47 M.L.R. 383* for useful discussions.

171 Replacing the Statute of Frauds 1677 s.9.

172 Contrast contracts for the sale of land, where the signature of an agent orally authorised suffices: see Law of Property (Miscellaneous Provisions) Act 1989 s.2.

173 *Re Danish Bacon Co Ltd Staff Pension Fund Trusts [1971] 1 W.L.R. 248*.

174 *Grey v IRC [1960] A.C. 1*.

175 *Re Tyler, Graves v King [1967] 1 W.L.R. 1269*; but see at 1277, 1278, referring to *Re Rees, Williams v Hopkins [1950] Ch. 204* at 210.

176 *Vandervell v IRC [1967] 2 A.C. 291*. See *R.C. Nolan [2002] C.L.J. 169*.
177 *Re Danish Bacon Co Ltd Staff Pension Fund Trusts [1971] 1 W.L.R. 248* at 255, 256.
178 *Re Vandervell's Trusts (No.2) [1974] Ch. 269*.
179 *Halley v Law Society (2003) 6 I.T.E.L.R. 40*.
180 Finance Act 1985 s.82(1); Stamp Duty (Exempt Instruments) Regulations 1987 (SI 1987/516) reg.2, Sch.1.

End of Document

1. - Distinction Between Completely and Incompletely Constituted Trusts

22-041 An express trust is not constituted until the settlor has vested the trust property in the trustees. Until that happens, the general rule is that the trust is only a future possibility and the intended trustee's duties to the beneficiaries do not come into effect. A distinction is sometimes drawn between completely and incompletely constituted trusts. But this is something of a misnomer since it does not actually refer to different kinds of trust. Rather, it relates to whether the express trust that the settlor intended to create has come into existence at all.

An express trust may be completely constituted even when it is executory. A trust is executory, rather than executed, when the settlor has not completely defined the interests of the beneficiaries under it. [181] The status of a trust as completely or incompletely constituted depends on the vesting of the trust property in the trustee rather than on the completeness with which the settlor has defined the beneficiaries' interests.

Footnotes

181 See para.22-026 above.

2. - Volunteers

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Mainwork

Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 6. - Constitution of Trusts

2. - Volunteers

22-042 Equity's treatment of volunteers has influenced its rules on the constitution of trusts. They are relevant here since most traditional settlements of property on trust amount to gifts made by the settlor to the beneficiaries.

Once a trust is completely constituted, the beneficiaries can enforce it whether they have given value or are mere volunteers. If the trust is incompletely constituted, the outcome depends on whether the beneficiaries have given value. Beneficiaries who have given value can enforce the trust since the intended trustee would be in a position to compel the settlor to vest the trust property in him. The relevant maxim is that equity looks on that as done which has been agreed to be done.

But if the beneficiaries of the intended trust are volunteers, then they generally cannot enforce the trust or compel the settlor to complete the conveyance to the trustee. [182] As Lord Eldon LC said in *Ellison v Ellison* [183]:

> "If you want the assistance of the Court to constitute your cestui que trust, and the instrument is voluntary, you shall not have that assistance."

He added, however, that if there is a complete transfer of the property, "though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be inforced by this Court". [184]

This doctrine is well illustrated by *Jefferys v Jefferys*. [185] A father by voluntary deed conveyed certain freeholds and covenanted to surrender certain copyholds to trustees in trust for his daughters. Afterwards he devised the same freeholds and copyholds to his widow, and died without having surrendered the copyholds in pursuance of his covenant. The daughters then sought to have the trusts of the deed carried into effect and to compel the widow to surrender the copyholds to which she had been admitted. The court enforced the trusts as to the freeholds, as they had been duly conveyed to the trustees, but refused to order the widow to surrender the copyholds. The deed did not operate to vest them in the trustees, and as the father's covenant was voluntary, the daughters had no equity to compel the widow to part with the legal interest which she had properly acquired.

Footnotes

182 Quaere whether there is any equity to rectify an imperfect voluntary trust: *Van der Linde v Van der Linde [1947] Ch. 306* at 311. For rectification, see above Ch.16.

183 *Ellison v Ellison (1802) 6 Ves. 656* at 662.

184 See also *Paul v Paul (1882) 20 Ch. D. 742*; *Re Bowden, Hulbert v Bowden [1936] Ch. 71*; *Re Adlarde [1954] Ch. 29*.

185 *Jeffreys v Jeffreys (1841) Cr. & Ph. 138*.

End of Document

3. - Ways of Constituting a Trust

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Chapter 22 - Private Express Trusts

Section 6. - Constitution of Trusts

3. - Ways of Constituting a Trust

22-043 There are two main ways that a settlor may constitute an express trust. He may either convey the property to a trustee to hold for the beneficiaries, or he may declare himself a trustee of it. If the conveyance upon trust to the intended trustee has been completed, then the beneficiary can enforce the trust. The outcome is the same where the settlor simply declares himself a trustee of the property in the beneficiary's favour [186] : once the declaration has been made over property already vested in the settlor, the beneficiaries can immediately enforce the trust.

Most of the problems arise under the first method if the conveyance from the settlor to the intended trustee is incomplete. The vesting of the trust property in the intended trustee may depend on a series of formal steps, only some of which have been taken. The question is whether the intended beneficiaries have any equity to compel performance of the remaining steps needed to vest the property in the trustee and to complete the constitution of the trust.

(a) By conveyance.

22-044 Where the settlor is both legal and equitable owner of the property, and is intending to constitute the trust by conveyance to the trustee, the express trust is generally not constituted until the conveyance of the legal ownership to the trustee is complete. The rule is the same as where a person sets out to make a direct gift to the donee. The gift will fail if anything remains to be done by the donor to divest himself of the legal interest.

The proper method of conveyance depends on the kind of property involved. Freehold property must be conveyed by a deed of grant, duly executed by the grantor, which is then registered at the Land Registry. [187] Leaseholds are conveyed by a registered deed of assignment. [188] A transfer of shares is complete at law when the transferor has executed the memorandum of transfer and the company has registered it. [189] A conveyance of these kinds of property is more likely to raise problems in the constitution of a trust since they involve a series of formal steps. Personal chattels are transferred by delivery or by deed. [190] Since the methods of transfer are relatively straightforward, it is generally clear whether the trust has been completely constituted or not.

1. Ineffective conveyances. [191]

22-045 For example, in *Richards v Delbridge*, [192] an intending donor indorsed and signed on a legal lease the following note: "This deed and all thereto belonging I give to Edward Bennetto Richards from this time forth, with all the stock-in-trade". The gift failed since the assignment required the donor to execute a deed. The same result was reached in *Antrobus v Smith*, [193] where the owner of shares in a company simply indorsed on the share certificate a memorandum to the effect that he assigned it to his daughter. [194]

2. Trust of an equitable interest.

22-046 The settlor (or donor, in the case of a direct gift) may only have an equitable interest in the property, as where the legal estate is vested in trustees for him. Here he need not procure a conveyance of the legal interest to the intended trustee, even if he can. It is sufficient for the settlor to assign his equitable interest, or to direct the trustees to hold that interest for the benefit of the donee. [195]

Thus in *Gilbert v Overton* [196] A, who was holding land under an agreement for a lease, by deed assigned the agreement to trustees upon certain trusts. Afterwards a lease was granted to him in accordance with the agreement. It was held that the trust was perfect. Again in *Kekewich v Manning* [197] certain shares were vested in trustees upon trust for A for life, and then for B. B by deed assigned her equitable reversionary interest in the shares to the trustees of her marriage settlement. This was held to create a perfect trust. In these two cases a deed was in fact used but this was strictly unnecessary. A written assignment of an equitable interest in real or personal property is effective even if it is not made by deed. [198]

3. All in settlor's power.

22-047 To this general principle there is one large exception. Where the settlor has taken all the formal steps that lie exclusively in his power to convey the legal interest in the property, then the trust will not fail simply because some other formal steps remain to be taken by the intended trustee or a third person. [199] Although the beneficiaries are mere volunteers, they may obtain an order to have the remaining formalities completed.

Until then, the settlor holds his legal interest in the property on a constructive trust for the intended trustee of the express trust. [200] The duties of the trustee under the express trust begin to operate. But until the remaining formal steps have been completed, the subject-matter of the express trust is only the trustee's equitable interest under the constructive trust rather than the legal interest in the intended trust property. The operation of this constructive trust is explained in a later chapter on constructive trusts that give effect to an informally expressed intention. [201]

4. Failed transfer.

22-048 If the settlor fails in his attempt to constitute a trust by transferring the property to trustees, and the beneficiaries have no equity to compel completion of the transfer, then the court will not treat the settlor's attempt as a declaration of trust over the property he retains. The two ways of constituting the express trust are generally incompatible with each other. By attempting to transfer the property the settlor has shown an intention to divest himself of it, and not to hold it as a trustee. [202] The court will not strive to find an intention that could not actually have existed. But if the transaction is genuinely open to the construction that the settlor was declaring himself a trustee of their property pending a formal conveyance to a different trustee, then the court may find that the trust is properly constituted. [203]

(b) By declaration of trust.

22-049 The second method of completely constituting a trust is for the settlor to declare himself a trustee of his property for the beneficiary. He may have either a legal or an equitable interest in the property. Such a declaration must be evidenced by writing

signed by him if it relates to land, but if it relates to other property it may be made by word of mouth, [204] or may be inferred from conduct. The test for establishing whether the settlor's declaration of intention has been expressed with sufficient certainty is considered earlier in this chapter. [205]

Footnotes

186 See *Milroy v Lord (1862) 4 De G. F. & J. 264* at 274.

187 LPA 1925 s.52(1); LRA 2002 s.27; e.g. *Mascall v Mascall (1984) 50 P. & C.R 119*.

188 LPA 1925 s.52(1); LRA 2002 s.27; e.g. *Richards v Delbridge (1874) L.R. 18 Eq. 11*.

189 In addition to the cases discussed below, see *Jones v Lock (1865) 1 Ch. App. 25*; *Re Swinburne [1926] Ch. 38*; and *Re Owen, Owen v IRC [1949] 1 All E.R. 901* (unpresented cheques); *Re Williams, Williams v Ball [1917] 1 Ch. 1* (indorsement on insurance policy); and *Re Wale [1956] 1 W.L.R. 1346* (shares).

190 *Cochrane v Moore (1890) 25 Q.B.D. 57*; *Jaffa v Taylor Gallery Ltd, The Times 21 March 1990*.

191 In addition to the cases discussed below, see *Jones v Lock (1865) 1 Ch. App. 25*; *Re Swinburne [1926] Ch. 38*; and *Re Owen, Owen v IRC [1949] 1 All E.R. 901* (unpresented cheques); *Re Williams, Williams v Ball [1917] 1 Ch. 1* (indorsement on insurance policy); and *Re Wale [1956] 1 W.L.R. 1346* (shares).

192 *Richards v Delbridge (1874) L.R. 18 Eq. 11*.

193 *Antrobus v Smith (1806) 12 Ves. 39*.

194 See also *Re Fry [1946] Ch. 312*.

195 *Re Chrimes [1917] 1 Ch. 30*; *Timpson's Executors v Yerbury [1936] 1 K.B. 645* at 664. See above Ch.3, as to assignment.

196 *Gilbert v Overton (1864) 2 H. & M. 110*.

197 *Kekewich v Manning (1851) 1 De G. M. & G. 176*.

198 LPA 1925 s.53; above para.3-018.

199 *Re Rose, Rose v IRC [1952] Ch. 499*; *Mascall v Mascall (1984) 50 P. & C.R. 119*.

200 *Pennington v Waine [2002] EWCA Civ 227; [2002] 1 W.L.R. 1075* at [59].

201 See below para.24-008.

202 *Richards v Delbridge (1874) L.R. 18 Eq.11*; and see *Milroy v Lord (1862) 4 De G. F. & J. 264*.

203 For example *Re Ralli's WT [1964] Ch. 288*; *T Choithram International SA v Pagarani [2001] 1 W.L.R. 1*.

204 *Paul v Constance [1977] 1 W.L.R. 527* (payment into settlor's bank account and words of gift sufficient); *Rowe v Prance [1999] 2 F.L.R. 787*.

205 See above para.22-013.

Section 7. - Setting trusts aside and unenforceable trusts

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Mainwork

Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 7. - Setting trusts aside and unenforceable trusts

22-050 Sometimes a trust may be revoked by the settlor or set aside by third parties even though it seems to be certain in its essential elements and to be completely constituted.

End of Document

1. - Revocation by Settlor

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Mainwork

Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 7. - Setting trusts aside and unenforceable trusts

1. - Revocation by Settlor

(a) Power of revocation.

22-051 In general, a settlor cannot revoke a completely constituted trust unless the settlement reserves a power of revocation in him. Nor is the mere absence of a power of revocation from a voluntary settlement, or the presence in it of unusual provisions, any ground for setting it aside, provided the provisions of the settlement were brought to the settlor's attention and understood by him [206]:

> "It is not the province of a Court of justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of justice to set aside a settlement which he chooses to execute on the ground that it contains clauses which are not proper." [207]

(b) Other grounds for revocation.

22-052 A settlor may revoke a settlement if it was obtained from him by fraud or undue influence, [208] or if they executed it under a fundamental mistake or misapprehension as to its effect. [209] Thus voluntary settlements of a reversionary interest under a marriage settlement made at the suggestion of their father by two children just over 21 years old were set aside 16 years later on the ground that they had not understood nor received any explanation of the effect of the settlements. [210] It is not necessarily an answer to a claim for revocation that had the settlor understood the nature of the transaction they would nevertheless have entered into it. [211]

(c) Method of revocation.

22-053 If a settlor seeks to set a settlement aside, the burden of proving fraud, undue influence, or mistake is on him. [212] It is otherwise where the relationship between him and the beneficiary is such as to raise a presumption of undue influence. There the settlement will be set aside unless the beneficiary can prove that the settlor was in fact a free agent and thoroughly understood and intended the settlement. [213] A settlement for value can very rarely be set aside. Where the valuable consideration consists of marriage,

the court will not interfere unless the parties can be restored to their original position. This is obviously impossible when the marriage has taken place. [214]

Footnotes

206 *Toker v Toker (1863) 3 De. G.J. & S. 487*; *Phillips v Mullings (1871) 7 Ch. App. 244*; *Hall v Hall (1873) 8 Ch. App. 430*; *Henry v Armstrong (1881) 18 Ch. D. 668*.

207 *Dutton v Thompson (1883) 23 Ch. D. 278* at 281, per Jessel MR; see also *James v Couchman (1885) 29 Ch. D. 212*.

208 See above Ch.8.

209 See, e.g. *Gibbon v Mitchell [1990] 1 W.L.R. 1304*; *Dent v Dent [1996] 1 W.L.R. 683*; *Anker-Petersen v Christensen [2002] W.T.L.R. 313*.

210 *Strauss v Sutro [1948] L.J.R. 33*; and see *Bullock v Lloyds Bank Ltd [1955] Ch. 317*.

211 *Anker-Petersen v Christensen [2002] W.T.L.R. 313*.

212 *Henry v Armstrong (1881) Ch. D. 668*.

213 *Powell v Powell [1900] 1 Ch. 243*.

214 *Johnston v Johnston (1884) 52 L.T. 76*.

2. - Transactions at an Undervalue Defrauding Creditors

22-054 A declaration of trust may be set aside under ss.423–425 of the Insolvency Act 1986 if it amounts to a transaction at an undervalue to defraud creditors.[215] The provisions apply to all kinds of transaction.[216] But their effect is often to catch declarations of trust since these are generally donative transactions. The regime in ss.423–425 prevents a settlor from declaring a trust over his assets with the purpose of putting his assets beyond the reach of his creditors or prejudicing the interests of a person who may have some claim against him.

These provisions apply whether or not the settlor later becomes bankrupt. They should not be confused with the similar regime that applies where the settlor does in fact become bankrupt after he has declared the trust.[217] But the difference in that regime is that the trust can be set aside even though the settlor did not declare it for the purpose of putting his assets beyond his creditors or to prejudice the interests of a person with some claim against him.

(a) The regime in ss.423–425.[218]

22-055 The regime applies to trusts declared after 28 December 1986.[219] The key terms in the regime are "a victim of the transaction" (which means a person who is, or is capable of being, prejudiced by the transaction); and "the debtor" (which in this context means the settlor who makes the declaration of trust that is being challenged).[220]

Under the regime the declaration of trust may be set aside if two conditions are fulfilled. The first is that the settlor must have entered into the transaction at an undervalue. This will be the case if the settlor entered into the transaction as a gift; in consideration of marriage or the formation of civil partnership; or for a consideration the value of which was significantly less than the value of the consideration provided by the settlor.[221]

The second condition relates to the settlor's purposes. The transaction must have been made for the purpose of putting the settlor's assets beyond the reach of a person "who is making, or may at some time make, a claim against him",[222] or otherwise to "prejudice the interests of such a person in relation to the claim which he is making or may make."[223] The section may apply although the settlor has more than one purpose in entering into the transaction. But one of the statutory purposes must have been substantial in the settlor's mind, and not merely be a by-product of the transaction or something that made no important contribution to it.[224] The wording is wide enough to cover a settlor whose purpose is to put his assets beyond the reach of future unknown creditors.[225]

(b) Procedure and powers of the court.

22-056 If the settlor has been adjudged bankrupt, an application for an order setting the transaction aside may only be made by the trustee of the settlor's estate or (with the leave of the court) by a victim of the transaction. In any other case, the application must be made by a victim of the transaction.[226] In every case, any application which is made is treated as made on behalf of every victim of the transaction.[227] If the court is satisfied that the applicant has established his case, it may make such order as it thinks fit for restoring the position to what it would have been but for the transaction and for protecting the interests of victims of the transaction.[228] The Act gives the court a wide range of ancillary powers which will enable it (broadly speaking) to reinstate the former position and to make orders of a restitutionary kind.[229]

(c) Protection of persons acting in good faith.

22-057 An order under these provisions may affect a person whether or not he is the person with whom the settlor entered into the transaction. There are, however, two provisions which are designed to protect a person who took an interest in property or a benefit from the transaction in good faith, for value and without notice of the relevant circumstances.[230] First, an order is not to prejudice any interest in property which was so acquired from a person other than the settlor, or prejudice any interest deriving from such an interest. Secondly, an order is not to require a person who, acting as mentioned, received a benefit from the transaction to pay any sum unless he was a party to the transaction.[231]

Footnotes

215 IA 1986 ss.423–425.

216 IA 1986 s.436.

217 See para.22-058 below.

218 Replacing IA 1985 s.212, which came into force for a scintilla temporis on 29 December 1986 (above s.236(2): SI 1986/1924) and was at once repealed by the IA 1986 s.438, Sch.12. Sections 423–425 then came into force: s.443 and the provisions just cited in parentheses.

219 For trusts declared before that date, the former regime under the LPA 1925 s.172 and the cases decided under it still apply: e.g. *Re Yates (a Bankrupt) [2005] B.P.I.R. 476*. See the 30th edition of this work at para.7–63 for a summary of the old law.

220 IA 1986 s.423(5).

221 IA 1986 s.423(1)(a)–(c).

222 See where the requirement was satisfied by a transaction designed to protect assets from the reach of future unknown creditors of a new business being set up by the defendant.

223 IA 1986 s.423(3).

224 *I.R.C. v Hashmi [2002] EWCA Civ 981; [2002] B.C.C. 943*.

225 *Midland Bank Plc v Wyatt [1997] 1 B.C.L.C. 242*.

226 IA 1986 s.424(1).

227 IA 1986 s.424(2).

228 IA 1986 s.423(2).

229 For the details, see IA 1986 s.425(1).

230 These are defined as those "by virtue of which an order under section 423 may be made in respect of the transaction": IA 1986 s.425(3).

231 IA 1986 s.425(2).

End of Document

3. - Bankruptcy of Settlor

(a) Insolvency Act 1986 ss.339, 342.

22-058 A declaration of trust also may be set aside under the regime in ss.339 and 342 of the Insolvency Act 1986 if it amounts to a transaction at an undervalue and the settlor has been declared bankrupt.[232] The general effect of the regime is to allow a declaration of trust to be set aside if it was made in the period of five years before the presentation of a petition on which the settlor is adjudged bankrupt. The main difference from the parallel regime in ss.423–425 is that the trustee in bankruptcy need not prove that the settlor's purpose was to put his assets beyond his creditors or to prejudice the interests of a person with some claim against him.

(b) Transactions that may be set aside.

22-059 The regime applies to declarations of trust made after 28 December 1986.[233] The declaration must be a transaction at an undervalue and entered into at a "relevant time". A transaction at an undervalue is defined in terms which mirror precisely those already considered in relation to the provisions of ss.423–425 of the Insolvency Act.[234]

(c) Relevant time.

22-060 The Insolvency Act specifies two periods. In general, a transaction at an undervalue is entered into at a relevant time if it falls within the five years preceding the presentation of the petition on which the settlor is adjudged bankrupt.[235] This provision is, however, qualified where the transaction was entered into between two and five years before the petition was presented. In such a case the time of the transaction is a relevant time only if the individual is then insolvent[236] or becomes so in consequence of the transaction. The requirement of insolvency is presumed to be satisfied, unless the contrary is shown, where the transaction is entered into by an individual with an associate of his.[237] "Associate" is an expression with a wide scope, which covers (among others) the spouse,[238] or a relative,[239] of an individual, and also the spouse of a relative of the individual or of a relative of his spouse.[240] Thus the traditional family settlement will almost always fall within this presumption of insolvency.

(d) Procedure and powers of the court.

22-061 An application under s.339 may only be made by the trustee of the bankrupt settlor's estate.[241] If the trustee establishes his case, the court may make such order as it thinks fit for restoring the position to what it would have been if the transaction had not been entered into.[242] Section 342 gives the court ancillary powers similar to those applying under the regime in ss.423–425.[243] Any sums which are required to be paid to the trustee in accordance with an order of the court shall be comprised in the bankrupt's estate.[244]

(e) Protection of persons acting in good faith.

22-062 The relevant statutory provisions[245] are similar to those applying in cases brought under ss.423–425 of the Insolvency Act.[246]

Footnotes

232 IA 1986 ss.423–425.

233 A transaction entered into before 29 December 1986 can only be set aside under IA 1986 to the extent that it could have been set aside under s.42 of the former Bankruptcy Act 1914. (This is the combined effect of IA 1985 s.235(3), Sch.10 Pt IV: in force on 29 December 1986, by virtue of above s.236(2); and IA 1986 s.443; SI 1986/1924). Under Bankruptcy Act 1914 s.42 a voluntary settlement of any property might in certain cases be avoided if the settlor later became bankrupt, even if it was not fraudulent. The repealed s.42 and the cases decided under it remain relevant to that extent. For a summary of the old law see the 30th edition of the work at para.7-66.

234 IA 1986 s.339(3); and para.22-055 above.

235 IA 1986 s.341(1)(a).

236 For the purposes of this provision "an individual is insolvent if—(a) he is unable to pay his debts as they fall due, or (b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities": IA 1986 s.341(3).

237 IA 1986 s.341(2).

238 Including former and reputed spouses: IA 1986 s.435(8).

239 Brother, sister, uncle, aunt, nephew, niece, lineal ancestor or descendant: IA 1986 s.435(8).

240 IA 1986 ss.341(2), 435.

241 IA 1986 s.339(1).

242 IA 1986 s.339(2).

243 IA 1986 s.342(1).

244 IA 1986 s.343(3).

245 IA 1986 s.342(2), (4) as amended by Insolvency (No.2) Act 1994 s.2.

246 Above para.22-057.

End of Document

4. - Voluntary Conveyance to Defraud Subsequent Purchaser

22-063 Every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of the purchaser.[247] This would include a declaration of trust over the land. The purchaser would need to prove that the settlor's actual intention in declaring the trust was to defraud the subsequent purchaser.[248] The court will not infer the intention from the mere sequence of a voluntary declaration of trust being followed by a conveyance of the same land for value.[249]

Footnotes

247 LPA 1925 s.173(1), repealing and replacing 27 Eliz. 1, c.4, 1585.

248 LPA 1925 s.173(2), replacing the Voluntary Conveyances Act 1893.

249 See *Re Barker's Estate (1875) 44 L.J.Ch. 487* at 489; *Doe d. Otley v Manning (1807) 9 East. 59*. The presumption was not made against a charity: *Ramsay v Gilchrist [1892] A.C. 412*.

5. - Illegality and Public Policy

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Mainwork

Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 7. - Setting trusts aside and unenforceable trusts

5. - Illegality and Public Policy [250]

22-064 A trust may be void or unenforceable if it is illegal, or if it is created for a purpose that is unlawful or contrary to public policy.

(a) Creation of trust illegal.

22-065 The trust may be wholly void if its creation involves the breach of a statute, or if its purpose is to encourage the commission of a criminal offence. [251] Similarly, a trust may be void if, though not strictly illegal, it is contrary to public policy. Trusts which breach the perpetuity rules; or which make the beneficiary's interest inalienable on bankruptcy; or which restrict the trust property to some wasteful or pointless use may all be void on this ground. [252]

The trust which is illegal in itself or contrary to public policy is substantively void. Any completed transfer of the legal interest in the property to the intended trustee would probably be effective, [253] but the intended beneficiary of the trust would not take any equitable interest or have rights enforceable against the intended trustee. The intended trustee would hold the property on resulting trust for the settlor. [254]

(b) Trust created for an unlawful purpose.

22-066 Where the settlor has an unlawful purpose for creating the trust, then the general rule is that the beneficiary may nonetheless enforce his rights under it. Examples would be where a settlor transfers his assets on trust to defraud his creditors, the revenue authorities or some other government agency. [255] An unlawful purpose to a transaction does not prevent it from passing the legal or beneficial interest in the property to another person. [256] Thus, an express trust that was completely constituted under a written declaration would generally be enforceable by a beneficiary even if the settlor created the trust for an unlawful purpose. [257] The same would be true where the trust arose informally and by operation of law. [258] It is no longer the case that a party is barred from enforcing his interest under a trust where he must rely on evidence of his illegal purpose to prove it. [259]

But a trust created for an unlawful purpose would not always be enforceable. Ultimately, a court will not lend its assistance where enforcement of the trust would harm the public interest in the integrity of the legal system. That decision would require a consideration of (a) the underlying purpose of the prohibition and whether it would be enhanced by denying enforcement of the beneficiary's interest; (b) any other public policy consequences of denying enforcement of the interest; and (c) and whether a denial of the beneficiary's interest would be a proportionate response to the illegality. [260]

Footnotes

250 See generally Law Comm. C.P. No.154; No. 189 read in the light of *Patel v Mirza [2016] UKSC 42; [2017] A.C. 467*.

251 *Thrupp v Collett (1858) 26 Beav. 125*.

252 *Brown v Burdett (1882) 21 Ch. D. 667*.

253 *Bowmakers Ltd v Barnet Instruments Ltd [1945] K.B. 65*; *Singh v Ali [1960] A.C. 167*.

254 See Ch.25. On the enforceability of the settlor's interest under the resulting trust, see Law Comm. C.P. No.154 at 3.42–3.50.

255 For example *Re Great Berlin Steamboat Co (1884) 26 Ch. D. 616*; *Tribe v Tribe [1996] Ch. 107* (creditors); *Chettiar v Chettiar [1962] A.C. 294*; *Tinsley v Milligan [1994] 1 A.C. 340* (government agencies).

256 *Bowmakers Ltd v Barnet Instruments Ltd [1945] K.B. 65;* ; *Singh v Ali [1960] A.C. 167* at 176; *Patel v Mirza [2016] UKSC 42; [2017] A.C. 467* at [110]–[111].

257 *Ayerst v Jenkins (1873) L.R. 16 Eq. 275*; *Perpetual Executors and Trustees Association of Australia Ltd v Wright (1917) 23 C.L.R. 185* at 192; *MacDonald v Myerson [2001] EWCA Civ 66*.

258 The question usually arises in relation to resulting trusts. See further para.25-014 below.

259 *Patel v Mirza [2016] UKSC 42; [2017] A.C. 467*; not following *Tinsley v Milligan [1994] 1 A.C. 340* on this point.

260 *Patel v Mirza [2016] UKSC 42; [2017] A.C. 467* at [101], [120].

End of Document

6. - Sham Trusts

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Mainwork

Part 5 - Trusts

Chapter 22 - Private Express Trusts

Section 7. - Setting trusts aside and unenforceable trusts

6. - Sham Trusts [261]

22-067 A trust may be void because the acts or documents that purport to set it up are a sham. The classic definition of a sham was given by Diplock LJ:

> "[I]t means acts done or documents executed by the parties to the sham which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create; for acts or documents to be a 'sham', with whatever consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived." [262]

The burden of proving the sham lies on the person making the allegation. [263]

(a) Common intention to mislead.

22-068 The person who alleges the sham must prove that the purported settlor and trustee had a common intention to enter into a kind of legal transaction that was different from the trust set out in the relevant document. [264] The aim is to discover "the substance and reality of the transaction", and to establish that it is different from the trust the parties purported to create. [265] It is not enough to show that only the settlor lacked any real intention to create the trust. It is true that the transfer of property from the settlor to the trustee is a unilateral transaction which depends on the expression of the settlor's intent. But since the creation of the trust requires the trustee to assume equitable powers and duties over that property, it is necessary to prove that the trustee was a party to the sham. [266] Where a single document provides for more than one legal transaction, and only one of them is alleged to be a sham, it is enough to show that the parties to that transaction shared the intention to mislead. [267] A person who signed the document but who was not a party to the sham transaction need not share the intention.

In establishing the intention to mislead, it is enough that one of the parties signed the document without knowing or caring what he was signing, or that his intentions were not exercised independently of the other party who was controlling the transaction. Either way, this shows a reckless willingness to mislead third parties. [268] The parties to the sham may act for different motives. [269] It is said that a sham requires proof of dishonesty. [270] But, correctly understood, this requirement only refer to the parties' common intention to mislead. [271] Beyond this, their motives need not be improper. [272]

(b) Proof.

22-069 An allegation of sham puts into the doubt the reality of the parties' intentions expressed in the trust document. It follows that the person who alleges the sham may rely on a wider range of evidence than is normally admissible when the court construes written documents. In principle, he may rely on evidence of the purported settlor's motives and general honesty; any declarations of the purported settlor's and trustee's subjective intentions about the nature of the transaction; and evidence of their conduct after they purported to create the trust.[273] Evidence that the parties later acted as if there was no trust in existence may be decisive. It is consistent with the possibility that the trustee was acting in breach of a real trust.[274]

(c) Consequences.

22-070 If a purported trust is proved to be a sham then it will be void and unenforceable by the parties to it. But they may be estopped from relying on its sham status if this would benefit their own interests and prejudice third parties who have relied on its validity as a trust.[275] So a person to whom property is transferred in a sham transaction may nonetheless grant a valid mortgage charge over it. The mortgagee's security would not be prejudiced by proof that the mortgagor's interest depended on a sham transaction.

The effect of proving that a purported trust is a sham is that the court often holds the parties to the real transaction that they intended. For example, a settlor who transferred property to a trustee to hold on a sham trust for other beneficiaries was found never to have intended to relinquish his beneficial ownership of the property. Proof of the sham did not affect the vesting of the property in the trustee so the trustee held as a bare trustee for the settlor.[276]

(d) Shams and certainty of intention.

22-071 The question whether a person intends to declare an express trust is distinct from whether a purported declaration of trust is a sham.[277] The ascertainment of the settlor's intention to declare a trust depends on the proper construction of the words in the relevant document, taking into account a narrow range of permissible background circumstances.[278] The purpose of the inquiry is to elicit the objective intention of the settlor from the trust instrument.[279]

But when a person alleges that a trust declared in an instrument is a sham, then the reality of the declaration is put in question. He alleges that the declaration should not be given effect in law because it does not reflect the true agreement between the parties about the kind of transaction they intended to enter into.[280] This difference in purpose explains why a wider range of evidence can be used to prove a sham from that which can be used to construe a genuine trust instrument.[281]

(e) Shams and "illusory" trusts.

A purported trust may be "illusory". To call a trust "illusory" is a convenient, although analytically inaccurate, label.[282] The trust transaction is illusory when the true intention gathered from the trust instrument was to leave the beneficial interest in the purported settlor of the trust rather than to create a trust for the beneficiaries named in the instrument.

An illusory trust is analytically different from a purported trust set out in a sham document. The sham doctrine is concerned with the misleading mismatch between the objective intentions of the parties in the trust instrument and their subjective intentions

about the transaction between them.[283] The conclusion that a purported trust is illusory follows from the construction of the trust instrument itself, rather than from a comparison between the terms of trust instrument and the parties' subjective intentions. The court construes the powers and duties of the parties as they are expressed in the trust instrument to work out their true effect. In going about this task, it is concerned with the substance of the transaction rather than its superficial terms. Some indications that the trust may be illusory are that the duties of the trustee stated in the trust instrument are incompatible with the core duties of trusteeship[284]; or that the settlor has reserved such extensive powers to himself as a protector of the trust that the interests of the beneficiaries named under it are unreal.[285]

Footnotes

261 *M. Conaglen [2008] C.L.J. 176*.

262 *Snook v London and West Riding Investments Ltd [1967] 2 Q.B. 786* at 802 (in the context of a hire purchase agreement) (approved by Lord Fraser in *WT Ramsay Ltd v Commissioner of Inland Revenue [1982] A.C. 300* at 337).

263 *Wily (as trustee of the Bankrupt Estate of Fuller) v Fuller [2000] FCA 1512*; cf. *Sharrment Pty Ltd v Official Trustee in Bankruptcy (1988) 19 F.C.R. 449*.

264 *Shalson v Russo [2003] EWHC 1637 (Ch); [2005] Ch. 281* at [190]; *Re the Esteem Settlement [2003] J.R.C. 092; [2004] 1 W.T.L.R. 1*; *MacKinnon v Regent Trust Co Ltd [2005] JCA 066; [2005] W.T.L.R. 1367*; *A v A [2007] EWHC 99 (Fam)* at [34]; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426; (2017) 20 I.T.E.L.R. 905* at [150]. The intention may be to create a trust but to postpone its operation until some future event agreed between the settlor and trustee. Although such an arrangement would not be immediately operative, it would not be a sham: *Arif v Anwar [2015] EWHC 124 (Fam)*.

265 AG Securities v Vaughan; *Antoniades v Villiers [1990] A.C. 417* at 466.

266 *Re The Esteem Settlement [2003] J.R.C. 092; [2004] 1 W.T.L.R. 1* at [53, (xi), (xii)], explaining *Mallott v Wilson [1903] 2 Ch. 494*.

267 *Hitch v Stone [2001] EWCA Civ 63; [2001] S.T.C. 214* at [85].

268 *Re The Esteem Settlement [2003] J.R.C. 092; [2004] 1 W.T.L.R. 1* at [58]; interpreting *Midland Bank Plc v Wyatt [1995] 1 F.L.R. 696* at 699; and *National Westminster Bank Plc v Jones [2001] 1 B.C.L.C. 98* at 98; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426; (2017) 20 I.T.E.L.R. 905* at [434].

269 *Chase Manhattan Equities v Goodman [1991] B.C.L.C. 897* at 922b–c.

270 *National Westminster Bank Plc v Jones [2001] 1 B.C.L.C. 98* at 98.

271 *Re the Esteem Settlement [2003] J.R.C. 092; [2004] 1 W.T.L.R. 1* at [58].

272 *Chase Manhattan Equities v Goodman [1991] B.C.L.C. 98* at 921i, and 922i; and cf. *Miles v Bull [1969] 1 Q.B. 258* at 264, per Megarry J. But an improper motive, such as to defraud creditors, may make the trust impugnable on other grounds: see para.22–054.

273 *Hitch v Stone [2001] EWCA Civ 63; [2001] S.T.C. 214* at [65]; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426; (2017) 20 I.T.E.L.R. 905*.

274 *A v A [2007] EWHC 99 (Fam)* at [42]–[43].

275 *National Westminster Bank Plc v Jones [2001] 1 B.C.L.C. 98* at [60]; *Re Yates (a bankrupt) [2004] EWHC 3448 (Ch)* at [219].

276 *Minwalla v Minwalla [2004] EWHC 2823 (Fam); [2005] 1 W.L.R. 771*; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426; (2017) 20 I.T.E.L.R. 905* at [455].

277 See para.22-013 above.

278 See *Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) [1998] 1 W.L.R. 896*, per Lord Hoffmann; *Re Sigma Finance Corporation (In Administrative receivership) [2009] UKSC 2* at [9]–[12].

279 See para.22-013 above.

280 *Re the Esteem Settlement [2004] 1 W.T.L.R. 1* at [53, (xi), (xii)] (Jersey R.C.); *Shalson v Russo [2003] EWHC 1637 (Ch); [2005] Ch. 281* at [190].

281 *Official Assignee v Wilson [2007] NZCA 122; [2008] 3 N.Z.L.R. 45*; *Raftland Pty Ltd v Commissioner of Taxation [2008] HCA 21; (2008) 246 A.L.R. 406* per Kirby J.

282 *Clayton v Clayton [2016] NZSC 216; [2016] 1 N.Z.L.R. 551* at [124].

283 See para.22-000 above; and *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426; (2017) 20 I.T.E.L.R. 905* at [436].

284 *Re the AQ Revocable Trusts [2010] SC (Bda) 40 Civ; (2010) I.T.E.L.R. 260*; *Clayton v Clayton [2016] NZSC 216; [2016] 1 N.Z.L.R. 551* at [124].

285 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426; (2017) 20 I.T.E.L.R. 905*.

1. - Nature

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Mainwork

Part 5 - Trusts

Chapter 23 - Charitable Trusts

Section 1. - Introduction

1. - Nature [1]

23-001 The trusts explained so far have been private: they are declared for the benefit of ascertainable individuals with standing to enforce the trustee's duties. But trusts may also exist for public purposes provided they are charitable according to the legal meaning of that term. Identifiable individuals may benefit from these charitable purposes. However, any benefit they derive as individuals is strictly incidental to the main purpose of the trust, which is to confer a benefit on the public at large or some section of it. An individual who benefits from a charitable trust generally has no standing under the trust to enforce the trustee's duties.

There are other kinds of legal organisation that can be used to carry out a charitable purpose. The charity may be an incorporated body with a legal personality of its own, such as a company limited by guarantee. [2] It may also be an unincorporated association where its charitable purposes are given legal effect through a network of contractual agreements binding on the members of the association. [3]

Footnotes

1 For specialist works on charities, see J. Warburton, Tudor on Charities, 9th edn (Sweet & Maxwell, 2003); H. Picarda, The Law and Practice Relating to Charities, 4th edn (Bloomsbury Publishing, 2014); P. Luxton, The Law of Charities (OUP, 2001); R. Meakin, Law of Charitable Status: Maintenance and Removal (Cambridge University Press, 2008).

2 For the advantages and disadvantages of incorporation, see P. Luxton, The Law of Charities (2001), para.870.

3 For example *Neville Estates Ltd v Madden [1962] Ch. 832*.

2. - Differences Between Charitable and Private Trusts

(a) Similarity to private trusts.

23-002 For the most part, charitable trusts are subject to the same rules as private express trusts. They arise, for example, when the settlor expresses an intention to create a trust over a specific fund of property. Charity trustees have the same general powers as private trustees, including the statutory powers conferred by the Trustee Act 1925 and the Trustee Act 2000, and any additional powers conferred on them by the court.[4] Further, a charity which is the beneficiary of a trust can take advantage the rule in *Saunders v Vautier*[5] in the same way as the beneficiary of a private trust. It can terminate the trust and direct payment of the trust capital to itself.[6]

(b) Differences.

23-003 There are, however some important differences: charitable trusts are not subject to the full effect of the rules against perpetuity; through the cy-pres doctrine the trusts can be varied if they become obsolete; they are enforced and regulated by certain public authorities; and they may be enforced by action despite the expiry of the ordinary limitation period. These matters are all discussed later.[7]

Unlike private trusts, charitable trusts cannot fail for uncertainty of object. So long as the trust instrument shows a clear intention to devote the property to charity, it does not matter that the settlor has left uncertain the particular way that intention is to be carried into effect. He may simply direct the property to be applied for charitable purposes, or for such charitable purposes as his trustees or executors may select.[8] He may authorise the trustees to alter the trusts if necessary.[9] The specific objects can also be supplied in a scheme ordered by the court or the Charity Commission.[10]

Footnotes

4 For example under TA 1925 s.57; see *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] Ch. 220*. For s.57, see below para.29-042.

5 *Saunders v Vautier (1841) 4 Beav. 115; affirmed Cr. & Ph. 240*; see below para.29-030.

6 See, e.g. *Wharton v Masterman [1895] A.C. 186*; *Re Knapp [1929] 1 Ch. 341*; but see *Re Levy [1960] Ch. 346* (indefinite gift of income not a gift of corpus, for a charity (unlike an individual) has a perpetual existence).

7 Below paras 23-040 (perpetuities), 23-043 (cy-pres), 23-060 (administration), and 30-040 (limitation).

8 *Mills v Farmer (1815) 1 Mer. 55*; *Moggridge v Thackwell (1803) 7 Ves. 36; affirmed (1807) 13 Ves. 416*; *Re Willis, Shaw v Willis [1921] 1 Ch. 44*.

9 As in *Re Roberts, Stenton v Hardy [1963] 1 W.L.R. 406*; and see *Re Beesty's WT [1966] Ch. 223* (revocable power of appointment).

10 *Re White v White [1893] 2 Ch. 41*; *Re Pyne [1903] 1 Ch. 83*. For schemes, see below para.23-069.

3. - Main Requirements

23-004 The primary source of the legal definition of charity is now the Charities Act 2011. The Charities Act 2006 had provided a statutory definition of charity for the first time. The Charities Act 2011 also consolidates the provisions of the Charities Act 1993, which mainly provided for matters of charity administration. In addition to providing a statutory definition of charity, the Charities Act 2011 preserves with some modifications the definition under the existing case law before the Charities Act 2006 came into force. A charitable trust must satisfy three main requirements.

(a) Charitable purpose.

23-005 The trust must be for one of the 12 charitable purposes listed in s.3(1) of the 2011 Act or for one of the purposes recognised as charitable under the existing law before the 2006 Act came into force. [11]

(b) Public benefit.

23-006 The purpose must be for the public benefit. [12] In exercising their powers, charity trustees must have regard to the public benefit guidance published by the Charity Commission. The guidance aims to promote awareness and understanding of the requirement that a charitable purpose must be for the public benefit. [13]

(c) Exclusively charitable.

23-007 The trust must be for charitable purposes only. [14]

Footnotes

11 Charities Act 2011 s.2(1), (2), (4).

12 CA 2011 ss.2(1), 4. See para.23-026 below.

13 CA 2011 s.14(2), 17.
14 CA 2011 s.1(1)(a).

End of Document

1. - Charitable Purpose

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Mainwork

Part 5 - Trusts

Chapter 23 - Charitable Trusts

Section 2. - The essentials of Charity

1. - Charitable Purpose

(a) Relationship between existing law and statutory definition.

23-008 The Charities Act 2011 expressly provides for 12 charitable purposes. Many of these are declaratory of the existing law before the Act came into force. The aim of the Charities Act was not to replace entirely the existing definitions of charitable purposes recognised in the case law, or to prevent the incremental development of new charitable purposes. Thus, the Charities Act expressly preserves any other purposes that were recognised as charitable under existing charity law before the 2006 Act came into force. [15] It also recognises the charitable status of any purpose that may reasonably be regarded as analogous to, or within the spirit of, any of the statutory purposes or the existing charitable purposes preserved by the Charities Act. [16]

(b) Sources of existing charitable purposes.

23-009 The main source of existing charitable purposes before the enactment of the Charities Act 2006 was the statute 43 Eliz.1, c.4, 1601 and the case law that had developed from it. The purpose of the statute was to reform abuses in the application of property devoted to charitable uses, rather than to define "charity". [17] But the list of charitable objects set out in the preamble to the statute was used by the courts as a guide to determining the legal meaning of charity. [18] A reference to "charity" in a statute was taken to mean charity as interpreted by the courts. [19] It was only necessary to establish that the purpose came within the spirit and intendment of the preamble and not within its literal words. This approach continued even after the statute was repealed in 1888. [20]

The purposes listed in the preamble were eclectic in character and reflected the social practices of the Elizabethan period. In 1891, in *Commissioners of Income Tax v Pemsel*, [21] Lord Macnaughton provided a more ordered description of four main heads of charitable purpose that had been recognised by that time. He said:

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.' [22]

The Recreational Charities Act 1958 extended the common law definition of charity to trusts providing facilities for recreation or other leisure-time occupations if they were provided in the interests of social welfare. These would have been classified under the fourth of Lord Macnaughton's charitable purposes as trusts for other purposes beneficial to the community. With one change, the Charities Act 2011 preserves the charitable status of these recreational charities. [23]

(c) Current ordering of charitable purposes.

23-010 The four *Pemsel* divisions of charity are preserved under the Charities Act 2011. But the 12 statutory purposes provided in the Charities Act are now a more convenient way of considering the main charitable purposes recognised under the current law. The description of charitable purposes in this book follows the statutory ordering.

Footnotes

15 CA 2011 s.2(1).

16 CA 2011 s.3(1)(m),(ii)–(iii). This continues the approach to the recognition of new charitable purposes under the existing law: e.g. *Scottish Burial Reform and Cremation Society v Glasgow Corp [1968] A.C. 138*.

17 *Royal College of Surgeons of England v National Provincial Bank Ltd [1952] A.C. 631* at 650, 651.

18 The version of the preamble reproduced in the Mortmain and Charitable Uses Act 1888 s.13(2) provided: "Whereas landes tenemente rentes annuities pfittes hereditamentes, goodes chattels money and stockes of money, have bene heretofore given limitted appointed and assigned, as well by the Queenes moste excellent Majestie and her moste noble progenitors, as by sondrie other well disposed psons, some for releife of aged impotent and poore people, some for maintenance of sicke and maymed souldiers and marriners, schooles of learninge, free schooles and schollers in univsities, some for repaire of bridges portes havens causwaies churches seabankes and highewaies, some for educacon and pfermente of orphans, some for or towardes reliefe stocke or maintenance for howses of correcon, some for mariages of poore maides, some for supportacon ayde and helpe of younge tradesmen, handiecraftesmen and psons decayed, and others for releife or redemption of prisoners or captives, and for aide or ease of any poore inhabitante concninge paymente of fifteenes, settinge out of souldiers and other taxes; whiche landes tenements rents annuities pfitts hereditaments goodes chattells money and stockes of money nevtheles have not byn imployed accordinge to the charitable intente of the givers and founders thereof, by reason of fraudes breaches of truste and negligence in those that shoulde pay delyver and imploy the same". The Mortmain and Charitable Uses Act 1888 was repealed by the CA 1960 s.48(2), Sch.7 (though see s.38(4)). The preamble has thus completely disappeared from the statute book, yet it has still been the courts' guide under the existing law before the 2003 Act: see, e.g. *Incorporated Council of Law Reporting for England and Wales v Attorney General [1972] Ch. 73* at 87–89.

19 *Ashfield Municipal Council v Joyce [1978] A.C. 122*.

20 It was repealed by the Mortmain and Charitable Uses Act 1888.

21 *Commissioners of Income Tax v Pemsel [1891] A.C. 531*.

22 It echoed a similar classification by Sir Samuel Romilly arguendo in *Morice v Bishop of Durham (1805) 10 Ves. 522* at 532.

23 See para.23-025 below.

2. - The main charitable purposes

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Mainwork

Part 5 - Trusts

Chapter 23 - Charitable Trusts

Section 2. - The essentials of Charity

2. - The main charitable purposes [24]

23-011 This section describes the main charitable purposes recognised in the current law. It follows the order set out in s.3(1) of the Charities Act 2011. Some charities may qualify under more than one head. [25] The recognition that the charity falls under one or other head may affect the way the public benefit it confers has to be established.

(a) Prevention or relief of poverty. [26]

23-012 "Poverty does not mean destitution … [I]t may not unfairly be paraphrased for present purposes as meaning persons who have to 'go short' in the ordinary acceptation of that term, due regard being had to their status in life and so forth." [27] The gift need not refer explicitly to poverty. It is enough that the donor's words, in the context of the likely uses that the money would be applied to, carry a sufficient connotation of poverty. Thus charity includes the provision of a working men's hostel [28]; or of flats at economic rents where the intention is to benefit elderly people of small means [29]; and the assistance of young women having a first baby in a Salvation Army home [30]; or for providing payments to a company's employees and their families who were in reduced circumstances. [31] On the other hand, a person is not necessarily "poor" in the charitable sense merely because he cannot afford to provide for himself the advantages provided by the gift and which may well be for his own benefit. [32] So gifts to provide dwellings "for the working classes", [33] and an employees' mutual benefit fund with no test of poverty would not qualify for charitable status. [34]

(b) Advancement of education. [35]

23-013 Before the statutory definition of charity came into force, the general law had a broad definition of educational purposes. It extended to the advancement of arts, culture and science, which the Charities Act 2011 now provides as distinct charitable purposes. But even allowing for this more detailed elaboration of charitable purposes, the definition of education preserved by the Charities Act is likely to be very broad. It would not be confined to education given by a teacher in class in a formal institution. [36] In all cases, however, a distinction must be drawn between the simple dissemination of information and true education, which involves some element of improvement and useful instruction. The mere increase of public knowledge [37] or the acquisition of experience [38] is not enough. This follows from the rule that a charity must benefit the public. [39]

The support of teaching and learning in formal institutions has been held to be educational. Thus the foundation of lectureships in a university, [40] or scholarships to support students have been held to be charitable, [41] as have prizes to reward educational

success.[42] Ancillary organisations in educational institutions may be charitable, such as a students' union attached to a medical school[43] or a polytechnic,[44] provided they exist solely to further the educational purposes of the main institution.

Education is not confined to purely intellectual matters (although games such as chess that promote foresight, concentration and memory may be charitable mainly for that reason).[45] The provision of facilities to enable pupils at schools and universities to play football or other games or sports thereby assisting their "physical education and development" has been held to be charitable,[46] as has a gift to provide prizes for sport at an educational institution.[47] Education may even extend to cultivating habits of "self-control, elocution, oratory, deportment" and "the arts of personal contact".[48] The gathering and publication of learned information may be charitable, such as the production of a dictionary,[49] or the publication of law reports.[50]

On the other hand, the following purposes have been held not to be educational: founding a college for training spiritualistic mediums[51]; and restocking the waters fished by an angling society since there comes a point where education shades into a hobby or pastime.[52] The reason is that it cannot be proved that the nature of the purpose would be a benefit to the public.[53] For the same reason, party "political propaganda masquerading … as education is not education".[54] It would be constitutionally inappropriate for a court to rule whether a partisan political purpose was for the public benefit. But the objection does not apply to gifts that merely promote awareness of political science and the institutions of government.[55]

(c) Advancement of religion.[56]

23-014 Since the nineteenth century, charity law has taken a broad view of the kinds of religion that might qualify for charitable status. It declined to make any distinction between one sect and another, and would only draw the line at a sect that would "inculcate doctrines adverse to the very foundations of all religion" or that were "subversive of all morality".[57] The court would not take a view of whether the tenets of a particular creed were sound or not.

This liberal view left open the question of what creeds were to be regarded as religions. The Charities Act 2011 has not provided a positive definition. It has added, however, that a religion for charitable purposes can include one that involves belief in more than one god or that does not involve belief in a god at all.[58] The minimum requirement seems to be some element of faith and worship by the adherents, and the recognition of a supernatural aspect that goes beyond purely intellectual inquiry.[59] It follows that the study of ethical principles and cultivation of a rational religious sentiment are not charitable under this head.[60] Similarly, the Charity Commission has ruled that scientology is not a religion.[61] Although its adherents may acknowledge the existence of a supreme being, their central practices do not involve a kind of worship that involves reverence or veneration.[62]

Religion may be advanced by pastoral and missionary work.[63] Thus trusts for the support of a religious order or community[64] such as a monastery or a convent are plainly within this head. Schemes to pay stipends or retirement benefits for clergy and their families may qualify for charitable status but not those that provide for ancillary workers in a religious organisation.[65] But if instead of engaging in good works (e.g. among the sick and the poor[66]) the object of a religious order is merely sanctification by prayer and pious contemplation, it cannot be proved if its purpose is in its nature beneficial to the public. It would therefore not be charitable.[67] But the celebration of masses for the dead is charitable if they are said in public and if the moneys given provide stipends for the priests saying the masses.[68] The improvement of musical services in a church,[69] and a gift simply "for God's work"[70] have also been held charitable.

While the upkeep of a particular tomb or vault in a churchyard is not charitable since it tends to confer a private, rather than a public benefit,[71] the repair of the whole churchyard or burial ground is charitable,[72] even if it is restricted to members of a particular religious sect.[73] The repair of all the headstones in a churchyard,[74] or of the churchyard and a specified monument,[75] is also charitable, and so is the upkeep of the whole or any part of a church, including a memorial window[76] or a specific monument or vault in it.[77]

(d) Advancement of health or saving lives. [78]

23-015 The Charity Commission takes a broad view of the advancement of health. It includes the prevention or relief of sickness, disease or human suffering, as well as the promotion of health. It includes conventional as well as complementary, alternative or holistic methods. In considering whether a health organisation should be registered as a charity, the Commission needs to be satisfied that there is sufficient evidence of the efficacy of the methods to be used. [79]

The saving of lives includes rescue charities, [80] as well as those set up to assist the victims of natural disasters or war. [81]

(e) Advancement of citizenship or community development. [82]

23-016 This covers a broad group of charitable purposes directed towards support for social and community infrastructure. It aims to support community development rather than the individual. The 2011 Act expressly extends this purpose to include rural or urban regeneration; civic responsibility [83]; the voluntary sector and the efficiency of charities. [84] Urban or rural regeneration can include helping unemployed people to find work; providing business advice that may help to generate work for the unemployed; preserving buildings that may be of architectural or historical significance. The Charity Commission is particularly concerned that regeneration charities provide substantial public benefits beyond the private benefits to the individuals using their services. [85]

(f) Advancement of arts, culture, heritage or science. [86]

23-017 This purpose, which was treated under the existing law as an aspect of the advancement of education, is now defined separately. It would include, for example, a gift to spread the knowledge and appreciation of an eminent composer's work [87]; to construct and endow a theatre, and to promote drama as an art form [88]; and the encouragement and advancement of choral singing in London [89]; as well as the cultivation of a non-religious appreciation of aesthetics and ethics. [90]

Research projects into matters of literary, [91] historical, linguistic or scientific significance would fall under this head. It would also include the preservation of artistic, historical or scientific collections in museums. [92] In cases of doubt, the court would take expert evidence about the artistic or scientific merits of a project or collection. A useless collection of pictures and furniture, for example, could not be passed off as a museum on the pretext that it advanced education or the arts, [93] since it would not confer any proven benefit upon the public.

(g) Advancement of amateur sport. [94]

23-018 This purpose extends the heads of charity that were recognised under the general law. Formerly, the mere playing of games or the encouragement of sport was not a charitable purpose [95] unless it was provided as part of a programme of physical education in an educational institution, [96] or if it was mainly to promote the efficiency of the armed forces. [97] This led to difficult distinctions

where a gift was to provide for sporting facilities in contexts that were not clearly educational since it was also accepted that to provide facilities for public recreation was a charitable purpose. [98] The status of a purpose as charitable or not depended on discerning whether the donor's dominant intention was to encourage competitive activity and enjoyment for spectators, or to improve the health of the public. [99]

The Charities Act 2011 removes these distinctions by declaring that the advancement of amateur sport is in itself charitable. The only limitation is in the statutory definition of "sport", which is confined to sport or games involving "physical or mental skill and exertion". [100] The Charity Commission interprets this test as requiring the sport to promote physical health. [101] It is not enough that the sport may result in participants developing some physical skills or that it may contribute in an incidental way to mental health and well-being. It considers that sports such as angling, ballooning, shooting and motor racing fall outside the statutory definition.

(h) Advancement of human rights, conflict resolution. [102]

23-019 Under the Charities Act 2011, the advancement of human rights and the resolution of conflicts are now explicitly recognised as charitable purposes. These include the promotion of religious or racial harmony, and equality and diversity. This is some advance on existing charity law where, for example, a gift to appease racial feelings between different linguistic groups in South Africa was held to be a political cause. [103] It will, however, remain essential that any political activity that the charity undertakes is strictly ancillary to its dominant purpose of advancing human rights or conflict resolution. It must not become the dominant means by which the organisation carries out its purposes. [104] Thus a trust with the dominant aim of securing peace by demilitarisation would not qualify for charitable status even under the Charities Act 2011. [105] The Commission or a court would not take a view on whether that aim was for the benefit of the public. It would, however, take a different view if the purpose of the trust were to assist in constitutional litigation aimed at testing laws that were arguably contrary to human rights treaties to which a government was a signatory. The government would have a binding obligation in international law to give effect to its treaty obligations and the trust would be seeking to secure compliance with those superior obligations. [106]

(i) Advancement of environmental protection or improvement. [107]

23-020 According to the Charity Commission, the advancement of environmental protection and improvement includes the preservation and conservation of the natural environment and the promotion of sustainable development. The purpose of a charitable organisation can be to preserve a particular species or habitat, or wildlife in general. The Commission or the court may require expert evidence about the environmental merits of a conservation project before accepting that it benefited of the public and so qualified for charitable status.

(j) Relief of those in need by reason of youth, age, ill-health etc. [108]

23-021 The Charities Act 2011 expressly stipulates categories of need or disadvantage that may qualify for charitable relief. These are youth, age, disability, financial hardship or other disadvantage. It is not essential that those in need suffer from any financial poverty. [109] But their circumstances must give rise to some specific need that the charitable activity actually relieves. [110]

(k) Advancement of animal welfare. [111]

23-022 The Charities Act 2011 makes the advancement of animal welfare a charitable purpose in itself. Under the general law, gifts for animal welfare were treated as charitable on the ground that they tended to promote human morality by discouraging cruelty or maltreatment by human beings. [112] The purpose would extend to promoting humane methods of slaughtering livestock [113]; running animal sanctuaries and re-homing services for lost or abandoned animals [114]; and the provision of veterinary care and treatment. [115] The advancement of animal welfare does not extend to the abolition of vivisection since this would be a political purpose that required a change in the law. Since the human benefits of vivisection outweigh its disadvantages for animal welfare the abolition of vivisection would not in itself confer a benefit on the public. [116]

(l) Promotion of efficiency of armed forces etc. [117]

23-023 Since the armed forces exist to maintain public security, it has long been charitable to promote the efficiency of the armed forces as a means of protecting the security of the country. Some of the traditional means of promoting their efficiency have included: the promotion of the defence of the country from air attack [118]; the provision of a library and plate for an officers' mess [119]; or prizes for sport in a regiment [120] (as increasing the army's efficiency and aiding taxation). [121] But the Charity Commission also recognises other purposes with this end, such as supporting military museums, encouraging recruitment to the services (e.g. through exhibitions and air displays), and the establishment of benevolent funds for service members and their families in need.

The Charities Act 2011 expressly extends this category to promoting the efficiency of the police, fire and rescue services or ambulance services. [122]

(m) Other recognised purposes. [123]

23-024 This category preserves the charitable status of purposes recognised under existing charity law before the 2006 and 2011 Charities Acts came into effect. Since s.3(1) of the Charities Act 2011 now puts many of those purposes on an express footing, these remaining purposes are residual in character. It would include such purposes as the encouragement of crafts and craftsmanship, [124] and good agricultural practices. [125]

(1) Recreational charities.

23-025 In particular, this category preserves, with some modifications, the objects that were charitable under the Recreational Charities Act 1958. [126] This Act confirmed the charitable status of facilities provided for recreation or other leisure-time occupation if the facilities were provided "in the interests of social welfare". It includes, for example, facilities at village halls, community centres, women's institutes, and grounds and buildings used for recreation purposes. [127]

The Charities Act 2011 provides a closed definition of "social welfare". The facilities must have been provided to improve the conditions of life for the persons for whom they are primarily intended; and either (i) those persons need the facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or (ii) the facilities

are available to the members, or female or male members, of the public at large. [128] The condition under limb (i) is satisfied even if the people who are intended to be benefit from the facilities do not suffer from any kind of social deprivation. [129] The expression in limb (ii) is intended to signify that the facilities must be open to anyone who cares to make use of them, and are not to be made subject, for example, to a membership election or to a prohibitive entry fee. [130] The Charities Act 2011 continues the amendment made in the Charities Act 2006 which allowed the facilities to be made available solely to male or to female members of the public at large.

Footnotes

24 See generally Charity Commission, Commentary on Descriptions of Purposes in the Charities Act 2006, (2009) ("Commentary on Descriptions") available at http://www.charity-commission.gov.uk [accessed 8 October 2019].

25 This was recognised under the existing law: e.g. Town and Country Planning Act 1947; *Re Crystal Palace Trustees v Minister of Town and Country Planning [1951] Ch. 132*.

26 See Charity Commission, Commentary on Descriptions paras [6]–[14].

27 *Re Coulthurst [1951] Ch. 661* at 666, per Evershed MR; and see *IRC v Baddeley [1955] A.C. 572* at 585.

28 *Re Niyazi's WT [1978] 1 W.L.R. 910*.

29 *Re Cottam [1955] 1 W.L.R. 1299*; and see *Re Lucas, Rhys v Attorney General [1922] 2 Ch. 52*; *Re Payling's WT [1969] 1 W.L.R. 1595*.

30 *Re Mitchell, Public Trustee v Salvation Army [1963] N.Z.L.R. 934*.

31 *Re Coulthurst [1951] Ch. 661*; and see *Re Armitage [1972] Ch. 438*; *Re Denison (1974) 42 D.L.R. (3d) 652* (indigent lawyers and law students).

32 *IRC v Baddeley [1955] A.C. 572* at 604 (a dissenting speech, but on this point all the members of the House were in agreement among themselves and with both the courts below: see at 585, 593, 613).

33 *Re Sanders' WT [1954] Ch. 265* (an appeal was settled: *The Times*, 22 July 1954); and see *Over Seventies Housing Association v City of Westminster (1974) 230 E.G. 1593*.

34 *Re Hobourn Aero Components Ltd's Air Raid Distress Fund [1946] Ch. 194*.

35 See Charity Commission, Commentary on Descriptions, paras [15]–[19].

36 *Re Shaw's WT [1952] Ch. 163*, below; *Royal Choral Society v IRC (1943) 112 L.J.K.B. 648*. See, however, *Re Hopkins' WT [1965] Ch. 669* at 680.

37 *Re Shaw [1957] 1 W.L.R. 729* (G. B. Shaw's alphabet).

38 *IRC v Baddeley [1955] A.C. 572* at 585.

39 See para.23-027 below.

40 *Attorney General v Margaret and Regius Professors in Cambridge (1682) 1 Vern. 55* (divinity).

41 *Re Gott [1944] Ch. 193*.

42 *Re Mariette [1915] 2 Ch. 284*.

43 *London Hospital Medical College v IRC [1976] 1 W.L.R. 613*.

44 *Attorney General v Ross [1986] 1 W.L.R. 252*.

45 *Re Dupree's Deed Trusts [1945] Ch. 16*.

46 *IRC v McMullen [1981] A.C. 1*.

47 *Re Mariette [1915] 2 Ch. 284*.

48 *Re Shaw's WT [1952] Ch. 163* (the wife of George Bernard Shaw); *Re Webber [1954] 1 W.L.R. 1500* (the Boy Scouts).

49 See *Re Stanford [1924] 1 Ch. 73*.

50 *Incorporated Council of Law Reporting for England and Wales v Attorney General [1972] Ch. 73*. Contra in Australia: see *(1972) 88 L.Q.R. 171*. In New Zealand some purposes of a law library are charitable: *Re Mason [1971] N.Z.L.R. 714*, esp. at 728, 729.

51 *Re Hummeltenberg [1923] 1 Ch. 237* (though nowadays a college for training faith healers would probably be charitable: see *Funnell v Stewart [1996] 1 W.L.R. 288*). Other more extreme hypotheticals include the education of pickpockets (*Re Macduff [1896] 2 Ch. 451* at 474, per Rigby LJ); or a public library devoted entirely to works of pornography (*Re Pinion [1965] Ch. 85* at 106, per Harman LJ).

52 *Re Clifford (1911) 106 L.T. 14 (omitted from [1912] 1 Ch. 29)*. But the result would be different if the main purpose were to protect or improve the environment: CA 2011 s.2(2).

53 *R. (on the application of Independent Schools Council) v Charity Commission for England and Wales [2011] UKUT 421 (TCC); [2012] Ch. 214* at [48]. See para.23-027 below.

54 *Re Hopkinson, Lloyds Bank Ltd v Baker [1949] 1 All E.R. 346* at 350, per Vaisey J (Labour); and see *Bonar Law Memorial Trust v IRC (1933) 49 T.L.R. 220* (Conservative); *Re Bushnell [1975] 1 W.L.R. 1596* (furtherance of socialised medicine, gift taking effect in 1941).

55 *Re McDougall [1957] 1 W.L.R. 81*.

56 See Charity Commission, Commentary on Descriptions paras [20]–[24].

57 *Thornton v Howe (1862) 31 Beav. 14* at 20; *Re Watson, Hobbs v Smith [1973] 1 W.L.R. 1472*.

58 CA 2011 s.3(2)(a).

59 *Re South Place Ethical Society [1980] 1 W.L.R. 1565, noted [1981] Conv. 150*. The gift was valid on the grounds of advancement of education.

60 *Re South Place Ethical Society [1980] 1 W.L.R. 1565*.

61 *Re Church of Scientology (England and Wales) (1999) [2005] W.T.L.R. 1151*. See also *R. v Registrar General, Ex p. Segerdal [1970] 2 Q.B. 697*.

62 *Re Church of Scientology (England and Wales) (1999) [2005] W.T.L.R. 1151* at 1117.

63 *United Grand Lodge v Holborn BC [1957] 1 W.L.R. 1080*.

64 *Re Banfield [1968] 1 W.L.R. 846*.

65 *Hester v CIR (2004) 7 I.T.E.L.R. 420* (New Zealand).

66 *Re Delany [1902] 2 Ch. 642*.

67 *Cocks v Manners (1871) L.R. 12 Eq. 574*; *Gilmour v Coats [1949] A.C. 426*. This is how the rule would be explain in terms of the current approach to proof of the public benefit in *R. (on the application of Independent Schools Council) v Charity Commission for England and Wales [2011] UKUT 421 (TCC); [2012] Ch. 214* at [65]. See also Charity Commission, The Advancement of Religion and the Public Benefit (Version December 2008).

68 *Re Caus [1934] Ch. 162*; *Re Hetherington [1990] Ch. 1*. The validity of gifts for the saying of masses was left open in *Gilmour v Coats [1949] A.C. 426* at 447, 454, 460.

69 *Re Royce [1940] Ch. 514* ("for the benefit of the choir"); contrast *Re Woodhams [1981] 1 W.L.R. 493* at 496 (tea for choirboys).

70 *Re Barker's WT (1948) 64 T.L.R. 273*.

71 *Hoare v Osborne (1866) L.R. 1 Eq. 585*.

72 *Re Eighmie [1935] Ch. 524*.

73 *Re Manser [1905] 1 Ch. 68* (Society of Friends).

74 *Re Pardoe [1906] 2 Ch. 184*.

75 *Re Eighmie [1935] Ch. 524*.

76 *Re King [1923] 1 Ch. 243*; *Re Hooper [1932] 1 Ch. 38*.

77 *Hoare v Osborne (1866) L.R. 1 Eq. 585*.

78 See Charity Commission, Commentary on Descriptions, paras [25]–[28].

79 See Charity Commission, Commentary on Descriptions, para.[25].

80 *Thomas v Howell (1874) L.R. 18 Eq. 198 (R.N.L.I.)*; *Re Wokingham Fire Brigade Trusts [1951] Ch. 373* (voluntary fire brigade established for community benefit).

81 See Charity Commission, Commentary on Descriptions, para.[28].

82 See Charity Commission, Commentary on Descriptions, para.[29].

83 For example e.g. Scout and Guide groups: *Re Webber [1954] 1 W.L.R. 1500* (categorised as an educational purpose).

84 CA 2011 s.3(2)(c).

85 See Charity Commission, Commentary on Descriptions, [A5]–[A15].

86 See Charity Commission, Commentary on Descriptions, paras [31]–[35].

87 *Re Delius [1957] Ch. 299* (Frederick Delius).

88 *Re Shakespeare Memorial Trust [1923] 2 Ch. 398*. Contrast *Thomson v Shakespeare (1860) 1 De G.F.&J. 399*.

89 *Royal Choral Society v IRC (1943) 112 L.J.K.B. 648*; and see *Levien [1955] 1 W.L.R. 964*.

90 *Re South Place Ethical Society [1980] 1 W.L.R. 1565*.

91 *Re Hopkins' WT [1965] Ch. 669* (true authorship of the plays attributed to Shakespeare).

92 *Re Lopes [1931] 2 Ch. 130* (London Zoological Society and Gardens).
93 *Re Pinion [1965] Ch. 85*; *Sutherland's Trustee v Verschoyle, 1968 S.L.T. 43*. See also Charity Commission, Preservation and Conservation (RR9) (Version February 2001) "Annex, Merit Criteria".
94 See Charity Commission, Commentary on Descriptions, paras [36]–[38].
95 *Re Nottage [1895] 2 Ch. 649*.
96 *IRC v McMullen [1981] A.C. 1*.
97 *Re Gray [1925] Ch. 362*; cf. *IRC v City of Glasgow Police Athletic Association [1953] A.C. 380*.
98 *Bath and North East Somerset Council v HM Attorney General [2002] EWCA 1623; [2002] W.T.L.R. 1257*.
99 *Bath and North East Somerset Council v HM Attorney General [2002] EWCA Civ 1623* at [35], [48].
100 CA 2011 s.3(2)(d).
101 Charity Commission, Charitable Status and Sport (RR11) (Version April 2003). The Report, which was published before the 2006 Act came into force does not refer explicitly to mental skill or exertion. It is undergoing revision.
102 Charity Commission, Commentary on Descriptions, paras 39–42.
103 *Re Strakosch [1949] Ch. 529*.
104 See Charity Commission, The Promotion of Human Rights (RR12) (Version January 2005) paras 33–36; and para.23-029 below.
105 See *Southwood v Attorney General [2000] W.T.L.R. 1199*.
106 *Human Dignity Trust v Charity Commission FTT (Charity) CA/2013/0013*.
107 See Charity Commission, Commentary on Descriptions, paras [43], [44]; and Charity Commission, Preservation and Conservation (RR9) (Version February 2001).
108 See Charity Commission, Commentary on Descriptions, paras [45]–[46].
109 *Joseph Rowntree Trust v Attorney General [1983] Ch. 159*.
110 *Joseph Rowntree Trust v Attorney General [1983] Ch. 159* at 171.
111 See Charity Commission, Commentary on Descriptions, paras [47]–[48].
112 *Re Wedgewood [1915] 1 Ch. 113*; *Re Moss [1949] 1 All E.R. 495* at 497.
113 For example *Re Wedgewood [1915] 1 Ch. 113*.
114 *Re Green's WT [1985] 3 All E.R. 455*.
115 Charity Commission, Commentary on Descriptions, paras [47]–[48].
116 *National Anti-Vivisection Society v IRC [1948] A.C. 31*. See also *Hanchett-Stamford v Attorney General [2008] EWHC (Ch); [2009] Ch. 173* (prohibition on performing animals).
117 See Charity Commission, Commentary on Descriptions, paras [49]–[50].
118 *Re Driffill [1950] Ch. 92*.
119 *Re Good [1905] 2 Ch. 60*.
120 *Re Gray, Todd v Taylor [1925] Ch. 362*.
121 Both *Re Good [1905] 2 Ch. 60* above; and *Re Gray [1925] Ch. 362* above; were doubted in *IRC v City of Glasgow Police Athletic Assoc [1953] A.C. 380* at 391, 401. It may be question of how closely the purpose is directed towards promoting the armed forces' efficiency.
122 Fire and rescue services means services provided by fire and rescue authorities under Pt 2 of the Fire and Rescue Services Act 2004: CA 2011 s.3(2).
123 Commentary on Descriptions, paras 51–53.
124 *IRC v White (1990) 55 T.C. 651*.
125 *Re Jacobs, Westminster Bank Ltd v Chinn (1970) 114 S.J. 515*.
126 CA 2011 s.2(4). See generally Charity Commission, The Recreational Charities Act 1958 (RR4). The 1958 Act was enacted in response to the decision of the House of Lords in *IRC v Baddeley [1955] A.C. 572* which held that a local community centre was not charitable under the general law.
127 CA 2011 s.5(4).
128 CA 2011 s.5(3).
129 *Guild v IRC [1992] 2 A.C. 310*.
130 Charity Commission, The Recreational Charities Act 1958 (RR4), [A11].

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3. - Public Benefit

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 23 - Charitable Trusts

Section 2. - The essentials of Charity

3. - Public Benefit

(a) Statutory qualifications.

23-026 A purpose recognised as charitable under the Charities Act 2011 or under the general law must be for the public benefit. The question of public benefit is determined according to the existing case law and Charities Act 2011. [131] This Act has qualified the existing understanding of the public benefit in two main ways.

First, the 2011 Act confirms that it is not presumed that any particular purpose is for the public benefit. [132] The burden is on the organisation to show that its purpose does in fact confer a public benefit when it first applies for registration as a charity, and while it continues to operate. This statutory rule confirms the position under the general law. [133]

Secondly, the trustees of a charity must have regard to any guidance published by the Charity Commission which aims to promote awareness and understanding of the public benefit requirement. [134] The guidance does not have the force of law but explains how the Charity Commission would apply the public benefit test to a new organisation applying for registration as a charity, and in reviewing the continuing operation of the charity.

(b) Two senses of public benefit.

23-027 Since the statutory definition of charity was enacted in the Charities Act 2006, it has become apparent that there two senses in which a charitable purpose may need to benefit the public. [135]

The first depends on whether the purpose would in itself be a benefit to the community. It requires the court or the Commission to consider whether the benefits of the purpose outweigh any possible dis-benefits to the public (such as in a trust for the abolition of vivisection) [136]; whether the benefits are capable of proper proof (such as in a trust for supporting a cloistered community of nuns) [137]; or whether it would be constitutionally proper for the court or Commission to rule on whether a purpose would be advantageous to the community (such as a trust for promoting a political purpose). [138]

The second sense refers to the extent of the benefit conferred by the purpose. Whatever the value of the purpose, it must be beneficial to the public or to a section of the public, and not merely to a private class of persons. The application of these two senses of the public benefit differs from one kind of charity to another. [139]

(c) Benefits capable of proof by evidence.

23-028 In establishing whether a purpose is beneficial in the first sense, the court or the Commission satisfies itself that the benefit is identifiable, and capable of being proved by evidence where that is necessary. It should always be possible to identify and describe how the purpose of the charity is beneficial, even if the benefit cannot be quantified or measured. [140] The benefit may sometimes be so clear that very little evidence would be needed. For example, very little proof would be required to show that education in schools, [141] disaster relief, [142] or the promotion of the works of an eminent musical composer were beneficial to the public. [143] In more debatable cases, it would be necessary to adduce positive evidence from an expert qualified in the relevant field. [144] The criterion that some benefits may be identifiable, without necessarily being capable of proof by positive evidence, would also be relevant to charities whose purposes were to preserve historic buildings or the natural landscape, [145] or to promote the welfare of animals. [146]

(d) Political purposes. [147]

23-029 The court or the Commission would decline to form a view on whether a political purpose was beneficial in the first sense. [148] A political purpose is one that seeks to change the law or government policy in any country, or to promote the views of a political party. [149] But the fact that trustees have power to use political means in furthering the non-political purposes of a trust will not necessarily render the trust non-charitable. [150] For example, a trust may be upheld as a good educational charity although it has some political aspects. [151] The subsequent adoption by Parliament of a political programme cannot validate a gift to promote it. [152]

(e) Benefit must be to the public or a section of the public.

23-030 A purpose which is beneficial to the public in the first sense may nonetheless fail as a charity because it fails to satisfy the second sense of the public benefit test. In this sense, the benefits must extend to the public or a section of the public rather be directed at a private class of persons. The distinction turns partly on whether the purpose has a public or private motivation. It is not a simple matter of numbers, though the number of people eligible to benefit from the purpose must be more than negligible. [153] So a trust for the education of children of the employees of a company employing over 110,000 staff was held not to be charitable even though education was a public benefit in the first sense, [154] and the number of persons benefitting was very great. The objection was that the beneficiaries were defined by their personal relationship with the employer which was acting in its own interests in establishing the trust. [155]

The proof of public benefit varies from one kind of charity to another, and trusts for the relief or prevention of poverty are to some extent an exception to the usual requirement. Although they must benefit the public in the first sense, they need not always confer a public benefit in the second sense. This explains why trusts for the maintenance of poor relations and disadvantaged employees continue to have charitable status. [156] Such a trust does not fail because the class of beneficiaries is defined by reference to their personal relationship with a single person, [157] an employer, or a professional organisation. [158]

Where the benefit is for a section of the public, rather than the public as a whole, the opportunity to benefit must not be capriciously restricted. Any restriction must be reasonable or rational in its relationship to the purposes of the organisation. [159] So an organisation whose purpose is to provide a local recreation centre cannot limit its membership to a particular religious

denomination if there is nothing peculiarly religious about its activities. [160] But there is not the same objection to "a form of relief extended to the whole community yet by its very nature advantageous only to the few" since its benefits would be open to the community as a whole. [161]

Special questions arise where the charity charges a fee for its facilities or services. Charities which charge high fees (notably schools) have a duty to make provision for people who are poor and cannot reasonably afford to pay. Such people must not be limited to benefiting from the charity's purposes in ways that are minimal or merely token. The benefits they derive must still relate to the charity's purpose. It is, however, for the trustees of the charity to decide how best to meet this obligation. [162]

(f) Race Relations Act 1976 and Equality Act 2010.

23-031 A provision which provides for conferring benefits on a class of persons defined by reference to colour takes effect as if the reference to colour was disregarded. [163] It is, however, permissible for a charity to benefit people who are defined by reference to a protected characteristic, as defined by the Equality Act 2010. The restriction on benefits must be a proportionate means of achieving a legitimate aim, and compensate for a disadvantage linked to the protected characteristic. [164]

Footnotes

131 *R. (on the application of Independent Schools Council) v Charity Commission for England and Wales [2011] UKUT 421 (TCC); [2012] Ch. 214*; *Attorney General v Charity Commission for England and Wales [2012] UKUT 420 (TCC); [2012] W.T.L.R. 977*.

132 CA 2011 s.4(2).

133 *R. (on the application of Independent Schools Council) v Charity Commission for England and Wales [2011] UKUT 421 (TCC); [2012] Ch. 214*.

134 Public Benefit; the Public Benefit Requirement (September 2013) ("*Public Benefit*"), available at http://www.charity-commission.gov.uk/ [accessed 8 October 2019].

135 *R. (on the application of Independent Schools Council) v Charity Commission for England and Wales [2011] UKUT 421 (TCC); [2012] Ch. 214*; *Attorney General v Charity Commission for England and Wales [2012] UKUT 420 (TCC); [2012] W.T.L.R. 977*.

136 *National Anti-Vivisection Society v IRC [1948] A.C. 31*.

137 *Gilmour v Coats [1949] A.C. 426*.

138 *McGovern v Attorney General [1982] Ch. 321*.

139 *Attorney General v Charity Commission for England and Wales [2012] UKUT 420 (TCC); [2012] W.T.L.R. 977*.

140 Public Benefit, Pt 3.

141 *R. (on the application of Independent Schools Council) v Charity Commission for England and Wales [2011] UKUT 421 (TCC); [2012] Ch. 214*.

142 Public Benefit, Pt 3.

143 *Re Delius [1957] Ch. 299*.

144 See *Re Pinion [1965] Ch. 85*.

145 Public Benefit, Pt 3.

146 For example *Re Wedgewood [1915] 1 Ch. 113*.

147 See generally Charity Commission, Speaking Out—Campaigning and Political Activity by Charities, CC9 (2008). This exclusion of political purposes from charitable status has not been followed in Australia or the US. It is accepted in those countries that it may be a charitable purpose to use lawful means to generate public debate on matters of government and politics. It is not fatal that the debate may be directed at the public at the large or even at governmental agencies. Debate of this kind if regarded as compatible with maintaining a system of responsible and representative government: *Aid/*

Watch Incorporated v Commissioner of Taxation [2010] HCA 42. For developments in other common law jurisdictions, see *H. Bieler (2015) 29 T.L.I. 97*.

148 *National Anti-Vivisection Society v IRC [1948] A.C. 31* (abolition of vivisection); and see *Baldry v Feintuck [1972] 1 W.L.R. 552* (school milk campaign); *D'Aguiar v Guyana Commissioner of Inland Revenue [1970] T.R. 31* (citizens' advice service); *Southwood v Attorney General [2000] W.T.L.R. 1199* (promotion of peace by de-militarisation); *Hanchett-Stamford v Attorney General [2008] EWHC (Ch); [2009] Ch. 173* (prohibition on performing animals).

149 For a useful categorisation, see *McGovern v Attorney General [1982] Ch. 321* at 340.

150 *McGovern v Attorney General [1982] Ch. 321* at 340, 343; and para.23-036 below.

151 *Re Koeppler WT Barclays Bank Trust Co Ltd v Slack [1986] Ch. 423* (formation of informed international opinion). And see *Attorney General v Ross [1986] 1 W.L.R. 252* at 263 (encouragement of political awareness among students). Contra, *McGovern v Attorney General [1982] Ch. 321* (research into human rights a mere adjunct to main political purpose of Amnesty); *Webb v O'Doherty (1991) 3 Admin. L.R. 731* (students' union seeking to spend money in campaign against Gulf War).

152 *Re Bushnell [1975] 1 W.L.R. 1596* (socialised medicine).

153 Public Benefit, Pt 2. See generally *M. Synge (2016) 132 L.Q.R. 303*.

154 *R. (on the application of Independent Schools Council) v Charity Commission for England and Wales [2011] UKUT 421 (TCC); [2012] Ch. 214*.

155 *Oppenheim v Tobacco Securities Trust Co Ltd [1951] A.C. 297*; and see *Re Cox, Baker v National Trust Co Ltd [1955] A.C. 627*. See also *Re Mead's Trust Deed [1961] 1 W.L.R. 1244* (convalescent home for members of a trade union and their wives).

156 *Attorney General v Charity Commission for England and Wales [2012] UKUT 420 (TCC); [2012] W.T.L.R. 977*.

157 *Re Scarisbrick [1951] Ch. 622*; *Re Cohen, Cowan v Cohen [1973] 1 W.L.R. 415*; *Re Segelman [1996] Ch. 171*.

158 *Gibson v South American Stores (Gath & Chaves) Ltd [1950] Ch. 177*; *Re Coulthurst [1951] Ch. 661*; *Dingle v Turner [1972] A.C. 601*. The principle was extended in *Re Young, Westminster Bank Ltd v Sterling [1955] 1 W.L.R. 1269* (benevolent fund for club members).

159 Public Benefit, Pt 5.

160 See, e.g. *IRC v Baddeley [1955] A.C. 572*; *Davies v Perpetual Trustee Co (Ltd) [1959] A.C. 439*; *Thompson v Federal Commissioner of Taxation (1959) 102 C.L.R. 315*; but see the gloss in *City of Hawthorn v Victorian Welfare Assoc [1970] V.R. 205* (class is sufficiently public if anyone can adhere to its beliefs).

161 *IRC v Baddeley [1995] A.C. 572* at 592, per Viscount Simonds: see *Re Wedge (1968) 67 D.L.R. (2d) 433* (trust to help "some needy displaced family" to make a new start held good).

162 *R. (on the application of Independent Schools Council) v Charity Commission for England and Wales [2011] UKUT 421 (TCC); [2012] Ch. 214*; Public Benefit, Pt 5.

163 Race Relations Act 1976 s.34; applied *Re Harding (Deceased) [2008] Ch. 235*. See generally *T.G. Watkin [1981] Conv. 131*.

164 Equality Act 2010 s.193.

End of Document

4. - Exclusively Charitable

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 23 - Charitable Trusts

Section 2. - The essentials of Charity

4. - Exclusively Charitable

(a) Charitable purposes only.

23-032 The trust must be for charitable purposes only. [165] A trust for charitable and non-charitable purposes is void. It would fall foul of the rule that a trust must generally have beneficiaries with standing to enforce the trustees' duties, and, in many cases, the rule that the objects of a trust must be defined with sufficient certainty.

The requirement that the trust be exclusively charitable arises where the settlor drafts the trust purposes rather generally, or as a list of specific purposes so that the trust authorises the application of funds for many different purposes. The effect of the requirement is that the trust cannot be valid as a charity unless every purpose is wholly charitable. [166] If, for instance, a settlor gives property to be used for such "charitable or deserving", [167] "charitable or philanthropic", [168] "charitable or benevolent", [169] "charitable or public," [170] "charitable or patriotic" [171] or "charitable or other" [172] objects or "worthy causes" [173] as his trustee may select, then the entire gift would be void. A gift in those terms would authorise the trustee to apply the whole of the property to a non-charitable object. The objection cannot be avoided by asking the court to omit the word "or" from probate unless there is strong evidence that the testator did not intend the word to appear in his will. [174] Similarly, a trust for organisations having "in the opinion of my trustees" charitable objects is not charitable. The trustees may be mistaken about the true charitable status of the organisation that they want to apply the gift to. [175]

(b) Compound purposes.

23-033 Where a gift is for certain "educational or charitable or religious purposes", it is valid since each of these heads is exclusively charitable. [176] Objects described as "charitable and deserving", or as "charitable and benevolent" will sometimes be construed as exclusively charitable objects, provided that they can be read as merely restricting the class of charities to which the property can be applied. [177] In each case there is a question of construction whether the "and" or the "or" has been used disjunctively (contrasting two dissimilar purposes) or conjunctively (coupling together two similar conceptions). [178] For example, when the word is used conjunctively in the expression "charitable or benevolent purposes", it confines the gift to charitable purposes that are also benevolent.

(c) Qualifications.

23-034

The rule that the purposes must be charitable only is subject to some qualifications.

(1) Apportionment.

23-035 If an executor or trustee is directed to apportion the property between undefined charitable and non-charitable objects, so that he cannot appropriate all of it to the non-charitable objects, the trust may not wholly fail. For if the executor or trustee does not make the appointment, the court will apportion the property equally between the two classes of objects according to the maxim that equality is equity. The trust will only fail for the part apportioned to the non-charitable objects. [179]

(2) Power of variation.

23-036 If under a charitable trust the trustees are given power to revoke the trusts and declare new non-charitable trusts, the mere existence of this unexercised power does not make the original trusts non-charitable. [180]

(3) Ancillary purposes. [181]

23-037 A purpose which, taken in isolation, might not seem to be charitable, will nonetheless be valid if it is merely ancillary to a primary charitable purpose. Thus a gift to pay for a dinner at the meeting of the trustees of a hospital charity was held to be charitable. The gift indirectly supported the primary charitable purposes of the trust. [182] Similarly, if the main objects of a trust are exclusively charitable, the mere fact that the trustees have incidental powers to further them by non-charitable (e.g. political) means will not deprive them of their charitable status. [183] But it is essential that the non-charitable purpose should be merely incidental; an otherwise wholly charitable institution will not be charitable if it can engage in subsidiary non-charitable purposes which are independent of its main purpose and not incidental to it. [184]

(4) Implication.

23-038 Where the stated purpose of a gift is vague or indefinite, it may be construed narrowly so that it is confined to charitable purposes only. This may be done in two kinds of case.

First are gifts for the general benefit of a particular locality, [185] and even for "my country England". [186] Where no purpose is specified in a gift for the benefit of a locality, the court will imply a limitation to charitable purposes in that district. [187] But this implication is not possible if the draftsman has expressed the specific purposes for which the gift is to be used, and these purposes are not confined to charity. It follows that a gift which may, by its express terms, be used for some non-charitable object is not made charitable by confining it to a particular locality. [188] So a trust for "public, benevolent or charitable purposes" in a district is not charitable. [189]

Secondly, a gift made to an official who discharges charitable functions may be valid even if it is not clearly limited to a charitable purpose. It may be construed as limited to the official, charitable purposes of the recipient. [190] Thus a gift to the Archbishop of Westminster Cathedral for the time being has been held charitable, [191] and so has a gift to the editors of a missionary periodical, who were also trustees of a missionary church. [192]

The addition of words to the gift may sometimes exclude this construction. A gift to the vicar and churchwardens of a parish to be applied as in their sole discretion they thought fit, [193] or to a bishop of a diocese to be used by him as he thought fit in his diocese, [194] is charitable. But a gift which may, by its express terms, be used for some non-charitable object is not rendered charitable by being given to a charitable corporation or trustees, e.g. a bishop. [195] Accordingly, a gift "for parish work" [196] or for "parochial institutions or purposes" [197] is not made charitable merely by being made to the vicar; for much that can be done in the parish is not charitable.

(5) Validation by statute.

23-039 The Charitable Trusts (Validation) Act 1954 has retrospectively validated certain dispositions of property for purposes that were not exclusively charitable. [198] The Charitable Trusts (Validation) Act only applies, however, to dispositions contained in instruments taking effect before 16 January 1952. [199] It was enacted in response to the decision in *Chichester Diocesan Fund and Board of Finance v Simpson*, [200] which held that a gift for a charitable or benevolent object or objects was void for uncertainty since it would have authorised the property to be applied for purposes that were not exclusively charitable.

The Charitable Trusts (Validation) Act applies to a so-called "an imperfect trust provision". This is one that:

> "consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable." [201]

It applies where two sets of purposes are expressed separately and only one of them is clearly charitable; or where the provision expresses a composite purpose that would permit the property to be applied solely for a charitable purpose but where it could equally be applied for a non-charitable purpose. [202] If the provision is to fall within this second limb, it must be possible to say that nobody would have a legitimate complaint if the whole fund were applied to the charitable purpose. [203] But a gift to institutions carrying on both charitable and non-charitable objects is not a "trust provision" and so cannot be validated, [204] and the same applies to what in substance is a private discretionary trust that aims to provide welfare benefits for beneficiaries with standing to enforce the trust. [205]

Where the Charitable Trusts (Validation) Act applies it has the following effect [206] :

(i)for the period before the Charitable Trusts (Validation) Act came into force on 30 July 1954, as if all the declared objects were charitable; and

(ii)for the period after it came into force, as if the provision had required the property to be held or applied for the declared objects only so far as they authorise use for charitable purposes.

Footnotes

165 CA 2011 s.1(1)(a). This reaffirms the existing law: e.g. *Chichester Diocesan Fund and Board of Finance (Inc) v Simpson [1944] A.C. 341*.

166 *Morice v Bishop of Durham (1805) 10 Ves. 522*; *Hunter v Attorney General [1899] A.C. 309*; *Attorney General v Wahr-Hansen [2001] 1 A.C. 75*; *A. W. Scott (1945) 38 Harv.L.R. 548*.

167 Contrast *Re Sutton (1885) 28 Ch. D. 464* ("charitable and deserving").

168 See *Re Eades [1920] 2 Ch. 353*.

169 See *Attorney General for New Zealand v Brown [1917] A.C. 393*; *Houston v Burns [1918] A.C. 337*; *Attorney General for New Zealand v New Zealand Insurance Co [1936] 3 All E.R. 888*; *Chichester Diocesan Fund and Board of Finance*

(Inc) v Simpson [1944] A.C. 341; see the sequel: *Re Diplock [1948] Ch. 465* (affirmed sub nom. *Ministry of Health v Simpson [1951] A.C. 251*).

170 *Blair v Duncan [1902] A.C. 37*; and see *Re Da Costa [1912] 1 Ch. 337*; *Houston v Burns [1918] A.C. 337*; *Re Davis, Thomas v Davis [1923] 1 Ch. 225*.

171 See *Attorney General v National Provincial and Union Bank of England Ltd [1924] A.C. 262*.

172 *Re Davidson [1909] 1 Ch. 567*; and see *Re Chapman, Hales v Attorney General [1922] 2 Ch. 479*.

173 *Re Atkinson's WT [1978] 1 W.L.R. 586*.

174 *Re Horrocks [1939] P. 198*.

175 *Re Wootton [1968] 1 W.L.R. 681*; contrast *Gibson v South American Stores (Gath & Chaves) Ltd [1950] Ch. 177* at 185.

176 *Re Ward, Public Trustee v Ward [1941] Ch. 308*.

177 *Re Sutton (1885) 28 Ch. D. 464*; *Re Best, Jarvis v Birmingham Corp [1904] 2 Ch. 354*; *Re Carapiet's Trusts [2002] W.T.L.R. 989*. cf. *Williams v Kershaw (1835) 5 Cl. & F. 111n.*; *Re Eades [1920] 2 Ch. 353*; *Attorney General of the Bahamas v Royal Trust Co [1986] 1 W.L.R. 1001*.

178 See the cases prior to *Chichester Diocesan Fund and Board of Finance (Inc) v Simpson [1944] A.C. 341*, collected at *(1940) 56 L.Q.R. 452*.

179 *Salusbury v Denton (1857) 3 K. & J. 529*; *Re Clarke, Bracey v Royal National Lifeboat Institution [1923] 2 Ch. 407*.

180 *Gibson v South American Stores (Gath & Chaves) Ltd [1950] Ch. 177*; contrast *George Drexler Ofrex Foundation Trustees v IRC [1966] Ch. 675*.

181 See generally *N. P. Gravells [1978] Conv. 92*.

182 *Re Coxen [1948] Ch. 747*. See also *Royal College of Surgeons of England v National Provincial Bank Ltd [1952] A.C. 631*; *Neville Estates Ltd v Madden [1962] Ch. 832*.

183 *McGovern v Attorney General [1982] Ch. 321*.

184 *Oxford Group v IRC [1949] 2 All E.R. 537*; *Ellis v IRC (1949) 31 T.C. 178*; and see *Associated Artists Ltd v IRC [1956] 1 W.L.R. 752*; *Re Harpur's WT [1962] Ch. 78*.

185 *Re Allen, Hargreaves v Taylor [1905] 2 Ch. 400*; *Re Norton's WT [1948] 2 All E.R. 842*; and see *Goodman v Saltash Corp (1882) 7 App. Cas. 633*; *Attorney General v Wahr-Hansen [2001] 1 A.C. 75* at 81–82.

186 *Re Smith, Public Trustee v Smith [1932] 1 Ch. 153*.

187 See *Williams' Trustees v IRC [1947] A.C. 447* at 459; *Re Strakosch [1949] Ch. 529* at 539–541; *Re Harding (Deceased) [2008] Ch. 235* at [16]. Contrast *M.J. Albery (1940) 56 L.Q.R. 49*.

188 *Re Gwyon [1930] 1 Ch. 255* at 261; *Re King [1931] W.N. 232* at 233; *Re Sanders' WT [1954] Ch. 265* at 272.

189 *Houston v Burns [1918] A.C. 337*; *Attorney General v National Provincial and Union Bank of England Ltd [1924] A.C. 262*; *Re Strakosch [1949] Ch. 529*.

190 See *Re Spensley's WT [1954] Ch. 233*; *Re Rumball [1956] Ch. 105*. See generally *V.T.H. Delany (1960) 24 Conv. (NS) 306*.

191 *Re Flinn [1948] Ch. 241*; and see *Re Rumball [1956] Ch. 105*. Contrast *Re Meehan [1960] I.R. 82* (to the Bishop of W. "absolutely").

192 *Re Norman [1947] Ch. 349*.

193 *Re Garrard [1907] 1 Ch. 382*.

194 *Re Rumball [1956] Ch. 105*. See also *Re Bain [1930] 1 Ch. 224*; *Re Simson, Fowler v Tinley [1946] Ch. 299*; *Re Eastes [1948] Ch. 257*.

195 *Dunne v Byrne [1912] A.C. 407*; *Re Spensley's WT [1954] Ch. 233* (a fortiori if only one out of two or more trustees is a charitable corporation); *Re Endacott [1960] Ch. 232*.

196 *Farley v Westminster Bank [1939] A.C. 430*.

197 *Re Stratton [1931] 1 Ch. 197*. See also *Re Rumball [1956] Ch. 105*, at 115; and see *Re Davies, Lloyds Bank Ltd v Mostyn (1932) 49 T.L.R. 5*.

198 For the background to the Act, see the Nathan Report Cmd. 8710 (1952), Ch.12; and for its detailed operation, see the 31st edition of this work at para.21-23. New Zealand and the Australian States of Victoria and New South Wales have for some time had legislation enabling courts to strike out the non-charitable excess (see Nathan Report paras 530, 531; *(1946) 62 L.Q.R. 23, 339*), though this legislation is not without its problems (see G. Dal Pont, Charity Law in Australia and New Zealand Ch.9; and see *Leahy v Attorney General for New South Wales [1959] A.C. 457*).

199 This is the date that the Nathan Report was published.

200 *Chichester Diocesan Fund and Board of Finance v Simpson [1944] A.C. 341*.

201 Charitable Trusts (Validation) Act 1954 s.1(1).

202 *Ulrich v Treasury Solicitor [2006] 1 W.L.R. 33*.

203 *Ulrich v Treasury Solicitor [2006] 1 W.L.R. 33* at 43.

204 *Re Harpur's WT [1962] Ch. 78*.

205 *Re Saxone Shoe Co Ltd's Trust Deed [1962] 1 W.L.R. 943*; as interpreted in *Ulrich v Treasury Solicitor [2006] 1 W.L.R. 33*.

206 Charitable Trusts (Validation) Act 1954 s.1(2).

Section 3. - Perpetuity

Section 3. - Perpetuity [207]

23-040 The rule against perpetuities has two aspects. First, is the rule against remoteness of vesting. This generally invalidates any gift that will not vest absolutely within the common law period of a life in being and twenty one years, or within the modified statutory periods of 80 years or 125 years. [208] Secondly, is the rule against inalienability, which prohibits restrictions on the alienability of trust property for longer than common law perpetuity period.

The rule against remoteness of vesting applies to charities in a modified form. Property held on charitable trusts is exempt from the rule against inalienability.

Footnotes

207 J.H.C. Morris and W.B. Leach, The Rule Against Perpetuties, 2nd edn (1962) Ch.7.

208 Perpetuities and Accumulations Act 1964 s.1. Perpetuities and Accumulations Act 2009 s.5(1).

End of Document

1. - The Rule Against Remoteness

23-041 Property may be given so as to pass from one charity to another outside the usual perpetuity periods.[209] A testator may, for example, make a bequest of property to Charity A with a gift over to Charity B if his tomb is permitted to fall out of repair.

In all other respects the rule against remoteness applies to charities. Thus a contingent gift over to a charity which takes effect after a primary non-charitable gift is void if the contingency may happen outside the perpetuity period.[210] The same applies to a gift over from a charity to individuals[211] or non-charitable purposes[212] or a gift over to a charity following a gift to individuals,[213] or non-charitable purposes.[214] In each case the gift over fails and the primary gift is treated as not subject to the contingency.

Footnotes

207 J.H.C. Morris and W.B. Leach, The Rule Against Perpetuities, 2nd edn (1962) Ch.7.

209 *Royal College of Surgeons of England v National Provincial Bank Ltd [1952] A.C. 631* at 649, 650; *Re Tyler, Tyler v Tyler [1891] 3 Ch. 252*; *Christ's Hospital v Grainger (1849) 1 Mac. & G. 460*. Perpetuities and Accumulations Act 2009 s.2(2), (3).

210 *Re Lord Stratheden and Campbell [1894] 3 Ch. 265*; *Re Mander [1950] Ch. 547*.

211 *Re Bowen [1893] 2 Ch. 491*. Contrast *Re Randell (1888) 38 Ch. D. 213*.

212 *Re Davies, Lloyd v Cardigan CC [1915] 1 Ch. 543*.

213 *Re Bowen [1893] 2 Ch. 491* at 494; *Re Peel's Release [1921] 2 Ch. 218*.

214 *Re Wightwick's WT [1950] Ch. 260*; *Re Spensley's WT [1954] Ch. 233*; *Re Bushnell [1975] 1 W.L.R. 1596*.

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2. - The Rule Against Inalienability

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 23 - Charitable Trusts

Section 3. - Perpetuity [207]

2. - The Rule Against Inalienability

23-042 Gifts for charitable purposes are completely exempt from the rule against inalienability. A charitable gift is not void merely because the duration of the gift is not limited to the common law perpetuity period, and the property is rendered inalienable in perpetuity. [215]

Footnotes

207 J.H.C. Morris and W.B. Leach, The Rule Against Perpetuties, 2nd edn (1962) Ch.7.

215 *Chamberlayne v Brockett (1872) 8 Ch. App. 206*.

1. - The Doctrine

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 23 - Charitable Trusts

Section 4. - The Cy-pres Doctrine

1. - The Doctrine

23-043 If a private trust is invalid at the outset or if it subsequently fails, then there is generally a resulting trust for the settlor.[216] But if a charitable trust is invalid or fails,[217] then in many cases the gift to charity will not be entirely ineffective. The Charity Commission (or the court) may instead apply the property cy-pres, that is, to some other charitable purpose "as nearly as possible" to the original trusts.[218] This will be done by a scheme.

There are two stages to applying the cy-pres rules. The first is whether one of the statutory grounds for applying charity property cy-pres has in fact arisen. The second, which applies in cases of so-called "initial failure", is whether the donor has manifested a paramount intention to benefit charity.[219]

Footnotes

216 See below Ch.25.

217 See *National Anti-Vivisection Society v IRC [1948] A.C. 31* at 64, 65. *Da Costa v De Pas (1754) Amb. 228* (corrected at 7 Ves. 76) would not, it seems, be followed as to a cy-pres application on failure of a non-charitable object. Contrast below para.23-046, as to a charity ceasing to be such. For Canadian cases, see *E. C. E. Todd (1954) 32 Can.B.R. 1100*; Waters, Law of Trusts in Canada, 2nd edn (Toronto, 1984), pp.611–632.The cy-pres application of public legacies was known to Roman law: D.33.2.16.

218 *Ironmongers' Co v Attorney General (1844) 10 Cl. & F. 908*; *Re Cunningham [1914] 1 Ch. 427*.

219 CA 2011 s.62.

2. - Grounds for Applying Property Cy-Pres

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Mainwork

Part 5 - Trusts

Chapter 23 - Charitable Trusts

Section 4. - The Cy-pres Doctrine

2. - Grounds for Applying Property Cy-Pres

(a) The former law.

23-044 Originally. the charity property would only be applied cy-pres if it was impossible to carry out the trust on its original terms. [220] But this approach was often found to be too restrictive. An existing use of charity property might have remained strictly possible but nonetheless be inefficient or out of line with current social practices. The Charities Act 1960 extended the grounds on which property may be applied cy-pres. The Charities Act 1993 re-enacted these grounds with some minor changes and they have been consolidated in the Charities Act 2011.

(b) Charities Act 2011.

23-045 The Charities Act 2011 [221] removes much of the need to decide whether there is impossibility in the common law sense. Instead it sets out five main grounds under which the purposes of a charitable gift can be altered.

For some of those grounds, the Charities Act requires that the Commission or court must have regard to what are called "the appropriate considerations". [222] The effect of this direction is that the Commission or court must balance the original spirit of the gift against the social and economic circumstances prevailing when the gift comes to be altered. [223] Previously, the Commission or court was only directed to have regard to the spirit of the gift. This was taken to mean the basic intention underlying the gift as a whole or the substance of the gift rather than the form of words used to express it. [224] The new criterion may allow the Commission or court to take a firmer view about the continuing usefulness of the charity's existing purposes when it considers how far it should be bound by the donor's original intentions.

The Commission is a public body and is bound by the Human Rights Act 1998 to exercise its powers of cy-pres amendment in a way compatible with the rights in the European Convention on Human Rights. If a proposed amendment infringed a convention right, the Commission would need to satisfy itself that the infringement was a proportionate means of achieving a legitimate aim. [225]

(1) Purpose fulfilled or impossible [226] :

23-046 the original purposes, in whole or in part, (i) have been fulfilled "as far as may be", or (ii) cannot be carried out, either at all or "according to the directions given and to the spirit of the gift".

This ground of alteration corresponds to the former common law ground of impossibility. In altering the trust purpose, the Commission is directed only to have regard to "the spirit of the gift" rather than the broader "appropriate considerations". The reason is that this ground applies where the original purpose has become practically impossible rather than where the trust property needs to be applied to a more appropriate or useful purpose.

(2) Surplus trust property [227] :

23-047 the original purpose may still be workable but does not provide a use for all the income or property that is available to the trust.

(3) Amalgamation [228] :

23-048 different trusts with similar purposes may combine when their property can be used more effectively together. Since this is not a case of impossibility, the Commission must have regard to the appropriate considerations in defining the new trust purposes.

(4) Change in area or class of persons [229] :

23-049 the original purpose may have been laid down by reference to an area that has ceased to be relevant (e.g. a municipality that has since been abolished) or be allowed having regard to the appropriate considerations.

(5) Unsuitability or ineffectiveness [230] :

23-050 since the original purposes were laid down, they have: (i) been adequately provided for by other means (as where an educational trust once held land for a school that has since moved to a new site and is now run by a local authority); (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or (iii) ceased in any other way to provide a suitable and effective method of using the trust property (as where the members of a religious charity undergo an irreconcilable schism in their beliefs). [231] Under each of these grounds the Commission has regard to the appropriate considerations when it alters the trust purposes.

The *original purposes* mean the objects for which the charity was established and not the accompanying administrative provisions. [232] The sale of charitable property and its reinvestment in other property subject to the same trusts is not necessarily an alteration in the original purposes that requires a cy-pres scheme. [233]

(c) Time for determination.

23-051 Whether or not a charitable gift is initially impossible must be determined as the facts stand when the gift is made, e.g. at the death of the testator. [234] If at that moment the trust was impracticable and there was no reasonable prospect of its becoming practicable at some future time, the property should be distributed immediately. It should either be applied cy-pres or, if there was no general charitable intent, distributed to those entitled to the residue of the estate or on intestacy. The property ought not

to be kept in suspense indefinitely on a mere possibility that the trust might one day become practicable.[235] Where the purposes of an existing charity need to be altered cy-pres, the Commission considers the purposes as they stand when the application for alteration is made.[236]

Footnotes

220 For a more detailed statement of the common law rules of cy-pres, see the 31st edition of this work at para.21-30.
221 CA 2011 s.62(1).
222 CA 2011 s.62(1)(c), (d), (e).
223 CA 2011 s.62(2), (4).
224 *Re Lepton's Charity [1972] Ch. 276*; *Varsani v Jesani [1999] Ch. 219*.
225 *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (No.2) [2012] UKUT 395 (TCC); [2013] 1 W.L.R. 2105*.
226 CA 2011 s.62(1)(a).
227 CA 2011 s.62(1)(b).
228 CA 2011 s.62(1)(c).
229 CA 2011 s.62(1)(d).
230 CA 2011 s.13(1).
231 See *Varsani v Jesani [1999] Ch. 219*.
232 *Re JW Laing Trust, Stewards' Co Ltd v Attorney General [1984] Ch. 143*.
233 *Oldham BC v Attorney General [1993] Ch. 210*.
234 *Re Wright [1954] Ch. 347*.
235 *Re White's WT [1955] Ch. 188*.
236 CA 2011 s.13(2).

End of Document

3. - Donor’s Paramount Charitable Intention

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 23 - Charitable Trusts

Section 4. - The Cy-pres Doctrine

3. - Donor’s Paramount Charitable Intention

(a) The requirement.

23-052 Where a charitable purpose is impossible from the outset, the cy-pres doctrine only applies where the donor has shown a paramount intention to benefit charity. But where an existing charitable purpose subsequently fails, it is unnecessary to show a paramount charitable intention.

(b) Initial failure.

23-053 If the trust is impossible from the outset, the cy-pres doctrine cannot apply unless the donor has manifested a paramount charitable intention.[237] He must have had a general charitable intention over and above the intention to benefit the particular organisation that failed before his gift to it could take effect. If this paramount intention is not proved, then donor’s property falls into the residue of his estate or is held on resulting trust for those entitled on intestacy. But under the Charities Act 2011[238] no such intention need be shown if the donor has disclaimed, or cannot be identified or found, e.g. where money has been raised by collecting boxes or sales.

(1) Instances.

23-054 The common instance of initial failure is where a charitable organisation ceases to exist between the date of a testator’s will and his death. Where a corporation with charitable objects is dissolved, a subsequent gift made to it is not necessarily impossible from the outset. If the gift is really a gift to the corporation in trust for its objects, it creates an effective trust for those objects,[239] unless the gift shows that the continued existence of the particular corporate trustee is essential.[240] But if the gift is merely a gift to the corporation, it fails[241] unless the donor has manifested a paramount intention of charity.[242] Where the gift is to an unincorporated association established for charitable purposes, the question is whether those purposes, rather than the association, continue to exist.[243] The original association and its assets may in effect have been combined in a new organisation that continues the original purposes. Only if those purposes have ceased is it necessary to ask whether the donor had a general charitable intent.[244]

A gift made to a charitable institution which is in existence at the testator’s death, but which subsequently ceases to exist before receiving the legacy, is not treated as failing at the outset.[245] The legacy belongs to the institution, and on its dissolution passes with the rest of its property to the Crown. The practice of the Crown is to apply the property cy-pres. Since this is not a case of initial failure, it is unnecessary to establish that the donor had a general charitable intention.

(c) Subsequent failure.

23-055 If a charitable gift actually takes effect but later becomes impossible, it is unnecessary to show that the donor had a paramount charitable intention before the Commission can alter the purposes cy-pres.[246] This is so even if the impossibility occurs before the property is available for the charity, e.g. while a prior life interest subsists.[247]

There are two reasons for this different treatment of cases of subsequent failure. First, once an outright gift to charity has been made, it is regarded as indefinite in its effect; those who would otherwise take the property have already been excluded from it for some period.[248] Secondly, a charity may fail long after it was first established. It would often be difficult to discover the donor's successors who would have claims to the property.

(d) Contrary intention.

23-056 These rules are subject to a contrary intention. If the testator intended a gift for only a limited time, with a gift over on failure of the charitable purpose, either the gift over will take effect,[249] or if it is too remote there will be a resulting trust for the testator's estate.[250] Similarly if property is handed over contingently on other property being given, there will be a resulting trust if the latter property is not given.[251]

(e) Establishing paramount intention.

23-057 What must be shown is "an overriding intention to devote [the property] to charity in general."[252] The test depends on construction of the relevant instrument. The reported cases show surprising instances of both liberal[253] and conservative[254] views upon it.[255]

(1) Indications of the intention.

23-058 The inclusion of the gift in question among other gifts to undoubted charities with kindred objects is some indication of such an intention.[256] So, too, is the fact that the funds were contributed by numerous small anonymous donations,[257] though this is stronger where there is a surplus after the immediate purposes have been fulfilled than where the project has failed at the outset.[258] Again, a gift to a charitable institution that has never in fact existed may indicate a general charitable intention.[259] But this is not conclusive,[260] especially where the result of the gift failing is that the property will fall into a residuary gift to charity.[261] The court has even extracted a general charitable intention by dissecting a gift into its essential and non-essential parts. If the latter are impracticable, the former may provide a general charitable intention to which effect can be given by means of a scheme which omits the latter.[262]

(2) Contrary indications.

23-059 It is very difficult to find a general charitable intention where there is a gift to a particular charity which the testator has taken some care to describe accurately, and before the testator's death the charity has ceased to exist [263] (whether through lack of funds [264] or lack of work [265] or for purely administrative reasons [266]), as distinct from being merely altered under a scheme. [267] Similarly, where the testator has only one particular purpose in mind, such as to build alms houses [268] or a hospital [269] or found a school [270] at a particular place and that purpose cannot be carried out, it is difficult to infer any general charitable intention, and so the gift will fall into residue or pass as on intestacy. Nor will even an express assertion of a "general charitable intention" suffice if the context shows it was not truly charitable. [271]

Footnotes

237 *Re University of London Medical Sciences Institute Fund [1909] 2 Ch. 1*; *Re Wilson, Twentyman v Simpson [1913] 1 Ch. 314*; *Re Packe [1918] 1 Ch. 437*; *Re Ulverston & District New Hospital Building Trusts [1956] Ch. 622*.

238 CA 2011 ss.63–64. See *D. Wilson [1983] Conv. 40*.

239 *Re Meyers [1951] Ch. 534*; *Re Vernon's WT (1962) [1972] Ch. 300n*.

240 See *Re Finger's WT [1972] Ch. 286* at 295.

241 *Re Stemson's WT [1970] Ch. 16*; *Re Finger's WT [1972] Ch. 286*.

242 See *Re Stemson's WT [1970] Ch. 16* (no paramount intention); *Re Finger's WT [1972] Ch. 286* (paramount intention).

243 *Re Roberts [1963] 1 W.L.R. 406*; *Re Morrison, Wakefield v Falmouth (1967) 111 S.J. 758*; *Re Finger's WT [1972] Ch. 286*.

244 See generally *J.B.E. Hutton (1969) 32 M.L.R. 283*.

245 *Re Slevin [1891] 2 Ch. 236*.

246 *Re Moon's WT [1948] 1 All E.R. 300*; *Re Wokingham Fire Brigade Trusts [1951] Ch. 373*; *Re Wright [1954] Ch. 347*; and see *Re British School of Egyptian Archaeology [1954] 1 W.L.R. 546*.

247 *Re Moon's WT [1948] 1 All E.R. 300* above; *Re Wright [1954] Ch. 347*.

248 See *Re Wright [1954] Ch. 347* at 362.

249 See *Re Hanbey's WT [1956] Ch. 264*.

250 *Cooper's Conveyance Trusts [1956] 1 W.L.R. 1096*. As to the position where the gift over is void for remoteness see *Bath and Wells Diocesan Board of Finance v Jenkinson [2001] W.T.L.R. 353*.

251 *McCormick v Queen's University of Belfast [1958] N.I. 1*.

252 *Re Sanders' WT [1954] Ch. 265* at 273, per Harman J.

253 For example *Lysaght, Hill v Royal College of Surgeons [1966] Ch. 191*.

254 For example *Stanford [1924] 1 Ch. 73*.

255 See *Wilson, Twentyman v Simpson [1913] 1 Ch. 314* at 320, 321, for the correct approach to this question (cited in *Re Good's W T [1950] 2 All E.R. 653* at 654); *Attorney General for New South Wales v Perpetual Trustee Co (Ltd) (1940) 63 C.L.R. 209* at 226–228. In *Re Raine [1956] Ch. 417*, two distinct forms of general charitable intention were propounded for specific and residuary gifts, though this seems to be untenable: see *(1956) 72 L.Q.R. 170*. See generally, Sheridan and Delany, The Cy-Pres Doctrine (Sweet & Maxwell, 1959), pp.33–36.

256 See *Re Davis, Hannen v Hillyer [1902] 1 Ch. 876*; *Re Knox [1937] Ch. 109*; cf. *Re Tharp (1942) 112 L.J.Ch. 3 (on appeal [1943] 1 All E.R. 257); (1943) 59 L.Q.R. 22*; *Re Satterthwaite's WT [1966] 1 W.L.R. 277*; *Re Finger's WT [1972] Ch. 286*; contrast *Re Jenkins's WT [1966] Ch. 249*.

257 *Re Welsh Hospital (Netley) Fund [1921] 1 Ch. 655*; *Re North Devon and West Somerset Relief Fund Trusts [1953] 1 W.L.R. 1260*.

258 See *Re Ulverston & District New Hospital Building Trusts [1956] Ch. 622* at 635, 636. See the critical comment of *G.H. Jones (1957) 20 M.L.R. 61*; *L.A. Sheridan (1956) 34 Can. B.R. 1066*; *J.C. Hall [1957] C.L.J. 87*.

259 See *Re Davis, Hannen v Hillyer [1902] 1 Ch. 876*; *Re Harwood [1936] Ch. 285*; *Re Knox [1937] Ch. 109*.

260 See *Re Maynard (1973) 21 W.I.R. 31 (Barbados HC)*.

261 *Re Goldschmidt [1957] 1 W.L.R. 524*. See *VTH Delany (1957) 73 L.Q.R. 166*.

262 *Re Lysaght, Hill v Royal College of Surgeons [1966] Ch. 191* (excluding undesirable religious tests); *Re Woodhams [1981] 1 W.L.R. 493* (omitting requirement of scholars to be absolute orphans from specified homes).

263 *Re Rymer [1895] 1 Ch. 19*; *Re Harwood [1936] Ch. 285*; *Re Goldney (1946) 115 L.J.Ch. 337*; *Re Slatter's WT [1964] Ch. 512*; *Re Stemson's WT [1970] Ch. 16*; cf. *Re Withall [1932] 2 Ch. 236*; *Re Tharp (1942) 112 L.J.Ch. 3 (on appeal [1943] 1 All E.R. 257)*; *Re Spence, Ogden v Shackleton [1979] Ch. 783*.

264 *Re Withall [1932] 2 Ch. 236* at 241.

265 *Re Slatter's WT [1964] Ch. 512*; *Re Mackenzie [1962] 1 W.L.R. 880*.

266 *Re Spence, Ogden v Shackleton [1979] Ch. 783* (old people's home closed by local authority; same work carried on in other homes).

267 *Re Faraker [1912] 2 Ch. 488*; *Re Lucas, Sheard v Mellor [1948] Ch. 424*; and see *Re Hutchinson's WT [1953] Ch. 387*; *Re Roberts [1963] 1 W.L.R. 406*.

268 *Re White's Trusts (1886) 33 Ch. D. 449*; and see *Re Packe [1918] 1 Ch. 437* (retreat for clergy and wives).

269 *Re Ulverston & District New Hospital Building Trusts [1956] Ch. 622*; *Beggs v Kirkpatrick [1961] V.R. 764* (effect reversed by Ripon Peace Memorial Trust Act 1961 (Vict. Stat. No.6747)); and see *Re Hillier's Trusts [1954] 1 W.L.R. 700*; *Re Pochin's WT (1943) [1948] Ch. 182n*.

270 *Re Wilson, Twentyman v Simpson [1913] 1 Ch. 314*.

271 *Re Sanders' WT [1954] Ch. 265* (appeal settled: *The Times*, 22 July 1954).

End of Document

Section 5. - Administration and Supervision

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 23 - Charitable Trusts

Section 5. - Administration and Supervision

23-060 As with private trusts, the general management of charitable trusts is in the hands of trustees. However, since charities confer benefits on the public and generally have no beneficiaries who can enforce the trusts, a number of official bodies are charged with the supervision of charities. The law on these topics is now found in the Charities Act 2011.

End of Document

1. - Persons and Bodies Controlling Charities

(a) The Charity Commission.

23-061 The Charity Commission is a body corporate which performs its functions on behalf of the Crown. In exercising its functions it is not subject to the direction or control of any Minister of the Crown or government department. [272]

(1) Commission's objectives.

23-062 The Commission has five main objectives. [273] These are:

(i)increasing public confidence and trust in charities;

(ii)promoting awareness and understanding of the public benefit requirement;

(iii)promoting compliance by charity trustees with the legal obligations;

(iv)promoting the effective use of charitable resources; and

(v)enhancing the accountability of charities.

(2) General functions.

23-063 The general functions of the Commission include the following [274] :

(i)determining whether institutions are charitable or not;

(ii)investigating misconduct or mismanagement of charities; and

(iii)obtaining, evaluating and disseminating information about the performance of its functions, which includes maintaining a register of charities.

(b) The trustees.

23-064 The powers and duties of the trustees of a charity are similar to those of other trustees. Like other trustees, their duties of care, and their powers to hold land and to delegate to agents, nominees and custodians are defined in the Trustee Act 2000. In dealing with land, they have all the equitable powers of an absolute owner. [275] The Limitation Act 1980 [276] applies to charitable trustees as it does to others. [277] Charity trustees are also authorised to delegate the execution of instruments to two or more of their body. [278]

There are, however, certain differences. The numbers of charitable trustees are not limited by statute. [279] They need not be unanimous in exercising their powers; a simple majority may generally bind the minority. [280] Charitable trustees are under a statutory obligation to keep accounting records, [281] to apply for registration of the charity, [282] and, where appropriate, to take steps to enable the trust property to be applied cy-pres. [283] There are special provisions governing the appointment and discharge of trustees, and the vesting of property. [284] Before the charity or its trustees may begin proceedings in any court, they must first obtain the authority of the Charity Commission. [285]

(c) Official Custodian for Charities.

23-065 The Official Custodian for Charities [286] is a public official in whom the property of a charity may be vested as a custodian trustee. [287] This saves the need for transfers of property upon the appointment of new managing trustees. Where property is vested in the Official Custodian he is not entitled to exercise any powers of management of the property. Thus proceedings for possession of the property may be brought by the charity trustees without the need to join the Official Custodian. [288]

(d) Attorney General.

"It is the province of the Crown as parens patriae to enforce the execution of charitable trusts, and it has always been recognised as the duty of the law officers of the Crown to intervene for the purpose of protecting charities and affording advice and assistance to the court in the administration of charitable trusts." [289] Accordingly, the Attorney General acting ex officio has powers to take legal proceedings relating to charities or to compromise charity claims. The Charity Commission has similar powers provided that it obtains his consent. [290] The Attorney General may also present a petition to wind up a charity. [291] The Attorney General, it seems, has power to enter into bargains with third parties as to the rights of the charity. [292] Further, if there is a strong case for making ex gratia payments out of charitable funds, the Attorney General may authorise the trustees to make them. [293]

(e) Person interested.

23-067 "Any person interested in the charity", or "any two or more inhabitants of the area of the charity if it is a local charity" may also bring charity proceedings if they first obtain the agreement of the Charity Commission. [294] To qualify as a "person interested" in a charity, they must have an interest in securing the due administration of the charity materially greater than, or different from, that possessed by ordinary members of the public (whether they are subscribers or potential beneficiaries or neither). [295] In appropriate circumstances, a local authority may be a "person interested". [296] But the phrase does not extend to

persons contracting with the trustees of the charity, for they are claiming against the charity, [297] nor does it include the personal representatives of the founder, [298] although it may well include the founder himself. [299]

Footnotes

272 CA 2011 s.13, Sch.1.
273 CA 2011 s.14.
274 CA 2011 s.15.
275 Trusts of Land and Appointment of Trustees Act 1996 s.6. For consents and orders, see below paras 23-074–23-075.
276 See below para.30-035.
277 See *Re Robert Gwynne's Charity (1894) 10 T.L.R. 428*; *Edwards v Warden (1876) 1 App. Cas. 281*; and see *Smith v Kerr [1902] 1 Ch. 774*; contrast *St Mary Magdalen, Oxford v Attorney General (1857) 6 H.L.C. 189*.
278 CA 2011 s.333(1).
279 See below paras 27-005–27-006.
280 *Re Whiteley [1910] 1 Ch. 600*.
281 CA 2011 s.130. For the general obligation, see below para.29-025.
282 CA 2011 s.35(1). For registration, see below para.23-068.
283 CA 2011 s.61.
284 CA 2011 s.334.
285 CA 2011 s.115(2), (3). See *Rendall v Blair (1890) 45 Ch. D. 139*; *Muman v Nagasena [2000] 1 W.L.R. 299*.
286 CA 2011 s.21.
287 CA 2011 ss.21, Sch.2. For custodian trustees, see below para.29-006.
288 *Muman v Nagasena [2000] 1 W.L.R. 299*.
289 *Wallis v Sol-Gen for New Zealand [1903] A.C. 173* at 181, per Lord Macnaghten. See also *Re Royal Society's Charitable Trusts [1956] Ch. 87* at 92, 93; *Hauxwell v Barton-upon-Humber UDC [1974] Ch. 432*. See also CA 1993 s.1A(3) which declares that the Charity Commission exercises its functions on behalf of the Crown.
290 CA 2011 s.114.
291 CA 2011 s.113(2).
292 *Re Freeston's Charity [1978] 1 W.L.R. 120* at 129 (on appeal, *[1978] 1 W.L.R. 741* at 755).
293 *Re Snowden, Shackleton v Eddy [1970] Ch. 700* (part of ten-fold increase in value given up to testator's relations).
294 CA 2011 s.115(1). On the meaning of "charity proceedings", see *Rendall v Blair (1890) 45 Ch. D. 139*; *Rooke v Dawson [1895] 1 Ch. 48*; *Brooks v Richardson [1986] 1 W.L.R. 385*; *Muman v Nagasena [2000] 1 W.L.R. 299*.
295 *Re Hampton Fuel Allotment Charity [1989] Ch. 484* at 494; *Royal Society for the Prevention of Cruelty to Animals v Attorney General [2001] 3 All E.R. 530*.
296 *Re Hampton Fuel Allotment Charity [1989] Ch. 484*.
297 *Haslemere Estates Ltd v Baker [1982] 1 W.L.R. 1109*.
298 *Bradshaw v University College of Wales [1988] 1 W.L.R. 190*.
299 *Re Hampton Fuel Allotment Charity [1989] Ch. 484* at 493.

End of Document

2. - Special Rules in Administration

(a) Registration.

23-068 The Charity Commission maintains a register of charities, [300] which is open to public inspection. [301] Registration is compulsory except for:

(i)exempt charities: these comprise important national institutions such as the British Museum and some universities and colleges [302] ;

(ii)charities permanently exempted from registration whose gross income does not exceed £100,000 [303] ; and

(iii)charities whose gross income does not exceed £5,000 a year. [304]

Institutions ceasing to be charities or ceasing to exist or operate must be removed from the register. [305] Subject to certain rights to procure rectification of the register, registration raises a conclusive presumption that an institution is a charity at any time when it is on the register, [306] and also that it was a charity at all times prior to registration while its purposes were the same. [307]

(b) Schemes.

23-069 The High Court and the Charity Commission have a concurrent jurisdiction to establish a scheme for the administration of a charity. [308]

(1) Purpose.

23-070 A scheme for the administration of charitable trusts may be made in a variety of cases, e.g. for the better management of the charity, or when the cy-pres doctrine is applied, [309] or when land which has been devoted to charitable purposes under certain statutes [310] has ceased to be used for those purposes, [311] or when property has been given to charity without sufficiently specifying the objects or providing for the way in which the trust is to operate. [312] The jurisdiction depends upon the existence of a trust, or a corporate body obliged under its constitution to apply its assets exclusively for charitable purposes. [313] Hence there is no power to direct a scheme if there is a direct gift to a non-existent body and no trust; the gift in such a case is applied in accordance with the directions of the Crown under the royal prerogative. [314]

(2) Jurisdiction.

23-071 The court and the Charity Commission have in general[315] a concurrent jurisdiction in the making of schemes,[316] except that especially contentious and difficult questions[317] and schemes for charities established by Royal Charter[318] are reserved to the court.[319] The court will not interfere with the details of a scheme unless the Commission has exceeded its authority or the scheme contains something wrong in principle.[320] Schemes for altering charities established by statute may be made by the Commission and given effect by statutory instrument.[321]

(3) Details.

23-072 The details of schemes vary infinitely. Thus one scheme may consist of an elaborate constitution and rules for establishing and running a children's home or school, while another scheme may merely direct the division of the property among a number of existing charities. The establishment of common investment funds and common deposit funds for a number of charities is expressly authorised.[322] The court is not bound to make a scheme, and has refused to do so where the trustees had acted in breach for many years, where it would have been difficult to settle a useful scheme, and where the result would be to defeat a gift over to another charity.[323]

(c) Transfer of property and alteration of objects.

23-073 A charity, with the concurrence of the Charity Commission, is in certain circumstances entitled to transfer all its property to one or more other charities or to modify the trusts of a charity by replacing the purposes by other charitable purposes. This possibility applies only to a charity whose gross income in the previous financial year did not exceed £10,000, which does not hold land on trusts which stipulate that the land is to be used for the purposes or any particular purpose of the charity, and which is neither an exempt charity nor a charitable company.[324] The transfer of property or alteration of objects must be authorised by a two thirds resolution of the charity trustees.[325] The resolution may be passed only where the trustees are satisfied that the transfer of property is expedient in furthering the purposes of the transferor charity and the purposes of the charity to whom the property is to be transferred are substantially similar to the existing purposes of the transferor charity.[326]

(d) Power to spend capital.

23-074 Unincorporated charities may spend part or all of their endowment fund if the trustees are satisfied that the purposes of the trust could be carried out more effectively by spending the capital of the fund as well as the income accruing to it.[327] It is generally unnecessary for the trustees' resolution to be passed by a special majority or for the Charity Commission to be notified of it. The procedure is different for larger unincorporated charities whose endowment capital consists entirely of property given by a particular individual or institution, and with endowment funds valued at more than £10,000 and an annual income exceeding £1,000.[328] Here the trustees must notify the Charity Commission of their resolution to free the endowment from restrictions on capital expenditure.[329] The Commission will not agree to the resolution unless it is satisfied that it accords with the spirit of the original donor's gift.[330]

(e) Restrictions on dealings.

23-075 There are restrictions on the entitlement of charities to sell, lease or dispose of land without an order of the court or of the Charity Commission. [331] These generally require the charity to obtain and consider a written report from a qualified surveyor. The trustees must be satisfied that the terms of the proposed disposition are the best that can reasonably be obtained for the charity. [332] Similar restrictions apply to the mortgaging of land. [333]

Footnotes

300 CA 2011 s.29(1).
301 CA 2011 s.38(1).
302 See CA 2011 Sch.3.
303 CA 2011 s.30(2).
304 CA 2011 s.30(2).
305 CA 2011 s.34(1).
306 CA 2011 s.37(1): see *Finch v Poplar BC (1967) 66 L.G.R. 324* (seamen's mission).
307 *Re Murawski's WT [1971] 1 W.L.R. 707*.
308 CA 2011 s.69(1).
309 See above para.23-043.
310 School Sites Acts 1841, 1844, 1849, 1851 and 1852; Literary and Scientific Institutions Act 1854; Places of Worship Sites Act 1873: see Reverter of Sites Act 1987 ss.1(1), 7(1).
311 Reverter of Sites Act 1987 ss.2–4. See also Education Act 1996 s.554.
312 For example *Robinson, Besant v The German Reich [1931] 2 Ch. 122* at 128; *Re Harding (Deceased [2008] Ch. 235*.
313 *Liverpool and District Hospital for Diseases of the Heart v Attorney General [1981] Ch. 193*.
314 *Re Bennett, Sucker v Attorney General [1960] Ch.18*.
315 Jurisdiction under the Reverter of Sites Act 1987 above, is vested in the Commissioners, subject to an appeal to the court.
316 See CA 2011 s.69(1); and see *London Parochial Charities Trustees v Attorney General [1955] 1 W.L.R. 42* at 46; *Re Berkhamsted Grammar School [1908] 2 Ch. 25*.
317 CA 2011 s.70(8).
318 CA 2011 s.68(2). See also *Re Whitworth Art Gallery Trusts [1958] Ch. 461*.
319 For scheme-making procedure, see CA 1993 ss.16, 20; and see *Re Hyde Park Place Charity [1911] 1 Ch. 678*; *Childs v Attorney General [1973] 1 W.L.R. 497*.
320 *Re Campden Charities (1881) 18 Ch. D. 310*; *Re Weir Hospital [1910] 2 Ch. 124*.
321 Charities Act 2011 s.73. The court has very limited powers to alter statutory charities: see *London Parochial Charities Trustees v Attorney General [1955] 1 W.L.R. 42*; *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] Ch. 220*.
322 CA 2011 ss.96–104. See *Re Royal Society's Charitable Trusts [1956] Ch. 87*; *Re University of London Charitable Trusts [1964] Ch. 282*.
323 *Re Hanbey's WT [1956] Ch. 264*.
324 CA 2011 ss.267–268; 275–280.
325 CA 2011 s.268(4), 275(5).
326 CA 2011 s.268(3), 275(4).
327 CA 2011 s.281(1).
328 CA 2011 s.282(1), (2).

329 CA 2011 s.282(4).

330 CA 2011 s.284.

331 CA 2011 s.117. As to the effect of this provision and of s.122 (which protects third parties dealing with charities) see *Bayoumi v Women's Total Abstinence Union Ltd [2004] 3 All E.R. 110*; and *T. Dumont and F. Wilson [2004] P.C.B. 118*.

332 CA 2011 s.119(1).

333 CA 2011 ss.124–126.

End of Document

Section 1. - General

24-001 The defining feature of express trusts is that they are created by the actual intention of the settlor that the legal owner of property should take it subject to another person's beneficial entitlement. That intention is gathered objectively from the settlor's words and conduct. In many situations, however, a person's express intention that the beneficial interest should pass to another, whether by way of trust of the legal interest or by entire transfer, may be ineffective to achieve that end. The parties may not have complied with some formality necessary to make the transaction valid or enforceable. Similarly, the transaction may only be complete once an entire series of formal steps has been carried out, and the parties have carried out some, but not all, of them.

In such situations a constructive trust may be imposed on the property. The trust arises by operation of law and is exempt from any formality provisions that might have determined the validity or enforceability of the express transaction which the parties intended. [1] It is not an express trust, though the parties' intention to complete the original express transaction is one of the facts on which the creation of the trust depends. [2] A common feature of such trusts is that the intended transaction has proceeded to the stage where the intended beneficiary could obtain a specific equitable remedy to require it to be completed. The trust gives effect to, and is coincident with, the intended beneficiary's present equitable right to have the transaction completed. Another commonly cited rationale for such trusts is to prevent fraud. The effect of the trust is to prevent the person in whom the legal interest in the property remains from relying on the formality rules to deny the beneficiary's entitlement to the property.

Footnotes

1 Law of Property Act 1925 s.53(1)(b), (2); Wills Act 1837 s.9.

2 In this respect it differs from other constructive trusts which arise to reverse the consequences of a person's wrongful conduct where he has no intention at all to hold the property for the benefit of the equitable claimant. See Ch.26.

Section 2. - Trusts Giving Effect to Specifically Enforceable Obligations

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 2. - Trusts Giving Effect to Specifically Enforceable Obligations

24-002 When a specifically enforceable contract for sale has been made, the effect in equity is to divide the beneficial interest in the land between the vendor and the purchaser. The vendor retains the legal estate until the transaction is completed but he holds it until then as a trustee for the purchaser. The trust arises on the provisional assumption that specific performance of the contract is available and that the contract will in due course be completed. The incidents of the trust are determined by the parties' contractual rights since the trust only exists to give effect to the transaction contemplated in the contract. [3] On similar grounds a specifically enforceable covenant for value to settle land makes the covenantor a trustee for the beneficiaries. [4]

The trust has two main functions. First, as against the vendor, it serves to impose certain duties on him pending completion of the transaction. These duties are imposed by law rather than specified in the contract. Their purpose, nonetheless, is to protect the purchaser's contractual right to have the specific property conveyed to him. The second is its effect as against a third party to the contract. By treating the purchaser's contractual right as an equitable interest in the legal estate, the priority of the purchaser's right to a conveyance of the estate is preserved against the third party. The justification for giving the purchaser these additional rights is that the contract is specifically enforceable. He has a present right to a conveyance of the specific land owned by the vendor.

Footnotes

3 *Lysaght v Edwards (1876) 2 Ch. D. 499*; *Rayner v Preston (1881) 18 Ch. D. 1*; Megarry and Wade, Law of Real Property, 7th edn (Sweet & Maxwell, 2008) paras 15–051—15–061; P.G. Turner (2012) 128 L.Q.R. 582.

4 See *Central Trust & Safe Deposit Co v Snider [1916] 1 A.C. 266* at 272.

1. - Vendor’s Trusteeship and the Nature of the Purchaser’s Interest

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Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 2. - Trusts Giving Effect to Specifically Enforceable Obligations

1. - Vendor’s Trusteeship and the Nature of the Purchaser’s Interest

24-003 The vendor’s trusteeship is a special one, and the duties arising from the vendor’s trusteeship are limited. In general, his duty is to preserve the property until completion in its state as at the time of the contract.[5] Thus he will be liable to the purchaser if he fails to take reasonable steps to prevent damage to the property by trespassers[6] or by the elements,[7] or if he damages it himself[8]; if he grants tenancies of it on unfavourable terms[9]; or if he withdraws an application for planning permission to develop the land.[10] If, before completion, the vendor wrongfully sells the property to another purchaser, he may be accountable qua trustee to the first purchaser in respect of the proceeds of sale.[11] On the other hand, subject to the terms of the contract, the vendor is entitled to retain possession and the income of the property between contract and completion, and any statutory compensation payable before completion in respect of prior damage to the land.[12] Since the vendor’s duty as trustee arises from his contractual duty to convey the specific land in the contract, he would not generally be liable for failing to take steps in relation to other properties which might indirectly affect the land he has agreed to convey.[13]

The purchaser’s interest under the trust, through proprietary in character, is not absolute. It is not the case, for example, that the vendor is a bare trustee to the purchaser from the moment they conclude the contract. The trust only exists to secure the purchaser’s right to a conveyance under the contract. The purchaser’s interest under the trust is therefore defeasible and only subsists for as long as the contract remains specifically enforceable.[14] The purchaser’s beneficial entitlement to the property may be best treated as passing to the purchaser by stages as the various conditions upon which completion of the contract depends are fulfilled.[15]

It may determine, for example, if one of the parties rescinds the contract or if the vendor fails to make good title. But whatever the state of the purchaser’s interest, he may give effect to its proprietary character by alienating it. So he may assign it; devise it; make it the subject of an equitable charge or pass the benefit of it to another by a contract of sale.[16] The assignee or sub-purchaser of his interest may enforce his rights against the vendor provided that he first fulfils his duties under the contract and has given notice that he intends to enforce the contract against him.[17]

The purchaser may also enforce his interest against a third party to whom the vendor makes a disposition of the land in breach of the contract. The purchaser’s interest, however, would only entitle him to a conveyance of the land in priority to any competing claim by the third party. It is only in respect of this main contractual duty that the vendor is treated as a trustee. The purchaser could not enforce the vendor’s ancillary contractual undertakings against the third party. He would need to protect the priority of his interest over the disposition to the third party by registering a notice against the vendor’s estate.[18]

Footnotes

5 *Englewood Properties Ltd v Patel [2005] EWHC 188 (Ch); [2005] 1 W.L.R. 1961*.

6 *Clarke v Ramuz [1891] 2 Q.B. 456* (removal of soil).

7 *Lucie-Smith v Gorman [1981] C.L.Y. 2866*.
8 See *Cumberland Consolidated Holdings Ltd v Ireland [1946] K.B. 264* at 269.
9 *Abdulla v Shah [1959] A.C. 124*.
10 *Sinclair-Hill v Sothcott (1973) 226 E.G. 1399*.
11 *Lake v Bayliss [1974] 1 W.L.R. 1073*.
12 *Re Hamilton-Snowball’s Conveyance [1959] Ch. 308*.
13 *Englewood Properties Ltd v Patel [2005] EWHC 188 (Ch); [2005] 1 W.L.R. 1961*.
14 *Yewbelle Ltd v London Green Developments Ltd [2006] EWHC 3166 (Ch); [2007] 1 E.G.L.R. 137* at [92].
15 *Jerome v Kelly [2004] UKHL 25; [2004] 1 W.L.R. 1409*.
16 *Paine v Meller (1801) 6 Ves. 349* at 352; e.g. Land Charges Act 1972 s.2(4)(iv) (extended definition of “estate contract”).
17 *Shaw v Foster (1872) L.R. 5 H.L. 321* at 338, 350.
18 Land Registration Act 2002 ss.29, 32. For unregistered land, the estate contract would be registered as a land charge: LCA 1972 and see para.4-010 above.

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2. - Basis of the Vendor’s Trusteeship

24-004 The trust has been said to be constructive. [19] The significance of this classification is that the trust is enforceable even though the vendor has not made any signed writing to evidence an intention to declare it. [20] The relationship of trustee and beneficiary is created between the parties to the contract by operation of law, though in response to the vendor’s intentionally assumed obligation in the contract to convey property to the purchaser.

It is essential to the explanation of the trust that the contract between the vendor and purchaser is capable of specific enforcement. For this reason, the trust is most commonly encountered in contracts to sell an interest in land, though it would also arise under contracts of sale of personal property, such as shares, provided that they were not readily obtainable in the market. [21] The trust arises on the hypothesis that the parties are treated as having already performed all the obligations which they have undertaken in the contract. [22] Although the formalities necessary to complete the agreed transaction, such as a conveyance at law, have still to be fulfilled, the parties are already in a position to compel each other to secure that result by obtaining specific relief in equity. [23] There is a strong analogy therefore with constructive trusts which arise to give effect to incomplete inter vivos gifts and to those under the doctrine of mutual wills. In those instances, however, the beneficiary is permitted to compel the obligations of the person who has the legal interest in the relevant property even though he has given no consideration under a binding contract.

Footnotes

19 See, e.g. *Shaw v Foster (1872) L.R. 5 H.L. 321* at 349, 356.

20 LPA 1925 s.53(1)(b). But the contract must comply with requirements of signed writing in the Law of Property (Miscellaneous Provisions) Act 1989 s.2. See para.22-036 above.

21 *Michaels v Harley House (Marylebone) Ltd [2000] Ch. 104*.

22 *Shaw v Foster (1872) L.R. 5 H.L. 321*.

23 *Hewett v Court (1983) 46 A.L.R. 87* at 106; *Central Trust and Safe Deposit v Snider [1916] A.C. 266*.

Section 3. - Trusts to Enforce Incomplete inter vivos Gifts

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Section 3. - Trusts to Enforce Incomplete inter vivos Gifts

24-005 A trust may arise where there has been an incomplete express gift of the legal interest in property. This will typically occur where a number of formal steps are required to complete the transfer of the legal interest from the donor to the donee, and where, at the critical time, some of those steps remain to be fulfilled.[24] Necessarily, the donor will not have divested himself of the legal interest so the gift will be ineffective at law. Nonetheless, the transaction may have proceeded to the point where the donee may be taken to have a complete title in equity. The donor may be treated as a trustee, holding his legal interest subject to the beneficial title of the donee.

The trust may arise where the donor intends to make an outright gift of his entire legal and beneficial interest to the property, or where he intends to transfer his legal interest to trustees for the benefit of another. The trust arising in this situation is therefore an important qualification to the rules governing the complete constitution of express trusts.[25] It is also an important exception to the general maxim that equity will not assist a volunteer.[26] The effect of the trust is to give the donee a complete equitable title to the property and to enable him to compel the completion of the transaction in equity, even though he has given no valuable consideration for the gift to him.

Two important questions arise in such cases. First, what are the formal steps necessary to complete the transfer of the legal title in the property to the donee? This point was considered earlier in the context of constitution of trusts.[27] Secondly, which of those formal steps must be completed in order that the gift of the property may be treated as complete in equity? This point is the subject of the following section.

Footnotes

24 See para.22-044 above.
25 See para.22-041 above.
26 See para.22-042 above.
27 See para.22-041 above.

1. - Circumstances Where an Imperfect Gift may be Complete in Equity

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Section 3. - Trusts to Enforce Incomplete inter vivos Gifts

1. - Circumstances Where an Imperfect Gift may be Complete in Equity

(a) Acts exclusively in the donor's power.

24-006 The gift of the legal interest in the property will not be complete until the donor has completed all the formalities necessary to vest the legal interest in the donee. The gift may, however, be treated as complete in equity at an earlier point in the transaction when some of those remaining steps are still unfulfilled. It has been held that if the donor has taken all the steps that lie exclusively in his power, according to the nature of the property given, to vest the legal interest in the property in the donee, then the gift will be complete in equity. The gift will not fail even if something remains to be done by the donee or some third person. [28] Thus in *Re Rose, Midland Bank Executor & Trustee Co Ltd v Rose*, [29] the donor executed a transfer of shares in a private company and handed it with the share certificate to the donee but died before it had been registered. Although the donee's legal title would not be perfected until the company had passed the transfer for registration, or at least until the donee had an unconditional right to be registered, [30] it was held that the gift was good in equity because the donor had done all that was necessary on his part. [31] The donor held the shares on trust for the donee. Likewise, a gift of registered land becomes effective in equity upon execution and delivery of the transfer form to the donee. It cannot be recalled thereafter even though the donee has not yet been registered as proprietor so that the legal estate remains in the donor. [32] But the gift cannot be complete in equity according to this principle if the intended donee does not have in his possession all the documents necessary to complete his title to the property. [33]

(b) Unconscionability.

24-007 In *Pennington v Waine* [34] the rule was extended. It was held that, although further acts may remain to be done by the donor to vest the legal interest in the donee, the gift may nonetheless be effective in equity if it would unconscionable for the donor to resile from his intention that the transaction should be complete. [35] In that case the donor executed a share transfer form but did not deliver it to the donee or the company for registration. The donee acted on the assumption that the gift was complete and had been expressly told by the donor's agent that he need take no further action. The gift was held to be complete in equity. [36] But unless the intended done relies on the apparent gift, it is unlikely that the transaction would be regarded as complete in equity under the principle in *Pennington v Waine*. [37]

Footnotes

28 *Re Griffin [1899] 1 Ch. 408* at 411; *Re Rose, Midland Bank Executor & Trustee Co Ltd v Rose [1949] Ch. 78*; *Re Rose, Rose v IRC [1952] Ch. 499*; *Re Paradise Motor Co Ltd [1968] 1 W.L.R. 1125*. But the gift cannot be complete in equity according to this principle if the intended donee does not have in his possession all the documents necessary to complete his legal title to the property: *Kaye v Zeital [2010] EWCA Civ 159; [2010] 2 B.C.L.C. 1*.

29 *Re Rose, Midland Bank Executor & Trustee Co Ltd v Rose [1949] Ch. 78*.

30 *Moore v North Western Bank [1891] 2 Ch. 599*.

31 If registration were refused in such a case the gift would probably remain good: see *Re Fry [1946] Ch. 312 at 317; (1949) 93 S.J. 657* at 658. But the gift would not be complete in equity if the transferee was not put in possession of the share certificate: *Zeital v Kaye [2010] EWCA Civ 159*.

32 *Mascall v Mascall (1984) 50 P. & C.R. 119*. See *N. Seddon (1974) 48 A.L.J. 13* for the application of these principles to imperfect gifts of Torrens title land.

33 *Zeital v Kaye [2010] EWCA Civ 159; [2010] W.T.L.R. 913*.

34 *Pennington v Waine [2002] EWCA Civ 227; [2002] 1 W.L.R. 1075*.

35 *Pennington v Waine [2002] EWCA Civ 227; [2002] 1 W.L.R. 1075* at [64].

36 An alternative explanation is that the execution of the transfer form in proper form was a complete equitable assignment of the shares, even without delivery: *Pennington v Waine [2002] EWCA Civ 227; [2002] 1 W.L.R. 1075* at [81]–[83] per Clarke LJ.

37 *Curtis v Pulbrook [2011] EWHC 167 (Ch); [2011] B.C.L.C. 638* at [46].

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2. - Donor’s Trusteeship and the Nature of the Donee’s Interest

24-008 If the transaction has proceeded to the point where the title of the donee is complete in equity, then the donor holds his retained legal interest on trust for the donee.[38] The trust arises solely for the purpose of giving effect to the intended transfer. It may be analysed as constructive, in that it arises by operation of law,[39] or as one which arises from the effective separation of the legal and beneficial title to the property on a complete equitable assignment of the property.[40] It gives effect to the fact that the donee is already entitled in equity to seek a specific remedy requiring the donor to fulfil the remaining steps necessary to complete the transfer of the legal title in the property to himself.[41] The duties of the donor qua trustee are minimal.[42] He holds as a bare trustee for the donee and is bound to comply with any direction which the donee may give as to the disposition of the property. He would be personally liable to account to the donee for any unauthorised disposition of the property, and for profits accruing from his continuing legal ownership of the property.[43]

The donee’s equitable interest arising under the trust would be binding on third parties according to the nature of the property involved. It would give him a sufficient title to trace into the proceeds of the original property or to follow it into the hands of a third party to whom the donor transferred it without his authority. If his interest were in land, however, he would need to protect the priority of his interest in the appropriate manner.[44] Where the property was a kind of chose in action, such as shares in a company, the company or other obligor would remain liable to the donor. From the company’s point of view, the gift would only be complete once the transfer of the legal interest in the shares was fully effected by registration. Until then the company would continue to pay dividends to the donor, who would then be accountable for them to the donee.[45]

Footnotes

38 *Re Rose, Rose v IRC [1952] Ch. 499* at 510–510, 518.

39 *Pennington v Waine [2002] EWCA Civ 227; [2002] 1 W.L.R. 1075* at [59].

40 *Pennington v Waine [2002] EWCA Civ 227; [2002] 1 W.L.R. 1075* at [92], [111].

41 See above para.24-003 and trusts which give effect to specifically enforceable obligations to convey property.

42 See *Lowrie and Todd [1998] C.L.J. 46*.

43 For example dividends payable by the company if the property were shares: *Re Rose, Rose v IRC [1952] Ch. 499* at 507.

44 LRA 2002 s.29(2), Sch.3 para.2.

45 *Re Rose, Rose v IRC [1952] Ch. 499* at 507.

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3. - Related Ways that an Incomplete Gift may take Effect

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3. - Related Ways that an Incomplete Gift may take Effect

24-009 The trust arising in these cases of an imperfect gift of the legal interest in property must be distinguished from six analytically different transactions which may have a similar effect. For convenience it is also considered separately from the doctrines of secret trusts and of donatio mortis causa. These take effect primarily from the donor's failure to comply with the testamentary formalities necessary to make a gift by will, rather than his failure to make an effective transfer during his lifetime.

(a) Construction as declaration of express trust.

24-010 By giving a benevolent construction to the words of the gift, a transaction may be construed as the donor's declaration of a trust of his legal interest for the donee. This will only be possible where the court is satisfied that the donor had an intention to make an immediate gift. The words must fairly bear the meaning of declaration of trust, and the court must be satisfied that the gift would fail if the words were not construed in that way. In *T Choithram International SA v Pagarani*,[46] the donor executed a trust deed constituting a charitable foundation to which he intended to donate certain shares and deposit balances. He expressed a clear intention at that time to give all his assets to the foundation. Although the donor might have contemplated some later stage to the transaction when he would transfer the legal interest to the foundation, he intended his statements to effect an immediate declaration of trust of his continuing legal interest. But where the document fairly bears an intention to declare an immediate trust of the property, it is unnecessary to rely on any benevolent construction of the words to reach this result.[47]

The declaration must be evidenced by writing signed by him if it relates to land. This limitation does not apply where a constructive trust arises to give effect to a gift which is incomplete at law but treated as complete in equity.[48] If the declaration relates to personal property it may be by word of mouth, or may be inferred from conduct.[49]

It may be impossible to construe the transaction as a declaration by the donor of an express trust. His intention, properly construed, may be to make the gift by an immediate transfer of the legal interest in the property to trustees or to the donee. If the formalities for that transfer are not completed then the court will not treat the attempted transfer as a declaration that he holds on trust. In *Richards v Delbridge*[50] the donor attempted to make a voluntary gift of leasehold premises simply by making an endorsement on the back of the lease. He did not execute a deed of assignment. In *Jones v Lock*[51] a father put a cheque into his baby son's hands, saying "I give this to baby for himself". He did not make a formal endorsement on the cheque to his son. In both cases it was held that by attempting to transfer the property the donor had shown an intention to divest himself of it, not to keep it himself as trustee.[52] The two constructions involved inconsistent intentions. The maxim that equity would not assist a volunteer justified the courts' refusal to construe the transaction as involving an intention which it actually lacked. The same objection does not apply where a constructive trust arises by operation of law to give effect in equity to a gift which is incomplete at law.[53] The trust does not arise directly from the expression of the donor's intention.

(b) Immediate equitable assignment.

24-011 Although the formalities necessary to make the gift of the property complete at law may not have been fulfilled, the transaction may nonetheless take effect as an immediate equitable assignment of the property. It would be necessary to show that the donor intended the assignment to take effect immediately, rather than its being contingent on some future event, and that the document used to effect the assignment was in the appropriate form. This is an alternative explanation of the result in *Pennington v Waine* where it was held that an assignment of shares in equity could be complete on execution of the stock transfer form without the need for delivery. [54] This construction of the transaction may be preferable over that consisting in a direct declaration of trust where the obligations of express trusteeship are not in the forefront of the donor's mind. Nonetheless, the effect of the assignment is that the donor holds the legal interest in the property on trust for the assignee.

(c) Property vested in donee.

24-012 Under the doctrine of *Strong v Bird*, [55] an apparently imperfect gift of any property, whether personal or real, [56] is effective if two conditions are satisfied. First, the property given must have become lawfully vested in the donee, as where he becomes one of the donor's personal representatives, whether as executor [57] or administrator, [58] or is appointed a trustee of the property. [59] Secondly, the donor must have manifested an intention to make a present gift of definite property (which includes forgiving a debt), [60] and this intention must have continued until the donor's death. [61] It is not enough if he merely promises to give in the future, [62] nor if the continuance of his animus donandi is negatived by his subsequently taking security for the debt forgiven [63] or treating the property given as still being his own. [64] Where these conditions are satisfied, the gift is effective; for the vesting of the property in the donee as personal representative or trustee completes his title at law, and the donor's animus donandi overrides the claims of the beneficiaries entitled to the donor's estate and allows the donee to hold beneficially despite his fiduciary position. [65]

(d) Proprietary estoppel.

24-013 If a donor represents that he will make a gift of some specific property to the donee who then acts in reliance on that representation, then an estoppel may sometimes arise. The donor may be bound in conscience not to resile from his representation. The donee may have a remedy against him, which may include taking an interest in the property that the donor promised him as a gift. [66]

(e) Conveyance to minor.

24-014 Although after 1925 an attempt to convey a legal estate in land to a minor cannot vest the estate in him, [67] the conveyance is not totally ineffective. By statute it operates as a declaration that the land is held in trust for him. [68]

(f) Imperfect settlement.

24-015 If an instrument inter vivos intended to create a settlement of a legal estate in land fails to pass the legal estate because it does not comply with the requirements of s.4 of the Settled Land Act 1925 (which prescribes the proper form for such a settlement), it is treated as a trust instrument. The trustees may, and must on the request of the tenant for life, execute a proper vesting deed. This will perfect the settlement. [69]

Footnotes

46 *T Choithram International SA v Pagarani [2001] 1 W.L.R. 1*. But where the document fairly bears an intention to declare an immediate trust of the property, it is unnecessary to rely on any benevolent construction of the words of the gift to reach this result: *Shah v Shah [2011] W.T.L.R. 519; [2010] EWCA Civ 1408*.

47 *Shah v Shah [2011] W.T.L.R. 519; [2010] EWCA Civ 1408*.

48 LPA 1925 s.53(1)(b), (2).

49 *Paul v Constance [1977] 1 W.L.R. 527* (payment into settlor's bank account and words of gift sufficient); *Rowe v Prance [1999] 2 F.L.R. 787*.

50 *Richards v Delbridge (1874) L.R. 18 Eq. 11*; *Curtis v Pulbrook [2011] EWHC 167 (Ch); [2011] B.C.L.C. 638* at [44]–[46].

51 *Jones v Lock (1865) L.R. 1 Ch. App. 25*.

52 See also *Milroy v Lord (1862) 4 De G.F. & J. 264*.

53 See above para.24-008. *Pennington v Waine [2002] EWCA Civ 227; [2002] 1 W.L.R. 2075* at [59].

54 *Pennington v Waine [2002] EWCA Civ 227; [2002] 1 W.L.R. 2075* at [71], per Clarke LJ.

55 *Strong v Bird (1874) L.R. 18 Eq. 315*. See *G. Kodilinye [1982] Conv. 14*; and *J. Jaconelli [2006] Conv. 432*.

56 LTA 1897 s.1; AEA 1925 s.1; *Re Comberbach (1929) 73 S.J. 403*.

57 *Strong v Bird (1874) L.R. 18 Eq. 315*.

58 *Re James, James v James [1935] Ch. 449*; doubted in *Re Gonin [1979] Ch. 16*, but maintained here; see *93 L.Q.R. 486*.

59 *Re Ralli's WT [1964] Ch. 288*.

60 *Strong v Bird (1874) L.R. 18 Eq.*; *Re Pink, Pink v Pink [1912] 2 Ch. 528* at 75; *Re Wale [1956] 1 W.L.R. 1346*; and see *Re Stoneham [1919] 1 Ch. 149*; *Re Gonin [1979] Ch. 16*.

61 *Re Wale [1956] 1 W.L.R. 1346*; and see *Re Stoneham [1919] 1 Ch. 149*; *Re Gonin [1979] Ch. 16*.

62 *Re Innes [1910] 1 Ch. 188*; *Re Freeland [1952] Ch. 110*. cf. *Re Greene, Greene v Greene [1949] Ch. 333*.

63 *Re Eiser's WT [1937] 1 All E.R. 244*.

64 *Re Wale [1956] 1 W.L.R. 1346*; and see *Re Freeland [1952] Ch. 110*.

65 *Strong v Bird (1874) L.R. 18 Eq. 315*; *Re Stewart [1908] 2 Ch. 251*; *Re Pink, Pink v Pink [1912] 2 Ch. 528*; *Re Nelson, Nelson v Nelson (1947) 91 S.J. 533*. See also *Carter v Hungerford [1917] 1 Ch. 260*.

66 For example *Gillett v Holt [2001] Ch. 210*; *Thorner v Major [2009] UKHL 18; [2009] 1 W.L.R. 776* (promises to take effect on death not made a valid testamentary form); see further para.12-016 above.

67 LPA 1925 s.1(6).

68 Trusts of Land and Appointment of Trustees Act 1996 s.2, Sch.1 para.1.

69 Settled Land Act 1925 s.9.

Section 4. - Trusts Giving Effect to a donatio mortis causa

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Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 4. - Trusts Giving Effect to a donatio mortis causa

24-016 In *Re Beaumont*, [70] Buckley J described a donatio mortis causa as a gift of an amphibious nature. It is not exactly a gift inter vivos, nor exactly a legacy. It is the delivery of property in contemplation of the donor's death upon the express or implied condition that the gift is not to be absolute and complete until the donor dies. Such cases fall within the sphere of equity partly because of the general equitable jurisdiction exercised over personal representatives and the estates of deceased persons.

The topic is considered in this chapter because an effective donatio mortis causa may depend on the operation of a trust while the condition of the donor's death remains unfulfilled. The trust gives effect to present right of the donor or donee to compel the revocation or completion of the gift, as the case may be. For a full account of the pre-requisites to a donatio mortis causa, the reader is referred to the books on administration of estates. [71]

Footnotes

70 *Re Beaumont [1902] 1 Ch. 889* at 892.

71 See generally Williams, Mortimer and Sunnucks, Executors, Administrators and Probate, 21st edn (Sweet & Maxwell, 2018) Ch. 43.

1. - Requirements for a donatio mortis causa

24-017 There are three general requirements for an effective donatio mortis causa. [72]

(a) Contemplation of death.

24-018 The gift must have been made when the donor was contemplating his impending death, in the near future and for a specific reason. [73] It is not enough that the donor realises that he is reaching the end of his natural life span, even if he has reason to think that his death may come soon. [74]

(b) Conditional on death.

24-019 The gift must have been made on the condition that it was to be absolute and complete only on the donor's death. Until death the gift is inchoate [75] and the donee's title incomplete. [76] It is therefore revocable during the donor's lifetime, and ineffective if he does not die. In the absence of such a condition, the gift either takes effect as an ordinary gift inter vivos or fails altogether as an imperfect gift. [77] The condition need not be express, and will normally be implied from the fact that the gift was made when the donor was ill. [78] Since a donatio mortis causa is "a gift in praesenti, to take effect in futuro", [79] an intention to make a gift in the future or an attempted nuncupative will not suffice. [80] Thus the execution of a purported will which is not properly witnessed would not evidence the required intention. [81]

(c) Delivery. [82]

24-020 The donor must have made a delivery of the subject-matter of the gift or some means of accessing it, or documents evidencing an entitlement to possess it. [83] It is said that when the donor delivers the property, he must intend to part with dominion over it. [84] In substance, however, this can only mean that the donor delivers possession of the subject-matter to the donee, intending to make the gift. [85] In the absence of delivery, it is not enough that there are oral or written words of gift. [86] If there is delivery, it is immaterial that it is accompanied by an unattested writing, [87] or by no writing at all. [88] The delivery must be made to

the donee himself or to someone on his behalf.[89] Delivery to an agent for the donor is not enough,[90] unless it is made to the agent as trustee for the donee.[91]

In the case of a chattel, there must be delivery either of the chattel itself or of something which not only puts it out of the donor's power to interfere with the chattel,[92] but also provides the donee with some effective means of obtaining it.[93] Thus there may be delivery of the keys of a wardrobe containing the key of a safe in which the chattel lies.[94] Where the subject-matter of the gift is a chose in action transferable by delivery, similar rules apply to the document representing the chose.[95] If the chose is not transferable by delivery, there must be delivery of a document which would have to be produced in an action on the chose.[96] In such a case, the delivery of the document does not pass the legal ownership, but the court will compel the donor's personal representatives to perfect the imperfect gift,[97] contrary to the general rule. In the case of unregistered land delivery of the title deeds is sufficient.[98]

Footnotes

72 See generally *Sen v Headley [1991] Ch. 425* at 431–432, citing the 29th edition of this work.

73 *Sen v Headley [1991] Ch. 425* at 431; *King v Dubrey [2015] EWCA Civ 581; [2016] Ch. 221* at [55]. See also *Duffield v Elwes (1827) 1 Bli.(N.S.) 497* at 530, per Lord Eldon.

74 *Re Craven's Estate (No.1) [1937] Ch. 423* at 426, per Farwell J; *King v Dubrey [2015] EWCA Civ 581; [2016] Ch. 221* at [55].

75 *Agnew v Belfast Banking Co [1896] 2 I.R. 204* at 213.

76 *Duffield v Elwes (1827) 1 Bli.(N.S.) 497* at 530.

77 See *Edwards v Jones (1836) 1 My. & Cr. 226*; *Tate v Hilbert (1793) 2 Ves. Jun. 111*.

78 *Gardner v Parker (1818) 3 Madd. 184*; *Re Lillingston [1952] 2 All E.R. 184*.

79 *Jones v Selby (1710) Prec. Ch. 300* at 303, per Lord Cowper LC.

80 *Treasury Solicitor v Lewis [1900] 2 Ch. 812*; *Re Ward, Ward v Warwick [1946] 2 All E.R. 206*.

81 *King v Dubrey [2015] EWCA Civ 581; [2016] Ch. 221* at [71].

82 See, generally, *W.H.D. Winder (1940) 4 Conv.(N.S.) 38*.

83 *King v Dubrey [2015] EWCA Civ 581; [2016] Ch. 221* at [59].

84 *Hawkins v Blewitt (1798) 2 Esp. 662*; *Birch v Treasury Solicitor [1951] Ch. 298*.

85 *King v Dubrey [2015] EWCA Civ 581; [2016] Ch. 221* at [55].

86 *Miller v Miller (1735) 3 P. Wms. 356*; *Ward v Turner (1725) 2 Ves. Sen. 431*; but see *Tate v Hilbert (1793) 2 Ves. Jun. 111* at 120.

87 *Moore v Darton (1851) 4 De G. & Sm. 517*.

88 *Tate v Hilbert (1793) 2 Ves.Jun. 111* at 120.

89 *Moore v Darton (1851) 4 De G. & Sm. 517*.

90 *Farquharson v Cave (1846) 2 Coll. C.C. 356* at 367; *Re Kirkley (1909) 5 T.L.R. 522*; *Re Thompson's Estate [1928] I.R. 606*.

91 *Mills v Shields (No.1) [1948] I.R. 367*.

92 See *Re Craven's Estate (No.1) [1937] Ch. 423* at 427.

93 *Jones v Selby (1710) Prec.Ch. 300*; *Re Wasserberg [1915] 1 Ch. 195*.

94 *Re Mustapha (1891) 8 T.L.R. 160*; *Re Lillingston [1952] 2 All E.R. 184*. See *(1952) 96 S.J. 4*.

95 See *Re Wasserberg [1915] 1 Ch. 195*.

96 *Moore v Darton (1851) 4 De G. & Sm. 517*; *Re Dillon (1890) 44 Ch.D. 76*; *Birch v Treasury Solicitor [1951] Ch. 298*.

97 *Re Dillon (1890) 44 Ch.D. 76* at 82, 83.

98 *Sen v Headley [1991] Ch. 425*; *King v Dubrey [2015] EWCA Civ 581; [2015] W.T.L.R. 1225*. For the extension of these principles to registered land and to kinds of property represented by dematerialised indicia of title, see *N. Roberts (2013) 2 Conv. 113*.

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2. - Operation of the Condition

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Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 4. - Trusts Giving Effect to a donatio mortis causa

2. - Operation of the Condition

(a) The trust to give effect to the condition. [99]

24-021 The distinctive feature of a donatio mortis causa is that the gift is conditional until the donor dies. A trust device is used to give effect to this condition. Reliance on this analysis may be necessary for two reasons. First, a conditional gift of personal property cannot be made at law since, unlike real property, legal ownership of chattels cannot be divided into an ownership interest subject to a condition subsequent and a right of entry. [100] Secondly, even with real property where the theory of estates allows the creation of a conditional fee and a right of entry at law, [101] the donor in his lifetime will typically not have complied with the legal formalities necessary to create such a division of interests.

The precise operation of the condition depends on whether the transfer of the legal interest in the property to the donee is complete before the donor dies. The trust gives effect to the fact that its beneficiary—whether the donor or the donee—is entitled to an order for transfer of the legal interest in the property to himself.

If the transfer of the legal interest to the donee is complete, he will hold it on trust for the donor during his lifetime, subject to a condition subsequent which may take effect on the donor's death. The condition would operate to extinguish the trust so that the donee would hold his legal interest as beneficial owner. If, however, the donor revokes the gift before he dies, then the donee holds the legal interest in the property on bare trust for the donor absolutely. The donor would thereby be entitled to an order for specific recovery of the property, or to sue a third party who interfered with the property provided that he first joined the donee as party to the suit. [102]

If the transfer of the legal interest in the property is not complete, then the gift "leaves the whole title in the donor" [103] until by their death they perfect the gift. The donee's title then becomes complete without any assent by the donor's personal representatives. [104] They hold the property for the donee upon a constructive trust, [105] conferring on them a sufficient title to compel the personal representatives to complete the gift by transfer of the legal interest. The significance of the trust's being constructive is that a donatio mortis causa of an interest in land may take effect without the donor leaving any signed writing to record the transfer. [106]

(b) Revocation.

24-022 Revocation may be either automatic or express. It is automatic when the contemplated risk ends, as where the donor recovers from his illness. [107] Revocation is express if the donor resumes dominion over the property, [108] or, perhaps, informs the donee of the revocation. [109] But a mere resumption of possession and not dominion, e.g. for purposes of safe custody for the donee,

will work no revocation. [110] Nor can a donatio mortis causa be revoked by will, [111] for the donee's title is complete before the will takes effect.

Footnotes

99 *Re Bogusz, Vallee v Birchwood [2013] EWHC 1449 (Ch); [2014] Ch. 271*.
100 Goode, Commercial Law, 4th edn (LexisNexis Publishing, 2009) at 37–38.
101 LPA 1925 s.7(1); Megarry and Wade, Law of Real Property, 9th edn (2012), para.6–014.
102 See *Staniland v Willott (1852) 3 Mac. & G. 664*.
103 *Edwards v Jones (1836) 1 My. & Cr. 226* at 235, per Lord Cottenham LC.
104 See *Tate v Hilbert (1793) 2 Ves. Jun. 111* at 120.
105 *Snellgrove v Baily (1744) 3 Atk. 214*; *Duffield v Elwes (1827) 1 Bligh N.S. 497* at 543; *Re Dillon (1890) 44 Ch. D. 76* at 82.
106 *Sen v Headley [1991] Ch. 425* at 440.
107 *Staniland v Willott (1852) 3 Mac. & G. 664*.
108 *Bunn v Markham (1816) 7 Taunt. 224* at 231. See *Re Mulroy [1924] 1 I.R. 98*.
109 See *Jones v Selby (1710) Prec. Ch. 300* at 303.
110 *Re Hawkins, Watts v Nash [1924] 2 Ch. 47*.
111 *Jones v Selby (1710) Prec. Ch. 300*.

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Section 5. - Secret Trusts

24-023 A secret trust gives effect to the express intentions of a testator which are not contained in a written document duly executed as a will. A will is a public document. The advantage of a secret trust is that the testator may use a will to implement his wish to establish a trust upon his death without disclosing the intended beneficiary or the terms under which he holds.

Secret trusts are a device by which the express intention of a person to make a testamentary gift may be enforced despite the testator's failure to comply with the formalities for the execution of a will or testamentary disposition under the Wills Act 1837. [112] They demonstrate the rationale of preventing the fraudulent reliance on the statutory formalities as a justification for denying the enforceability of the secret trustee's expressly undertaken obligations. [113] The relevance of secret trusts has been much reduced in recent years. [114] An inter vivos agreement to confer a benefit on a secret beneficiary after the donor's death may now be given effect by a simple contract. [115] Alternatively, the donor may set up an inter vivos trust for the beneficiary, and then make a testamentary gift to the trustee to be applied for the purposes of the trust.

Footnotes

112 Wills Act 1837 ss.1, 9.

113 See *Drakeford v Wilks (1747) 3 Atk. 539*; *McCormick v Grogan (1869) L.R. 4 H.L. 82* at 88, 89, 97. Lord Jeffreys LC has some claim to paternity: see *Crook v Brooking (1688) 2 Vern. 50*.

114 See *R. Meager [2003] Conv. 203*.

115 Contract (Rights of Third Parties) Act 1999 s.1.

1. - Kinds of Secret Trusts

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Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 5. - Secret Trusts

1. - Kinds of Secret Trusts

24-024 Secret trusts are of two main types: fully secret and half-secret. They can also be created when property passes on intestacy.

(a) Fully secret.

24-025 A trust is "fully secret" if the testator makes a testamentary gift to a named legatee without stating in the will that the legatee is to hold on trust for a beneficiary rather than as beneficial owner. Either before or after making his will, [116] the testator must have told that legatee that he wishes him to hold the property on trust for a beneficiary, [117] and the legatee must have expressly or impliedly promised to do so. A trust giving effect to the testator's intentions is enforced against the legatee, even though it does not appear in the will, and the agreement between the testator and legatee does not comply with the formalities under the Wills Act 1837.

(b) Half-secret.

24-026 A trust is "half-secret" when property is given by will to a legatee with an express direction in the will that he is to hold upon trust, but the terms of the trust are not disclosed in any testamentary document. Typically, the trust on the face of the will does not disclose the beneficiary. Nevertheless, if the terms on which the named trustee is to hold the property are communicated to him before or at the time when the will is made and the will states that it has been so communicated, the trustee must carry it out. [118] Again, it is no objection to the validity of the trust that the agreement does not comply with the formalities in the Wills Act 1837.

(c) Secret trust on intestacy.

24-027 The principle upon which secret trusts are enforced also applies where the owner of property has refrained from disposing of it by will (or has revoked a will already made), [119] and has relied on the promise of a person who would take the property on intestacy to hold it on trust for the secret beneficiary. [120] It is doubtful whether the principle applies to dispositions inter vivos. [121] The rules for the complete constitution of trusts would govern such dispositions, and it would make no relevant difference that the terms of the trust were not communicated to the secret beneficiary of that disposition.

Footnotes

116 *Moss v Cooper (1861) 1 J & H. 352* at 367.

117 *Ottaway v Norman [1972] Ch. 698*. There is some similarity to the doctrine of mutual wills, below para.24-032; and see *R. Burgess (1972) 36 Conv. (N.S.) 113*.

118 *Blackwell v Blackwell [1929] A.C. 318*. And see *Re Williams, Williams v Parochial Church Council of All Souls, Hastings [1933] Ch. 244*. Contrast *Re Stirling [1954] 1 W.L.R. 763*; following *Re Falkiner [1924] 1 Ch. 88*, where the will expressly negatived any trust.

119 See *Tharp v Tharp [1916] 1 Ch. 142* (appeal settled *[1916] 2 Ch. 205*).

120 *Re Gardner, Huey v Cunnington [1920] 2 Ch. 523*.

121 See *Re Tyler, Graves v King [1967] 1 W.L.R. 1269* at 1275; but see *Gold v Hill [1999] 1 F.L.R.54* applying the principle by analogy to a nomination under a life insurance policy.

2. - Some Particulars of Secret Trusts

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Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 5. - Secret Trusts

2. - Some Particulars of Secret Trusts [122]

(a) Fully secret trusts.

24-028 The secret trust is not enforced unless, before the death of the testator, the legatee has expressly or impliedly accepted it. If the will contains no reference to any trust, and the legatee hears of the intended trust only after the testator's death (e.g. by finding an unexecuted document setting forth the trust), he is entitled to keep the property for himself. The trust is not contained in any will or codicil, and it would be no fraud on his part to set up the Wills Act 1837 as a bar to the enforcement of the trust. [123]

The trust communicated must be definite, and must be proved to exist applying the ordinary standard of proof in civil cases. [124] The onus of proof is on those who seek to establish the trust. [125] It is not enough for the legatee or devisee to know that he is to hold upon trust. He must also know in the testator's lifetime for whom or for what purpose he is to hold the property, and must accept that particular trust. If he agrees to hold upon some trust to be afterwards declared to him by the testator, and only discovers the nature of the trust after the testator's death, he will be a trustee for the residuary legatee or devisee. If the gift to him is a gift of residue, he will be a trustee for the persons entitled under an intestacy. To enforce the trust in such circumstances would enable a testator in effect to alter their will from time to time by means of an unexecuted codicil. [126]

(b) Half-secret trusts.

24-029 Unlike a fully secret trust, it is doubtful whether there can be any effective communication and acceptance of a half secret trust after the date of the will. The testator, it has been said, cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards. [127] Yet these doubts rest on somewhat unsatisfactory dicta. They are due, perhaps, to a flirtation with the rules governing the incorporation of documents in wills. [128] If the trusts are declared in a document to which the will refers as an existing document, the document may be incorporated in the will and all secrecy destroyed. [129] In principle, there seems to be no real reason why the communication of the trust at any time before the testator's death should not suffice for half secret as well as fully secret trusts. [130]

There is sufficient communication if the testator hands a letter to the legatee, even if it is in a sealed envelope marked "[n]ot to be opened until after my death", [131] though in such a case the recipient must know that the envelope sets out the terms of a secret trust and agree to carry them out. [132] If there is no proper communication of the trusts, the beneficial interest in the property belongs to the residuary legatee. If it were a residuary gift, it would belong to the persons entitled on an intestacy. [133]

Footnotes

122 For a detailed account, see Underhill and Hayton on the Law of Trusts and Trustees, 18th edn (Butterworths, 2010) at para.12.75.

123 *Wallgrave v Tebbs (1855) 2 K. & J. 313*.

124 *Re Snowden [1979] Ch. 528*; not following *Ottaway v Norman [1972] Ch. 698* at 712 where the higher standard applicable to rectification had been suggested. For the standard of proof in rectification, see above para.16-018.

125 *Jones v Badley (1868) 3 Ch. App. 362*.

126 *Re Boyes (1884) 26 Ch.D. 531*; *Re Hawkesley's Settlement [1934] Ch. 384*.

127 *Blackwell v Blackwell [1929] A.C. 318* at 339; *Re Keen [1937] 2 Ch. 236* at 246; *Re Karsten [1953] N.Z.L.R. 456* at 461; *Re Bateman's WT [1970] 1 W.L.R. 1463* at 1468.

128 *P. Matthews [1979] Conv. 360*, argues that the incorporation doctrine is the true basis of the half-secret trust. To the contrary: *D.R. Hodge [1980] Conv. 341*; *P. Critchley (1999) 115 L.Q.R. 631*.

129 See *Re Jones, Jones v Jones [1942] Ch. 328*.

130 As in Ireland (see *L.A. Sheridan (1951) 67 L.Q.R. 314*); Australia (*Ledgerwood v Perpetual Trustee Co Ltd (1997) 41 N.S.W.L.R. 532*); USA Scott, The Law of Trusts, 4th edn (Aspen Publishers, 1987), s.55.8 pp.87–88); and see *Gold v Hill [1999] 1 F.L.R. 54* at 62–63.

131 See *Re Keen [1937] Ch. 236* at 242; *Re Browne [1944] I.R. 90*; but see *Re Roberts, Murphy v Eadsforth (1956) 106 L.J. News. 663*.

132 See *Lomax v Ripley (1855) 3 Sm. & G. 48*. The law for fully secret trusts seems to be similar: *Re Boyes (1884) 26 Ch. D. 531* at 536.

133 *Johnson v Ball (1851) 5 De G. & Sm. 85*; *Re Keen [1937] Ch. 236*; *Re Spence, Quick v Ackner [1949] W.N. 237*; and see *Re Karsten [1953] N.Z.L.R. 456*. Where by a subsequent will a testator increases a legacy which is already bound by a half secret trust, but fails to communicate the increase to the trustees, the trusts will be valid as to the amount of the original legacy only: *Re Colin Cooper [1939] Ch. 811*.

3. - Basis of Secret Trusts

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Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 5. - Secret Trusts

3. - Basis of Secret Trusts

(a) Two explanations.

24-030 Two main theories have been proposed to explain the operation of secret trusts. The first is that they are enforced to prevent the Wills Act 1837 being used as an instrument of fraud. [134] The second is that the enforcement of the trust operates outside the will so that the Wills Act 1837 does not apply to it. [135]

The fraud theory now has less currency than in the past. The fraud which the doctrine seeks to prevent is so vaguely defined that it may not add substantially to the explanation. [136] The doctrine also applies where the trustee acts honestly and the only fraud which the enforcement of the secret trust could prevent is potential rather than actual. In the case of a fully secret trust, it would clearly be fraud for the named legatee to deny the validity of his promise and take the donor's gift beneficially for himself. [137] No distinction should be drawn between a case where the legatee fraudulently induces the testator to make the gift to him on the strength of his promise, [138] and one where he later relies on the statute to deny the validity of the trust he has accepted. [139] This, however, is not a sufficient explanation for the doctrine of half-secret trusts. The half-secret trustee cannot benefit personally by denying his trust since he would then hold the property on trust for residuary beneficiaries or those entitled on intestacy. To explain a half-secret trust fraud must be taken to consist in his denying the secret beneficiary the property that would otherwise have been received. The trustee's refusal to enforce the trust would also be an abuse of the confidence which the testator placed in the trustee. The testator, by dying in the belief that the trust would be carried out, would have lost the opportunity to give his intentions any legal effect.

The preferable theory is that secret trusts operate outside the will. They rest on the simple principle of enforcing the equitable obligations binding a man's conscience, and do not depend on specific proof of fraudulent conduct by the trustee. [140] The will is only relevant so far as it completes the constitution of the trust by vesting the property in the intended trustee. Accordingly, since the title of a beneficiary under a secret trust arises outside the will, he does not lose his benefits if he witnesses the will [141] or predeceases the testator. [142] On the other hand if the secret trustee predeceases the testator the secret trust probably fails because there is a failure of the legacy upon which the trust was intended to operate. [143]

(b) Express or constructive trusts.

24-031 It is unsettled whether secret trusts are express trusts or constructive trusts. There are difficulties in either view. [144] The outcome may be important where there is a secret trust of an interest in land. If the trust were constructive, it would be enforceable despite the lack of writing signed by the testator or trustee to evidence the trust. [145]

The theory that secret trusts arise to prevent fraud by the trustee provides some weak support for the argument that they are constructive trusts, arising to prevent him taking a benefit from his wrongful conduct. This, however, is not compelling. First, the nature of the fraud is ill-defined. Secondly, an analogy cannot be drawn with the cases where a constructive trust is imposed on a fiduciary to make him accountable for a gain accruing from a breach of his fiduciary duty [146]: the status of the legatee as a fully secret trustee who might owe fiduciary duties depends on the prior question of whether the terms of the informal agreement between himself and the testator have been effective to make him a trustee owing such duties. Similar considerations apply to a half-secret trustee. Although it may be clear from the face of the will that he is a trustee, it is only by supposing that he already holds on trust for the secret beneficiaries that he can be held accountable to them for failure to discharge his duties to them under the trust.

Aside from the insufficiency of the explanation founded on wrongdoing, secret trusts may be better classified as constructive. This is consistent with the theory that they arise outside the will and that they depend for their creation on an expression of intention by the testator and trustee. The trust arising by operation of law gives effect to an intention which would otherwise be void for want of compliance with the formalities in the Wills Act 1837. The analogy is with the constructive trust arising to give effect in equity to an inter vivos gift of property which is incomplete at law or the trust arising to give effect a conditional gift by way of donatio mortis causa. [147] In consequence, a better view may be that an agreement evidencing a secret trust of an interest in land need not be recorded in writing to be enforceable against the trustee.

Footnotes

134 See *Drakeford v Wilks (1747) 3 Atk. 539*; *McCormick v Grogan (1869) L.R. 4 H.L. 82* at 88, 89, 97. Lord Jeffreys LC has some claim to paternity: see *Crook v Brooking (1688) 2 Vern. 50*.

135 *Re Young decd, Young v Young [1951] Ch. 344* at 350; *Cullen v Attorney General for Ireland (1866) L.R. 1 H.L. 190*; and see *J.G. Fleming (1947) 12 Conv. (N.S.) 28*; A.J. Oakley, Constructive Trusts, 3rd edn (Sweet & Maxwell, 1997) at pp.248–253.

136 For a recent defence of the fraud theory and an indication of the difficulty of defining fraud in this context, see *P. Critchley (1999) 115 L.Q.R. 631 at 646–653*.

137 *Blackwell v Blackwell [1929] A.C. 318* at 335, 341.

138 *McCormick v Grogan (1869) L.R. 4 H.L. 82* at 89, 93.

139 *D.R. Hodge [1980] Conv. 341 at 343–344* citing *Bannister v Bannister [1948] 2 All E.R. 122*.

140 See *Blackwell v Blackwell [1929] A.C. 318* at 334. See generally *J.G. Fleming (1947) 12 Conv. (N.S.) 28*; *L.A. Sheridan (1951) 67 L.Q.R. 314*; *B. Perrins [1985] Conv. 248*.

141 *Re Young, decd., Young v Young [1951] Ch. 344*.

142 *Re Gardner, Huey v Cunningham [1923] 2 Ch. 230*.

143 *Re Maddock [1902] 2 Ch. 220* at 231. But see *Blackwell v Blackwell [1929] A.C. 318* at 328; *Earl of Inchiquin v French (1745) 1 Cox Eq. 1*.

144 See *R. Burgess (1972) 23 N.I.L.Q. 263*; A.J. Oakley, Constructive Trusts, 3rd edn (Sweet & Maxwell, 1997) at pp.260–263; *Re Cleaver [1981] 1 W.L.R. 939* at 947; *Brown v Powan [1995] 1 N.Z.L.R. 352* (holding that under New Zealand law the secret trust is a remedial constructive trust). For criticism see *[1996] Conv. 302*.

145 LPA 1925 s.53(1)(b). See *Re Baillie (1886) 2 T.L.R. 660* at 661 (lack of writing may prevent enforceability of unwritten secret trust of land); *Ottaway v Norman [1972] Ch. 699* (unwritten secret trust of land upheld, though lack of writing not argued).

146 See paras 7-057, 26-006.

147 See above paras 24-005 and 24-016.

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Section 6. - Mutual Wills

Section 6. - Mutual Wills [148]

24-032 Where two testators make mutual wills containing reciprocal provisions as to the disposition of the property under them, and agree that they will not revoke their wills, then, on the death of the first testator, the survivor holds his property on trust for the person to whom it was agreed that it should be left. The common case is of a husband and wife, T1 and T2, who make mutual wills under which each disposes of his or her property to the other for life, remainder to B. On the death of T1, T2 holds the relevant property on constructive trust for B on the terms provided in the will which was the subject of his or her agreement with T1.

Mutual wills are an instance of a trust arising by operation of law to give effect to an express intention of the two testators. [149]

Footnotes

148 See generally, *T.G. Youdan (1979) 24 U.Tor.L.J. 390*. For variations on the basic form of the mutual wills doctrine, see *Y. K. Liew (2016) 132 L.Q.R. 664*.

149 This sentence was cited with approval in *Olins v Walters [2009] EWCA 782; [2009] Ch. 212* at [40].

1. - Some Particulars of Mutual Wills

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 6. - Mutual Wills [148]

1. - Some Particulars of Mutual Wills

(a) Proof of the agreement.

24-033 Where two persons agree as to the disposal of their property and execute mutual wills in pursuance thereof, the one who predeceases the other without having departed from the agreement has performed his part of the bargain, and dies with the implied promise of the survivor that it shall hold good. [150] Usually the parties give each other a life interest with remainders over to the same person [151] but they may give each other an absolute interest with a substitutional gift in the event of the other's prior death. [152] The principle applies even where they agree to make wills leaving their property to third parties and no part to each other. [153] The arrangement will not be presumed from the simultaneous execution of virtually identical wills. [154] It must be proved by independent evidence of an agreement not merely to make identical wills but to dispose of the property in a particular way. [155] This typically requires that both parties agree not to revoke the wills so made. [156] The agreement may be implicit or explicit, and it would normally be the duty of the solicitor preparing the wills to ensure that it was clearly and accurately recorded. [157]

The agreement must amount to a contract at law. [158] If the subject-matter of the agreement is an interest in land the agreement must comply with the formality requirements of the Law of Property (Miscellaneous Provisions) Act 1989. [159] But it is unnecessary for all terms to be defined so precisely that they could be enforced by an order for specific performance. It is enough that T1 and T2's intentions to create the agreement are sufficiently clear for their conscience to be bound in equity. [160]

(b) Revocability.

24-034 Once one of the parties dies, the arrangement becomes irrevocable, at least if the survivor accepts the benefits conferred on him by the other's will. [161] Until the first death, either may withdraw from the arrangement by giving notice to the other party, and no trust interest arises for the intended beneficiary of the agreement. [162] Any material alteration by one party of his will prevents the arrangement from being binding on the survivor. The court is not in a position to assess the significance of the alteration to the parties, or whether it was subjectively intended to revoke the arrangement. [163] Yet the mere making of the arrangement may have some immediate effect as where joint tenants make mutual wills inconsistent with the joint tenancy and thereby sever it. [164] It has been suggested that it should be enough that the promise founding the agreement would support a binding proprietary estoppel against the second testator. If so, it would be unnecessary to insist on compliance with the 1989 Act to create a binding agreement affecting an interest in land. [165]

(c) The trust.

24-035 The effect of the agreement is that the surviving testator holds the property concerned on a constructive trust for the beneficiaries named in the wills. [166] It is no objection therefore to the validity of such a trust affecting an interest in land that it not evidenced by any writing signed by the testators. [167]

Any will which the surviving testator may make to replace the first will may be valid. The agreement cannot make the first will irrevocable. [168] His personal representative will, however, take the property subject to the trust arising under the prior agreement. [169] As the trust arises as soon as one testator has died, the interest of a beneficiary who dies before the surviving testator does not lapse. [170]

(d) Property bound.

24-036 It is primarily a question of construction to determine what property is bound by the trusts; a well-drawn will should define it. [171] Thus the trusts may bind merely the property left by the first testator to die, or such fraction of the survivor's estate as the wills state to be the notional equivalent of that property. [172] On the other hand, the trusts may bind the interests owned by each testator in certain identified property, so that when the first dies, the survivor cannot disregard the trusts even as regards his own interest in the property. [173] But if the trusts extend to the whole of the property of each party, or the residue, it is not clear how far the survivor would be free to deal with his own property during his lifetime, or whether after-acquired property would be caught by the trusts. No view is free from difficulties. [174] If the terms of the agreement contemplate that the surviving testator should be free to apply the property for his own beneficial use during his lifetime, then the trust may "float" during this period and crystallise only on his death. The beneficiary could not therefore restrain the surviving testator from disposing of the property unless the disposition was calculated to defeat the agreement. [175]

Footnotes

148 See generally, *T.G. Youdan (1979) 24 U.Tor.L.J. 390*. For variations on the basic form of the mutual wills doctrine, see *Y. K. Liew (2016) 132 L.Q.R. 664*.

150 This sentence was cited in *Re Gillespie [1969] 1 O.R. 585 at 593; 69 D.L.R. (2d) 368* at 372.

151 *Re Hagger [1930] 2 Ch. 190*. Probably remainders to different, but agreed, persons would suffice; for the essence is the agreement.

152 *Re Green, Lindner v Green [1951] Ch. 148*; but consider *Re Oldham [1925] Ch. 75* at 84, 88. See also *Re Fox [1951] O.R. 378* (agreement providing for limited changes in wills).

153 *Re Dale [1994] Ch. 31*.

154 Contrast a joint will: *Re Gillespie [1969] 1 O.R 585; 69 D.L.R. (2d) 368 Ont. CA*, Kelly & McLennan JJA, Laskin JA dissenting.

155 *Re Oldham [1925] Ch. 75*; *Gray v Perpetual Trustee Co Ltd [1928] A.C. 391* (no agreement); *Re Cleaver [1981] 1 W.L.R. 939* (agreement found); *Birch v Curtis [2003] 2 F.L.R. 847* (no agreement).

156 *Birmingham v Renfrew (1937) 57 C.L.R. 666* at 675; *Lewis v Cotton [2001] 2 N.Z.L.R. 21*.

157 *Charles v Fraser [2010] EWHC 2154 (Ch); [2010] W.T.L.R. 1489*.

158 *Re Dale [1994] Ch. 31* at 38; *Re Goodchild [1997] 1 W.L.R. 1216* at 1224, 1229; *Olins v Walters [2009] EWCA 782; [2009] Ch. 212* at [36]–[41].

159 *Healey v Brown [2002] W.T.L.R. 849*. But the agreement is not void for non-compliance with the Act if it does not directly refer to an interest in land and either testator's estate merely includes an interest in land when the contract is made or when either testator dies: *Birmingham v Renfrew (1937) 57 C.L.R. 666*. An empirical survey indicates that many mutual wills which refer specifically to land fail to comply with the formality requirements of the 1989 Act: *M. Pawlowski and J. Brown [2012] Conv. 467*.

160 *Olins v Walters [2009] EWCA 782; [2009] Ch. 212* at [36]–[41], per Mummery LJ.

161 It is doubtful whether acceptance is necessary: see *Stone v Hoskins [1905] P. 194* at 197; *Re Hagger [1930] 2 Ch. 190* at 195, *J.D.B. Mitchell (1951) 14 M.L.R. 136 at 138*.

162 *Stone v Hoskins [1905] P. 194*; *Barns v Barns [2003] HCA 9; (2003) 214 C.L.R. 169* at [85]. cf. *T.G. Youdan (1979) 24 U.Tor.L.J. 390 at 406–410*.

163 *Re Hobley [2006] W.T.L.R. 467*.

164 *Re Wilford's Estate (1879) 11 Ch. D. 267*; *In b. Heys [1914] P. 192*; *Szabo v Boros (1967) 64 D.L.R. (2d) 48*.

165 *Legg v Burton [2017] EWHC 2088 (Ch); [2017] 4 W.L.R. 168* at [19]–[27].

166 *Birmingham v Renfrew (1937) 57 C.L.R. 666*.

167 LPA 1925 s.53(1)(b).

168 *Vynior's Case (1609) 8 Co.Rep. 81b*; *In b. Heys [1914] P. 192*.

169 *Re Green, Lindner v Green [1951] Ch. 148*. This passage was cited with approval in *Thomas and Agnes Carvel Foundation v Carvel [2007] EWHC 1314 (Ch); [2008] Ch. 395*.

170 *Re Hagger [1930] 2 Ch. 190* (a joint will).

171 See, e.g. *Re Kerr [1948] O.R. 543 (affirmed: [1949] O.W.N. 71; [1949] 1 D.L.R. 736)* (defined assets pooled).

172 *Re Green [1951] Ch. 148*.

173 *Re Hagger [1930] 2 Ch. 190*.

174 Contrast *Birmingham v Renfrew (1937) 57 C.L.R. 666* at 689 with *J.D.B. Mitchell (1951) 14 M.L.R. 136 at 139, 140*; see *Re Cleaver [1981] 1 W.L.R. 939* at 946, 947.

175 *Birmingham v Renfrew (1937) 57 C.L.R. 666* at 689–690.

End of Document

2. - Basis of Mutual Wills

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Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 6. - Mutual Wills [148]

2. - Basis of Mutual Wills

24-037 In contrast to secret trusts, there can be no question of the constructive trust arising to compel performance of a trust which would be void for failure to comply with the relevant formalities under the Wills Act 1837. The trust arises outside the will. [176] Since it comes into force when the first testator dies and it binds the surviving testator's property during his lifetime, it does not operate as a testamentary disposition by the first testator.

The doctrine of mutual wills survives from the period before the full development of the doctrine of privity of contract. [177] The basis of the trust is the express agreement between the testators. The trust gives effect to the beneficiary's equitable right to compel the benefit of obligations binding on the surviving testator's conscience. It does not depend on the beneficiary's having any contractual entitlement to compel specific performance of the agreement. [178] Hence it is no objection that the beneficiary was not a party to the agreement, and that damages might have been an adequate remedy for the survivor's breach of it. [179]

Mutual wills have a similar rationale to secret trusts. The first testator is treated as having made a disposition of property in reliance upon the survivor carrying out his obligations under it. It would be a fraud for the survivor to resile from it.

Footnotes

148 See generally, *T.G. Youdan (1979) 24 U.Tor.L.J. 390*. For variations on the basic form of the mutual wills doctrine, see *Y. K. Liew (2016) 132 L.Q.R. 664*.

176 *Thomas and Agnes Carvel Foundation v Carvel [2007] EWHC 1314 (Ch); [2008] Ch. 395* at [27] per Lewison J.

177 *T.G. Youdan (1979) 24 U.Tor.L.J. 390*.

178 *Olins v Walters [2009] EWCA 782; [2009] Ch. 212* at [36] per Mummery LJ.

179 *Birmingham v Renfrew (1937) 57 C.L.R. 666* at 684–685.

End of Document

Section 7. - Constructive Trusts under the Equity in Pallant v Morgan

24-038 A constructive trust may be imposed over property acquired by one person, A, that he had previously agreed with another person, B, he would only acquire for the benefit of both himself and B. The trust arises under what is called the equity in *Pallant v Morgan*.[180] A holds the property on trust for himself and B to prevent A from benefiting unconscionably from the breach of the agreement with B. It should be read in the light of *Generator Developments Ltd v Lidl UK GmbH*.[181]

Footnotes

180 *Pallant v Morgan [1953] Ch. 43*; considered with approval in *Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55; [2008] 1 W.L.R. 1752* at [24].

181 *Generator Developments Ltd v Lidl UK GmbH [2018] EWCA Civ 396*.

1. - The Requirements for the Pallant v Morgan Equity

24-039 A *Pallant v Morgan* equity typically relates to specific property that is not at first owned by either of the parties, A or B. [182] A and B form a common intention that A will take steps to acquire the property; and that, if A does so, B will obtain some interest in it. They may contemplate, for example that A will buy the property, subdivide it and convey part of it to B, [183] or that it will be acquired by a corporate vehicle, the shares in which will be divided between A and B. [184] The common intention need not be recorded in writing, [186] but its main term must be agreed between the parties. [185] The equity cannot arise where the agreement is expressed to be subject to contract, [186] or where A and B realise that their agreement is legally unenforceable because they plan to enter into a binding agreement in the future. [187]

In reliance on A's assurance or B's expectation that B would acquire an interest in the land, B then does something which confers an advantage on A in acquiring the property or which is detrimental to B's ability to acquire it on equal terms. [188] B may, for example, withdraw from making his own bid to acquire the property, with the consequence that A acquires the property more cheaply than he would otherwise have done. [189] The effect is that it would then be unconscionable for A to keep the property for itself. But A does nothing unconscionable if he resiles from an agreement that was expressed to be subject to contract or which both parties realised was not legally binding between them. Where A and B are commercial parties dealing at arm's length, B takes the risk that a binding agreement may not materialise. [190]

The effect of the equity is that A becomes bound by a constructive trust to prevent him from benefiting by his unconscionable breach of the agreement. A may, for example, hold the property on trust for himself and B jointly. The effect is to force A to bargain with B for the proper implementation of their agreement or to allow the division of the proceeds of sale between them.

Footnotes

182 *Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55; [2008] 1 W.L.R. 1752* at [37].

183 *Pallant v Morgan [1953] Ch. 43*.

184 *Banner Homes Group Plc v Luff Developments Ltd [2000] Ch. 372*.

185 *Generator Developments v Lidl UK Gmbh [2018] EWCA Civ 396; [2018] 2 P. & C.R. 7* at [78].

186 *Generator Developments v Lidl UK Gmbh [2018] EWCA Civ 396; [2018] 2 P. & C.R. 7* at [67], [79].

187 *Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55; [2008] 1 W.L.R. 1752* at [37]; *Herbert v Doyle [2010] EWCA Civ 1095; [2011] 1 E.G.L.R. 119* at [57]; *Generator Developments Ltd v Lidl UK GmbH [2018] EWCA Civ 396* at [56].

188 *Holiday Inns Inc v Broadhead (1974) 232 E.G. 951*.

189 *Pallant v Morgan [1953] Ch. 43*.

190 *Generator Developments v Lidl UK Gmbh [2018] EWCA Civ 396; [2018] 2 P. & C.R. 7* at [85].

2. - Basis of the Equity

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Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 7. - Constructive Trusts under the Equity in Pallant v Morgan

2. - Basis of the Equity

24-040 The precise basis of the equity remains uncertain in the authorities. Like the other doctrines considered in this chapter, the *Pallant v Morgan* equity is one where the defendant acts unconscionably by taking advantage of the informality of an expressly intended transaction affecting specific property. A holds the property on a constructive trust for B to give effect to their informal common intention. [191] The basis of the equity is distinct from proprietary estoppel. It does, however, share the limitation of estoppel that it cannot arise where B knows that the agreement between himself and A is not legally binding. [192] The practical effect of this limitation is that it is unlikely to apply between commercial parties dealing with each other at arms' length.

A different explanation is that the equity is more easily explained through conventional principles of agency and fiduciary liability. The equity only arises if A and B agree that A will acquire the property as an agent for B. The constructive trust imposed on A can then be readily explained: A, as agent, holds property for B, as principal, which he acquired in breach of his fiduciary duty to B. [193]

Footnotes

191 *Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55; [2008] 1 W.L.R. 1752* at [30]; *Generator Developments v Lidl UK Gmbh [2018] EWCA Civ 396; [2018] 2 P. & C.R. 7* at [72].

192 *Generator Developments v Lidl UK Gmbh [2018] EWCA Civ 396; [2018] 2 P. & C.R. 7* at [44], [55]–[67].

193 *Generator Developments v Lidl UK Gmbh [2018] EWCA Civ 396; [2018] 2 P. & C.R. 7* at [36]–[37], [72], [83] where the Court of Appeal considered that agency was the basis on which *Pallant v Morgan [1953] Ch. 43* was originally decided.

End of Document

1. - General

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Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 8. - Constructive Trusts of Land to Enforce Informal Common Intention

1. - General

(a) Summary.

24-041 A constructive trust may arise when land is purchased as a joint home but where the registered legal title does not reflect the beneficial shares which the proprietors intended for themselves. The common case is of cohabiting partners who buy a house to live in as their home. The legal estate may be registered in the name of only one of them, and the name of the other does not appear on the registered title. Alternatively, both may be registered as joint proprietors but they do not intend to hold for each other as joint beneficial proprietors. In each case, a constructive trust may arise which binds the legal estate and gives effect to the parties' common intentions as to their beneficial shares in the property. Those intentions are usually inferred from the entire course of dealings between the parties, and go beyond financial contributions to the purchaser or maintenance of the property. In sole proprietorship cases, the trust arises because it would be inequitable for the registered proprietor to hold the legal estate as sole beneficial owner given the contributions made by his partner in reliance on their shared understanding. In cases of joint proprietorship, it would be inequitable for one of the joint registered proprietors to take a larger share than he and his partner intended when each contributed to the property and their relationship.

(b) Context.

24-042 The rules about common intention constructive trusts of a shared home should be considered in their proper context.

(1) Family assets and re-distribution.

24-043 In English law there is no special category of "family assets" or family property" which would determine how property should be divided when such a relationship breaks up. [194] The property of people who have been married or in a civil partnership [195] may be divided by a property transfer order in matrimonial proceedings. [196] For the present, however, the division of assets belonging to unmarried cohabitants depends on the proprietary interests that they acquired while their relationship subsisted. The courts have no jurisdiction to re-distribute their property according to the future needs of the parties and any dependent children. [197] Trusts become relevant since it is accepted that the parties' legal ownership does not conclusively define their beneficial entitlements to the assets.

(2) Purpose.

24-044 The main purpose of the common intention constructive trust is to give effect to the parties' actual intentions as deduced from their words and conduct. Only if that proves impossible does the court impute to the parties an intention that each should have a fair share in the property. [198]

(3) Default rules.

24-045 The rules governing common intention constructive trusts apply only default. It is unnecessary to resort to them if the parties have declared a valid and enforceable express trust that defines their beneficial entitlements to the property. The express, enforceable statement of the parties' intentions displaces any informal understanding between them. [199]

(4) Relationship with resulting trust.

24-046 In the past, the rules for ascertaining the parties' intentions in this kind of constructive trust overlapped with the presumptions of intention that give rise to resulting trusts. [200] Nowadays, however, where the parties buy the property as a joint home, the principles of resulting trust are unlikely to be relevant to defining the extent of the parties' beneficial shares in the property. [201] The assumptions as to human motivation in making gifts or providing for the maintenance of dependants which were relevant to the imputation of intentions under a resulting trust are no longer appropriate to the ascertainment of interests in a family home. [202] A wider range of evidence is relevant to proving the parties' share under a common intention constructive trust than was relevant to proving a resulting trust. Resulting trust principles may now only be relevant where the parties buy property for commercial purposes or as an investment, rather than as a shared home. [203]

(5) Overlap with proprietary estoppel.

24-047 A constructive trust arising out of an express agreement between the parties may overlap with a claim founded on proprietary estoppel. [204] In both, the claimant may have acted to his detriment in reliance on the belief that he would obtain an interest. [205] In both, equity acts on the conscience of the legal owner to prevent him from defeating the common intention. [206] The distinction between the claimant's rights under an estoppel and under a constructive trust is now much diminished since both may operate as interests in land and be overreached. [207] The difference remains, however, that the remedy by which an estoppel is enforced is discretionary, while under a constructive trust the claimant is entitled to his agreed beneficial share.

Footnotes

194 See *Pettitt v Pettitt [1970] A.C. 777* at 809, 810, 817; *Gissing v Gissing [1971] A.C. 886* at 899, 904; *Grant v Edwards [1986] Ch. 638* at 651.

195 *Mossop v Mossop [1989] Fam. 77*.

196 See Matrimonial Causes Act 1973 ss.21–40.

197 See *Pettitt v Pettitt [1970] A.C. 777* at 803, 813; *Gissing v Gissing [1971] A.C. 886* at 896–905; *Grant v Edwards [1986] Ch. 638* at 651, 652. For reform proposals, see Law Com. No. 307.

198 *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776* at [47], [51].

199 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [49].

200 See Ch.25.

201 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [3], [42], [60].

202 *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776* at [53].

203 *Laskar v Laskar [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695*.

204 *Stokes v Anderson [1991] 1 F.L.R. 391* at 398–399; *Lloyds Bank v Carrick [1996] 4 All E.R. 630* at 640; *Yaxley v Gott [2000] Ch. 162*. See *D. Hayton [1990] Conv. 370*; *P. Ferguson (1993) 109 L.Q.R 114*; *D. Hayton (1993) 109 L.Q.R 485*; *T. Etherton [2009] Conv. 104*.

205 *Grant v Edwards [1986] Ch. 638* at 656, 657; *Lloyds Bank Plc v Rosset [1991] 1 A.C. 107* at 132.

206 *Grant v Edwards [1986] Ch. 638* at 656; and see *Maharaj v Chand [1986] A.C. 898* at 907, 908; *Re Basham [1986] 1 W.L.R. 1498* at 1504.

207 LRA 2002 s.116; *Birmingham Midshire Mortgage Services Ltd v Saberwahl (1999) 80 P. & C.R. 256*.

2. - Express Trust

24-048 If there is an express declaration of the trusts on which the property is to be held then it generally determines the existence and extent of the parties' beneficial shares in the property. Any constructive or resulting trust is excluded.[208] Only where the express trust was executed through fraud or mistake,[209] or where it was varied by subsequent agreement or qualified by proprietary estoppel would the property not be held according to the terms of the express trust.[210] It displaces any presumption about the extent of the parties' share based on their conduct relating to the property.[211]

The trust is commonly declared on the Land Registry TR1 transfer form between the transferor and the transferee who becomes the trustee. It is not essential that the transferee execute the instrument in which the trust is declared. If the declaration was inserted with the consent or on the instructions of the purchasers it will probably be conclusive.[212] But a declaration in the transfer to the joint registered proprietor of land that the survivor of them can give a valid receipt for capital money is not sufficient evidence of a declaration of trust creating a beneficial joint tenancy.[213] Even if the parties had understood the legal effect of this declaration, it is not necessarily consistent with an intention that they intended a trust for themselves as joint beneficial owners.[214] The same is true of a covenant given by the joint legal proprietors to a mortgagee that had authority to charge the property as "beneficial owners".[215]

Footnotes

208 *Pettitt v Pettitt [1970] A.C. 777* at 813; *Goodman v Gallant [1986] Fam. 106*; *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [49]; *Pankhania v Chandegra [2012] EWCA Civ 1438; [2013] W.T.L.R. 101*.

209 See Ch.8.

210 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [49]; *Hameed v Qayyum [2008] EWHC 2274 (Ch)* at [67]–[68].

211 *Goodman v Gallant [1986] Fam. 106* at 118, 119.

212 *Pink v Lawrence (1977) 36 P. & C.R. 98* at 101; *Re Gorman (a bankrupt) [1990] 1 W.L.R. 616*; not following *Robinson v Robinson (1976) 241 E.G. 153*; *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776* at [18].

213 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [51], [130]. For analysis, see Law Com. No.307 paras [2.17]–[2.25].

214 *Harwood v Harwood [1991] 2 F.L.R. 274*; *Huntingford v Hobbs (1992) 24 H.L.R. 652*. It seems that *Re Gorman (a bankrupt) [1990] 1 W.L.R. 616* is no longer to be followed on this point. But in the context of other evidence, the declaration may support an inference that the parties agreed that they should be beneficial joint tenants: *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [69].

215 *Harwood v Harwood [1991] 2 F.L.R. 274*.

3. - Requirements for Constructive Trust

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Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 8. - Constructive Trusts of Land to Enforce Informal Common Intention

3. - Requirements for Constructive Trust

(a) Presumptions as to beneficial ownership.

24-049 Where an express trust has not been declared, then the starting point is that equity follows the law, and the beneficial ownership of the property is held in the same way as the registered legal estate in the property.[216] If the property is registered in the name of one party only, then they will be presumed to be the sole beneficial owner.[217] If it is registered jointly in the names of both parties, then it is presumed that they hold for themselves as beneficial joint tenants. This will be the case even where one party has made no financial contribution at all to purchasing the property.[218] The reason is that if a couple decide to buy a property where they will live together, then that is a strong indication of an emotional and economic commitment to a joint enterprise. This is then reflected in the joint beneficial shares that each takes in the property.[219] But the presumption of joint beneficial ownership cannot in fact apply if the property is in fact registered in the joint names of both parties. The claimant cannot rely upon it where the parties decide for reasons of convenience that it should be registered in the name of only one of them. The presumption in that case is that the claimant has no beneficial interest in the property at all.[220]

24-050 The effect of the presumption is to allocate the burden of proof. The party who alleges that this presumption does not reflect parties' true intentions about the beneficial shares in the property bears the burden of proof.[221] The usual civil standard of proof on the balance of probabilities applies.[222] Where the legal estate is held in the name of one party only, then the other party bears the burden of proving whether he has any beneficial share at all and what the extent of it may be.[223] Where it is registered in joint names, the party arguing for the unequal share bears the burden of proving its extent. That burden is not easily discharged. It is now firmly recognised that in a trusting personal relationship, the parties generally expect to hold the property as a joint enterprise. They would not generally expect to hold each other to account financially for their different contributions to the property and their relationship. Where the parties are in a relationship the facts would need to be very unusual to displace the presumption of joint beneficial ownership.[224] The presumption might even hold where the parties purchased properties as investments rather than for their own use and occupation. The financial motivation for the purchase would not necessarily cause the property to be held on a resulting trust in proportion to the parties' monetary contributions in buying it.[225]

(b) Express and inferred agreements.

24-051 The claimant alleging the constructive trust or the different beneficial share in the property must prove that there was an agreement, arrangement or understanding about their respective beneficial shares in the property.[226] The agreement may be based on evidence of express discussions between them or it may be inferred from their conduct. The relevant intention should generally be found when the property was first acquired, though later conduct may be relevant to proving what was previously

intended.[227] The parties may also intend that their beneficial shares should be "ambulatory" in the sense that they would vary over time.[228] In that case, the parties' conduct after the property was acquired would be directly relevant to ascertaining the existence and extent of each party's beneficial share.

(1) Express agreement.

24-052 To found an express agreement between the parties, there must have been some actual discussion between the parties about their beneficial entitlements to the property.[229] Their discussions need not directly refer to the claimant having a beneficial interest in the property provided that they indicate the parties' shared understanding that the claimant was to have an interest. It may be inferred, for example, from a stated reason or excuse for not making the claimant a registered proprietor.[230] An explicit understanding that the property was to be the parties' shared home for themselves and their family is not enough to establish an agreement that the claimant was to have a proprietary interest in it.[231] It may, however, be relevant to the inference of that agreement from their subsequent conduct.

(2) Inferred agreement.

24-053 Failing these express discussions, the agreement must be inferred. The primary search is to ascertain what the parties actually intended to agree, as deduced objectively from their words and conduct.[232] They are therefore taken to intend what the other party would reasonably understand them to mean, rather than what might have been subjectively in each party's mind.[233] So one party's actual intentions about the ownership of the property, which he did nothing to disclose to the other party, are not relevant to inferring their shared understanding.[234] Likewise, if the proprietor of the legal estate does not know about the claimant's conduct, it cannot support the inference of an agreement between them.[235] The court cannot impose a solution on them which is different from what the evidence shows they actually intended.[236] It follows that an agreement as to shared beneficial ownership cannot be inferred when the party who holds the legal interest in the property explicitly says that the other is not to have a beneficial share in it.[237]

The relevant evidence is not confined to direct financial contributions made by the claimant to acquiring the property or to paying mortgage instalments.[238] It may include: any advice or discussions at the time of acquisition that may shed light on the parties' intentions; the reason why the property was registered in joint names or in the name of a sole proprietor; the purpose why the home was acquired; the nature of the parties' relationship and whether they had any children; how the purchase was financed, initially and subsequently[239]; how any mortgage liability and household expenses were met; and the extent to which they ran their finances jointly, separately, or in a coordinated way.[240] A discount due to a sitting tenant would count as a contribution to purchasing the property.[241] Even in domestic cases where the presumption of resulting trust is no longer directly relevant, financial contributions to acquiring the property or to paying a mortgage debt secured on it may provide some of the strongest evidence of the parties' intentions.[242] The evidence must, however, have some bearing on their intentions as to the beneficial ownership of the property.[243] For example, evidence of the claimant's contributions to a business run from the property from which they and the proprietor earned their livelihood may not prove much about their intentions as to the property itself.[244]

Only where it is impossible to ascertain by direct evidence or inference what the parties' actual intentions were as their shares in the property does the court resort to imputing an intention to them. The parties are imputed with an intention to take shares in the property which, as reasonable and just people, they would regard as fair had they thought about it at the time.[245] Only the parties' intentions about the extent of their shares may be imputed to them. The court does not impute to the parties an intention that the claimant should take a beneficial interest in the property if there was no actual or inferred agreement to this effect. Nor can the court use the criterion of fairness to compensate the claimant for the other party's conduct in a relationship where natural love and affection were not to the fore.[246]

(3) "Ambulatory" agreement.

24-054 The parties' agreement about their beneficial shares in the property may be "ambulatory" in the sense that their understanding of the existence and extent of their beneficial interest evolves over time. The court is not confined to considering evidence of their intentions when they first acquired the property.[247] The claimant might have been presumed to have a share in the property from the outset but on the understanding that its value would vary depending on the extent of the parties' subsequent contributions to the property and the relationship.[248] But where the parties' intentions on acquiring the property together were clear, as where the surrounding circumstances support the presumption drawn from the initial vesting of the legal estate, then the court would be slow to infer from conduct alone that the parties intended to vary the existing beneficial interests established at the outset. A written declaration of an express trust would certainly suffice, as might an agreement founded on express discussions between the parties.[249] A change in intention might also be inferred from significant conduct. The intention of one party to leave the relationship and abandon the property may indicate that the parties no longer intended to share it equally. Such conduct might cause the value of the departing party's interest to become fixed at that time. Any subsequent capital growth in the value of the property might then benefit the party who remained.[250] A party who extracts his equity by re-mortgaging the property and using the proceeds for his own use may be taken to have varied the original agreement as to his share in the property.[251] Where the property was originally acquired in the name of only one of them, very substantial improvement to the property funded by one of the parties would perhaps support the inference of an agreement that he was to have a share in it different from the initial presumption.[252] The assumption of part of the mortgage liability might have the same effect.[253] Routine maintenance or improvement works would not suffice to displace the initial presumption.[254]

(4) Successive interests.

24-055 Occasionally, the proper inference may be that the parties intended to have successive interests in the property.[255] When the property is sold, the holder of the life interest takes the actuarial value of his life interest.

The monetary value of the parties' agreed or imputed shares becomes due to them when the property is sold or realised.[256] There may, however, be some adjustments made to the sum actually paid under the court's jurisdiction to conduct an equitable accounting or to order compensation to a party who has been excluded from the house.[257]

Footnotes

216 *Pettitt v Pettitt [1970] A.C. 777* at 813–814; *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776* at [51].

217 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [4], [5], [56], [109].

218 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [63].

219 *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776* at [19]. The parties are presumed to hold for themselves as beneficial joint tenants. For the difficulties in ascertaining when the joint tenancy may be severed, see *Pawlowski and Brown (2013) 27 T.L.I. 59, 172*.

220 *Thompson v Hurst [2012] EWCA Civ 1752; [2014] 1 F.L.R. 238*.

221 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [4], [5], [56]; *Tackaberry v Hollis [2007] EWHC 2633 (Ch); [2008] W.T.L.R. 279*.

222 *Fowler v Barron [2008] EWCA Civ 377; [2008] 2 F.L.R. 831* at [35].

223 There may be no special difficulty about displacing the presumption where the contributors are not in a relationship with each other or family members but are simply sharing the house as a joint home. Here, natural inference may be that they

intended their beneficial interests to reflect their financial contributions to buying the house and servicing any mortgage on it: *Gallarotti v Sebastianelli [2012] EWCA Civ 865; (2012) 15 I.E.T.L.R. 277*.

224 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [33], [68], [69]; *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776* at [19]–[22].

225 *Marr v Collie [2017] UKPC 17; [2018] A.C. 631*.

226 *Lloyds Bank Plc v Rosset [1991] 1 A.C. 107* at 132.

227 *Supperstone v Hurst [2005] EWHC 1309 (Ch); [2005] B.P.I.R. 1231*.

228 See para.24-054 below.

229 *Lloyds Bank Plc v Rosset [1991] 1 A.C. 107* at 132.

230 For example *Eves v Eves [1975] 1 W.L.R. 1338*; *Grant v Edwards [1986] Ch. 638*. The logic of these findings has been questioned. An unwarranted excuse may perhaps better found an estoppel than provide evidence of an agreement that the claimant should take an interest in the property: *Van Laethem v Brooker [2005] EWHC 1478 (Ch); [2006] 2 F.L.R. 495* at [67].

231 *Lloyds Bank Plc v Rosset [1991] 1 A.C. 107* at 130D.

232 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [126]; *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776* at [46].

233 *Gissing v Gissing [1971] A.C. 886* at 906B–D.

234 *Fowler v Barron [2008] EWCA Civ 377; [2008] 2 F.L.R. 831* at [36], [37].

235 *Lightfoot v Lightfoot-Brown [2005] EWCA Civ 201; [2005] W.T.L.R. 1031*.

236 *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776* at [47].

237 *Geary v Rankine [2012] EWCA Civ 555; [2012] 2 F.L.R. 1409*. *Capehorn v Harris [2015] EWCA Civ 955; [2015] Fam. Law 1347* at [20]–[23].

238 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [26], [63]; *Abbott v Abbott [2007] UKPC 53; [2008] 1 F.L.R. 1451*; not following on this point the dicta of Lord Bridge in *Lloyd's Bank Plc v Rosset [1991] 1 A.C. 107* at 133A.

239 *Midland Bank Plc v Cooke [1995] 2 F.L.R. 915*; *Abbott v Abbott [2007] UKPC 53; [2008] 1 F.L.R. 1451* (gift from a parent to a newly married couple presumed to be a gift to them jointly).

240 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* (separate finances rebuts inference of joint beneficial ownership); *Chapman v Chapman [1969] 1 W.L.R. 1367*; *Hargrave v Newton [1971] 1 W.L.R. 1611*; *Grant v Edwards [1986] Ch. 638* (coordination of finances to repay mortgage supports inference of claimant's interest).

241 *Marsh v Von Sternberg (1986) 16 Fam. Law 160*; *Laskar v Laskar [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695*.

242 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [11].

243 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432*.

244 For example *James v Thomas [2007] EWCA Civ 1212; [2008] 1 F.L.R. 1598*; *Morris v Morris [2008] EWCA Civ 257*.

245 *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776* at [33], [47].

246 *Capehorn v Harris [2015] EWCA Civ 955; [2015] Fam. Law 1347* at [20]–[23]; *Barnes v Phillips [2015] EWCA 1056* at [21]–[24]; *Graham-York v York [2015] EWCA Civ 72* at [16], [22].

247 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [38]–[139]; *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776* at [13].

248 For an analysis of the "ambulatory" trust, see *Mee (2012) 128 L.Q.R. 500*.

249 *James v Thomas [2007] EWCA Civ 1212; [2007] 3 F.C.R. 696*; *Morris v Morris [2008] EWCA Civ 257*.

250 For example *Jones v Kernott [2011] UKSC 53; [2012] 1 A.C. 776*. In extreme cases the departing party may be taken as abandoning his share entirely: *Quaintance v Tandan [2012] EWHC 4416 (Ch)*.

251 *Capehorn v Harris [2015] EWCA Civ 955; [2015] Fam. Law 1347* at [20]–[23].

252 *Bernard v Josephs [1982] Ch. 391* at 404.

253 *Gissing v Gissing [1971] A.C. 886 at 901D*.

254 *Pettitt v Pettitt [1970] A.C. 777*; *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [36], [139].

255 *Ungarian v Lesnoff [1990] Ch. 206*; *Pritchard Englefield v Steinberg [2004] EWHC 1908 (Ch); [2005] 1 P. & C.R. D6*.

256 *Turton v Turton [1988] Ch. 542*; disapproving *Hall v Hall (1982) 3 F.L.R. 379*; and see *Gordon v Douce [1983] 1 W.L.R. 563*. In so far as this last case suggests the court has a discretion to order valuation at an earlier date, it would not be followed.

257 See Ch.20 above.

End of Document

4. - Basis of Trust Arising from Informal Common Intention

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Mainwork

Part 5 - Trusts

Chapter 24 - Trusts Arising To Enforce An Informally Expressed Intention

Section 8. - Constructive Trusts of Land to Enforce Informal Common Intention

4. - Basis of Trust Arising from Informal Common Intention [258]

24-056 Simple proof of the oral or inferred agreement between the parties or an unwritten declaration of trust would not be enough to entitle the claimant to an enforceable interest in the property under a trust. Such an arrangement could only take effect as an express trust. It would be unenforceable since it would not be evidenced by writing signed by the party declaring the trust. [259] Accordingly, proof that the claimant has acted to his detriment in reliance upon the agreement that he would take an interest in the property is essential to explaining the constructive trust. In these circumstances it would be fraudulent for the proprietor of the legal estate to rely on the formality requirements to deny the enforceability of the beneficial interest and claim the entire beneficial rights to the property for himself. The constructive trust arises to prevent this result. Where the agreed is inferred, then the parties' conduct is both the evidence from which the agreement is inferred and the detriment which gives rise to the constructive trust.

Footnotes

258 See *T. Etheron [2008] C.L.J. 265*; *M. Harding [2009] Conv. 309*.

259 LPA 1925 s.53(1)(b).

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1. - Default Presumption of Intention

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 25 - Resulting Trusts

Section 1. - Rationale

1. - Default Presumption of Intention

25-001 Express trusts are created by the actual intention of the settlor that the person holding the legal interest in the property should take it subject to the beneficial entitlement of another. It may happen, however, that a transferor of property causes the legal interest to vest in another person in circumstances where it is unclear whom the transferor intends to have the beneficial interest in it. Here, by operation of law, a resulting trust may arise for the benefit of the transferor. It gives effect to a default presumption about the intention of a person in making a gratuitous transfer of property: although he has transferred the legal interest, he would generally not intend the transferee to take the property beneficially. The name "resulting" describes the effect of the trust in causing the beneficial entitlement to the property to spring back to the person who transferred it. Since it arises by operation of law it may take effect informally. [1]

There are two main situations where resulting trusts may arise: where there is a gratuitous transfer of property and where an express trust of property fails to dispose of the beneficial interest in property. This chapter also considers so-called *"Quistclose"* trusts, which have been explained as resulting trust arising in the second main situation. Their common feature is that they give effect to a default presumption about the intention of the person transferring the property, in circumstances where the express evidence of that intention is uncertain. [2]

Footnotes

1 A resulting trust of an interest in land need not be evidenced by signed writing: Law of Property Act 1925 s.53(2).

2 See *W.J. Swadling (2008) 124 L.Q.R. 72* who argues that the two kinds of resulting trust lack a common rationale.

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2. - Unjust Enrichment

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 25 - Resulting Trusts

Section 1. - Rationale

2. - Unjust Enrichment

25-002 It has been argued that resulting trusts arise to reverse the unjust enrichment of the person who takes the legal interest in the property [3] ; the situations where a transferor is presumed to lack the intention to vest the beneficial interest in the transferee are those where his intention to enrich the transferee is vitiated, and which would found a personal action in unjust enrichment. On this view, the function of resulting trusts would be to provide proprietary remedies alongside the personal claims in unjust enrichment.

This theory has not met with general acceptance. [4] It has been said that actions in unjust enrichment generally lie because the claimant's intention to enrich the recipient has been vitiated. [5] But the vitiation of a person's intention for the purposes of an unjust enrichment action means something different from the absence of intention to pass the beneficial interest in property to the recipient. So a person paying money by mistake or pursuant to a void contract may intend to pass his beneficial interest in the money even though his intention to enrich the recipient is, in one sense, vitiated because the recipient would be liable to him in a personal action for mistake or failure of consideration. The mistake or the intention to discharge the putative contractual liability proves, rather than negates, the payer's intention that the recipient should become the beneficial owner of the money. [6]

Footnotes

3 See R. Chambers, Resulting Trusts (1997); P. Birks in S. Goldstein (ed), Equity and Contemporary Legal Developments, 335–73; P. Birks, Unjust Enrichment, 2nd edn, (OUP, 2005), 146–7, 304–7.

4 *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* (England); *Nishi v Rascal Trucking Ltd [2013] S.C.C. 33; [2013] 2 S.C.R. 438* (Canada).

5 P. Birks, Introduction to the Law of Restitution (OUP, rev edn 1989) Ch.6.

6 *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at 708–709, per Lord Browne-Wilkinson; explained in D. Fox, Property Rights in Money (2006) paras [3.84]–[3.98].

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1. - General

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 25 - Resulting Trusts

Section 2. - Gratuitous Transfer

1. - General

25-003

> "[W]here A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of joint purchase by A and B in shares proportionate to their contributions." [7]

In both kinds of transaction, the facts giving rise to the presumption of a resulting trust are that A transfers property to B for which B provides no consideration. The trust arises by operation of law to give effect to presumption that A did not intend B to take the property beneficially. [8] The presumption can be rebutted by proof that A did in fact intend B to take the property as beneficial owner. [9] This intent may be established by direct evidence, or to a degree by reliance on the presumption of advancement.

The presumption of advancement sometimes applies to transfers between parties where it may be readily inferred that A would have intended to make a gift to B. [10] It is found therefore where A is under an equitable obligation to support or make provision for B. An example is where A is the father of B. It is, in effect, a counter-presumption which provides prima facie evidence about A's intentions as to where the beneficial interest in the property should lie. Its effect is to negative any initial presumption that the transfer creates a resulting trust.

Footnotes

7 *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at 708–709, per Lord Browne-Wilkinson.

8 *Air Jamaica Ltd v Charlton [1999] 1 W.L.R. 1399* at 1412; noted *C. Rickett and R. Grantham (2000) 116 L.Q.R. 21*; *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [115] (explained as a presumption against making gifts). But cf. *W.J. Swadling (2008) 124 L.Q.R. 72* who argues, mainly for historical reasons, that the fact presumed is A's intention to declare a trust. The precise characterisation of the presumption rarely affects the outcome of cases. But acceptance of Swadling's view would further undermine the view that resulting trusts arise to reverse unjust enrichment. It is, however, not essential to the rejection of that view: see para.25-002 above.

9 *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at 708.

10 See *Wirth v Wirth (1956) 98 C.L.R. 228* at 237; and see *Re Pauling's ST (No.1) [1964] Ch. 303* at 336.

2. - Purchase of Property in the Name of Another

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 25 - Resulting Trusts

Section 2. - Gratuitous Transfer

2. - Purchase of Property in the Name of Another

(a) Evidence.

25-004 A resulting trust may arise where B purchases real property of any description [11] or personal property [12] using money provided by A. A bears the burden of proving that he provided the money. [13] The advance of the purchase money by A need not appear on the face of the deed. It is no objection to the presumption of resulting trust that the purchase is stated to have been made by B (e.g. in the ordinary receipt in a conveyance on sale). Parol evidence is admissible to prove that A was the genuine purchaser of the property, with B acting as his agent. [14] Even in the case of land such evidence is admissible. The statutory rule which requires a declaration of trust respecting the land to be manifested and proved by writing [15] does not affect the creation or operation of resulting, implied or constructive trusts. [16]

(b) Several purchasers.

25-005 In principle, the doctrine may also apply where two or more persons advance purchase money jointly and the purchase is taken in the name of one only, in which case there is a resulting trust in favour of the other or others as to so much of the money as he or they advanced. [17]

(c) Joint purchase of home.

25-006 In practice, however, the resulting trust doctrine is now unlikely to be relevant where the contributors are a married or cohabiting couple or other members of a family, and purchase the property as a joint home for themselves. Here, it is more likely that they intend the beneficial interest to be shared between themselves according to some informal common intention. [18] The evidence from which the court would infer their common intention extends more widely than their monetary contributions to the purchase. In practice, therefore, resulting trust reasoning where property is purchased in another person’s name will mainly be relevant outside a domestic setting, and where the parties are acting for commercial motives or are making the purchase as an investment. [19]

(c) Presumption of advancement. [20]

25-007 B will not be presumed to hold property on trust for A, although A has provided the purchase money, if the presumption of advancement applies to explain the payment from A to B. The rationale of the presumption has changed over time, and some of the old cases applying the presumption may be out of line with the current understanding of its purpose. It used to apply most strongly among family members where B was legally dependent upon A so that A had a moral duty to support or advance B. This explains the formal categories where the presumption has applied. These are transactions from father to child, and from husband to wife. Nowadays, it is recognised that the rationale of the presumption is broader and the court may be prepared to draw inferences of A's intention to make a gift to B in situations outside the formal categories where the presumption applied. So the court may be prepared to draw an inference that a transaction between members of household or family was intended as a gift when that accords with common social experience.

The evidential weight attached to the formal presumption of advancement is now less definite than it once was and it varies from case to case. [21] The Equality Act 2010 abolished the presumption of advancement between husband and wife since it involved unlawful discrimination. [22] But the relevant provision of the Equality Act 2010 has not yet been brought into effect so that in principle the formal presumption remains in force. It may be however that this will not make much substantive difference to the relative positions of husbands and wives. [23] Aside from the Equality Act 2010, the approach in recent cases has been to strive to determine the real intentions of the parties. It may only resort to the formal presumptions where the direct evidence of those intentions is absent and a default rule is needed. [24] Where modern experience indicates that the presumption does not provide any firm rational basis for presuming an intention to make a gift between parties in the position of A and B, then it may only be of slight probative value. [25]

(1) Between spouses.

25-008 The formal presumption of advancement applied where a man bought property and had it conveyed to his wife, or if he contributed to the mortgage payments on a property owned or purchased by her. [26] Prima facie this was treated as a gift to her. The presumption was extended to payments made to a man's intended wife. [27] The presumption of advancement existing at the date of the conveyance was not destroyed by the fact that the marriage did not take place, [28] or was afterwards dissolved or was declared null on some ground which made the marriage voidable only, and not void ab initio. [29] An advancement was perhaps effective and beyond recall by the settlor even before there had been any transfer of the property concerned, as where A made an irrevocable contract with X that X would make certain payments at future dates to A's wife. [30]

It has been held that the presumption of advancement does not arise when a wife buys property and puts it in her husband's name; prima facie he holds as trustee for her. [31] And where a wife mortgages her property for her own purposes and the husband joins as surety, [32] or where the husband guarantees the wife's bank account, [33] no presumption of advancement normally [34] arises if he is afterwards obliged to pay under his guarantee; he can therefore require her to repay him. But these decisions are now in some doubt. Given that less weight is now attached to the formal categories where the presumption applies, it seems likely that a court might be more willing to infer that a wife's purchase of property in her husband's name was intended as a gift to him if this was consistent the tenor of the transaction.

The formal presumption of advancement does not apply to transactions between an unmarried couple who live together. [35] But aside from the formal presumption, there is perhaps no compelling reason why an intention to make a gift should not be inferred if the parties are in a life-long relationship similar to a formal marriage. [36] The question may now arise only rarely. Even in relation to husbands and wives, the formal presumption is unlikely to apply where one spouse contributes money towards the purchase of property in the other spouse's name if the property is intended to be their joint home. The trust which

arises is a constructive trust, and the spouse's financial contribution is relevant to inferring the parties' common intention about the beneficial ownership of the property. [37]

(2) Between parent and child.

25-009 The formal presumption of advancement applies to transfers from a father to his child. [38] Where a father pays the premiums of an insurance policy which he held on trust for his son, the payments were prima facie to be taken as advancements and not as payments made qua trustee in order to maintain the trust property. [39] Similarly, if a father buys property and has it put in the name of his son or daughter, prima facie it is a gift to the child. [40] The presumption can apply even where the child is no longer a minor, [41] since the rationale of the presumption is no longer confined to cases where the parent has a duty to provide for the child.

Traditionally, it was held that the formal presumption of advancement did not apply to a transaction from mother to child since mothers were not under an obligation to provide for their children. [42] This is unlikely to be followed nowadays. [43] Even aside from the formal presumption, the inference would be readily drawn that a gift or a contribution to the child's maintenance was intended, even when the child was an adult. [44] It would be particularly strong where a widowed mother was providing for her child. [45]

(3) Other relationships.

25-010 Traditionally, there was no formal presumption of advancement where a father-in-law transferred property to his son-in-law, [46] nor where an uncle purchased land in the name of a nephew. [47] But there was a presumption of gift if A stood in loco parentis to B. He must have taken upon himself the duty of providing for the child in life. [48] Thus the facts of the case might have shown that a man was in loco parentis to an illegitimate son, [49] to a stepson, [50] or to a grandchild whose father was dead. [51] Nowadays, however, the court would readily infer that a transfer of money or property from a parent to a newly married couple was intended as a gift to the son and daughter in law jointly. [52]

Footnotes

11 *Anon (1683) 2 Ventr. 361*.
12 For example *Re Scottish Equitable Life Assurance Society [1902] 1 Ch. 282*; *The Venture [1908] P. 218*.
13 *Constandas v Lysandrou [2018] EWCA Civ 613; [2018] W.T.L.R. 19*.
14 *Heard v Pilley (1869) 4 Ch. App. 548*.
15 LPA 1925 s.53(1); above para.22-036.
16 LPA 1925 s.53(2).
17 *Wray v Steele (1814) 2 V. & B. 388*. The sentence in the text was cited with approval in *Gissing v Gissing [1971] A.C. 886* at 902.
18 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [3], [60]; *McGrath v Wallis [1995] 2 F.L.R. 114* at 115, 122. See para.24-053 above.
19 *Laskar v Laskar [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695*.
20 See Chambers, *Resulting Trusts* (1997) n.4 at 27-32.
21 *Pettitt v Pettitt [1970] A.C. 777* at 793F; *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [101].
22 Equality Act 2010 s.199.

23 The presumption between husband and wife has been said to be "on its death-bed": *Bhura v Bhura [2014] EWHC 727 (Fam)* at [8].

24 *Kyriakides v Pippas [2004] EWHC 646 (Ch)*; *Antoni v Antoni [2007] UKPC 10*; *Laskar v Laskar [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695*.

25 *Pettit v Pettit [1970] A.C. 777* at 793, 811; *Calverley v Green (1984) 155 C.L.R. 242* at 250, 270; *McGrath v Wallis [1995] 2 F.L.R. 114* at 122.

26 *Silver v Silver [1958] 1 W.L.R. 259*; *Richards v Richards [1958] 1 W.L.R. 1116*.

27 *Moate v Moate [1948] 2 All E.R. 486*; *Wirth v Wirth (1956) 98 C.L.R. 228*.

28 Law Reform (Miscellaneous Provisions) Act 1970 s.2(1); as explained in *Mossop v Mossop [1989] Fam. 77*, where at 84 this passage was cited.

29 *Thornley v Thornley [1893] 2 Ch. 229*; *Dunbar v Dunbar [1909] 2 Ch. 639*; and see *Silver v Silver [1958] 1 W.L.R. 259*.

30 *Re Schebsman [1944] Ch. 83* at 93.

31 *Re Curtis (1885) 52 L.T. 244*, at 245; *Mercier v Mercier [1903] 2 Ch. 98*.

32 *Re Salisbury-Jones [1938] 3 All E.R. 459*.

33 *Anson v Anson [1953] 1 Q.B. 636*.

34 See *Anson v Anson [1953] 1 Q.B. 636* at 641, 645.

35 *Rider v Kidder (1805) 10 Ves. 360*; *Tinsley v Milligan [1994] 1 A.C. 340* (same sex relationship); *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [112]; *Chapman v Jaume [2012] EWCA Civ 476; [2013] 1 F.C.R. 619* (cohabiting man and woman). The presumption does not apply where the parties contracted an illegal marriage: *Soar v Foster (1858) 4 K. & J. 152* (deceased wife's sister). *Rider v Kidder* and *Soar v Foster* were questioned in *Calverley v Green (1984) 155 C.L.R. 242* at [8], per Gibbs CJ.

36 This was the reason given by Mason and Brennan JJ in *Calverley v Green (1984) 155 C.L.R. 242* at [10] for declining to extend the presumption from married to cohabiting couples.

37 See para.24-049 above.

38 *Tribe v Tribe [1996] Ch. 107*.

39 *Re Roberts, Public Trustee v Roberts [1946] Ch. 1*.

40 *Dyer v Dyer (1788) 2 Cox Eq. 92*; and see *Shephard v Cartwright [1955] A.C. 431*.

41 *Hepworth v Hepworth (1870) L.R. 11 Eq. 10*; *Nelson v Nelson (1995) 184 C.L.R. 538*; *Laskar v Laskar [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695* (presumption of some weight between mother and adult child but rebutted by direct evidence).

42 *Bennett v Bennett (1879) 10 Ch. D. 474* (not following *Sayre v Hughes (1868) L.R. 5 Eq. 376*).

43 *Edwards v Bradley [1956] O.R. 225*; *Brown v Brown (1993) 31 N.S.W.L.R. 582*; *Nelson v Nelson (1995) 184 C.L.R. 538*.

44 *Bennett v Bennett (1879) 10 Ch. D. 474* at 480; *Antoni v Antoni [2007] UKPC 10* (presumption expressed to apply between "parent and child"); *Laskar v Laskar [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695*. cf. *Sekhon v Alissa [1989] 2 F.L.R. 94* (presumption of resulting trust upheld in a payment from mother to daughter where other evidence contradicted the inference that a gift was intended).

45 *Re Orme (1883) 50 L.T. 51*.

46 *Knight v Biss [1954] N.Z.L.R. 55*.

47 *Drury v Drury (1675) 73 S.S. 205*.

48 See *Bennet v Bennet (1879) 10 Ch. D. 474*.

49 *Beckford v Beckford (1774) Lofft 490*. See also *Currant v Jago (1844) 1 Coll. C.C. 261*; *Soar v Foster (1858) 4 K. & J. 152* at 160.

50 *Re Paradise Motor Co Ltd [1968] 1 W.L.R. 1125*, where at 1139 the discussion in this subsection of the text was referred to with approval.

51 *Ebrand v Dancer (1680) 2 Ch. Ca. 26*.

52 *Midland Bank Plc v Cooke [1995] 2 F.L.R; 915*; *Abbott v Abbott [2007] UKPC 53; [2008] 1 F.L.R. 1451*.

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3. - Rebutting the Presumptions

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Mainwork

Part 5 - Trusts

Chapter 25 - Resulting Trusts

Section 2. - Gratuitous Transfer

3. - Rebutting the Presumptions

(a) Evidence of intention.

25-011 Both the presumption of a resulting trust and the presumption of advancement can be rebutted by evidence of the parties' actual intentions. The clearest evidence of rebuttal is an express declaration of trust on the face of the conveyance of the legal estate to the purchaser. This express statement of intention necessarily displaces any presumed intention arising by law from the form of the transaction. [53] Even where this is absent, the court aims to arrive at the parties' real intentions by considering direct evidence of the entire transaction. This requires an objective inference drawn from the parties' words and conduct. [54] As a result, the presumptions of a resulting trust or of advancement are only relied upon as default rules where there is no sufficient evidence to displace them. [55] They may be most relevant nowadays where the property is purchased for an unlawful purpose, and one of the parties is barred from pleading his true reasons for arranging to have the property held in another person's name. [56]

(b) Rebutting circumstances.

25-012 To rebut the presumption of resulting trust any evidence tending to indicate that A's intention was that B should take the beneficial interest in the property acquired with A's purchase money is relevant. A's intention to make a gift to B would certainly be relevant. [57] But the intention could also be inferred from other kinds of transaction, as where A paid money to B in the mistaken belief that he was discharging a valid contractual obligation. [58]

The presumption of advancement can also be rebutted by a wide range of evidence. Anything that proves it was not A's intention to make a gift to B, or to provide for his support and maintenance should rebut it. The circumstances may show that the property was put in another's name merely for convenience, [59] as under the old law where a husband in failing health opened a bank account in the joint names of himself and his wife shortly before his death. [60] Similarly, the fact that a son is acting as his father's solicitor would be sufficient to rebut the presumption of advancement, unless the rest of the evidence shows an intention to make a gift. [61]

(c) Contemporaneous and subsequent conduct.

25-013 The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration. It has been

held that subsequent acts and declarations may only be admissible as evidence against the party who made them, and not in his favour.[62] The preferable approach nowadays may be to treat the parties' subsequent conduct as admissible even in their own favour, and to leave the court free to assess its probative weight.[63] This approach would be consistent with the looser significance attached to the presumptions of resulting trust and of advancement in the modern authorities.

Thus, if a father buys property, and has it conveyed into the name of his son, the father's declaration at the time of the purchase that he wished the son to hold as trustee for him would be admissible to rebut the presumption of advancement; although the father's subsequent declarations could be used by the son to support the presumption of advancement, they could not be used in evidence by the father to rebut it.[64] On the other hand, the subsequent acts and declarations of the son may be used against him by the father, and may rebut the presumption of advancement if there is insufficient evidence of the intention of the father at the time of the purchase to counteract the effect of those acts or declarations.[65]

(d) Illegal purposes.

25-014 A person may make a gratuitous transfer of property to another for an illegal purpose. An illegal purpose does not generally prevent a transaction from the passing of the legal or beneficial title in property to the transferee.[66] Examples would be where A paid money to her partner, B, for the purchase of a house registered in B's name so that A could make fraudulent claims to welfare benefits. Here the starting point is that B would hold the house on resulting trust for A, despite A's illegal purpose.[67] Similarly, A, a husband, may transfer property into the name of B, his wife, to defeat his creditors,[68] or A, a father, might transfer land to B, his son, to evade government restrictions.[69] Here, the presumption of advancement would apply. B would hold the property beneficially in his or her own right. If A later wished to deny that he intended to make a gift of the property to B, he might be permitted to rely on his unlawful purpose as evidence of his true intention in making the transfer. Either way, the effect of enforcing the resulting trust is often to unwind the transaction. It restores the beneficial ownership of the money or property to A.

A court may, however, decline to enforce either of these outcomes if they were contrary to the public interest. In making that determination, the court would consider: (a) the underlying purpose of the prohibition which was transgressed and whether it would be enhanced by enforcing or denying the party's beneficial interest in the property; (b) any relevant public policy affected by the denial of enforcement; and (c) whether denial of enforcement would be a proportionate response to the illegality.[70]

The former rule that a party could not rely on evidence of his own illegal purpose to prove or deny an interest under a resulting trust no longer holds good.[71] The rule was arbitrary in its operation. The outcome of identical transactions differed depending on whether a presumption of advancement applied to it, and on the direction in which the property was transferred between the parties to the presumption.[72]

Footnotes

53 See *Goodman v Gallant [1986] Fam. 106*; and *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [49] (analogous position where an express trust displaces a trust arising from a common intention inferred from conduct).

54 *Gissing v Gissing [1971] A.C. 886* at 906; *Calverley v Green (1984) 155 C.L.R. 242* at [13], per Mason and Brennan JJ.

55 *Nelson v Nelson (1995) 184 C.L.R. 538* at 549; *Vajpey v Yusaf [2003] EWHC (Ch) 2339; [2004] W.T.L.R. 989*; *Kyriakides v Pippas [2004] EWHC 646 (Ch)*.

56 For example *Tinsley v Milligan [1994] 1 A.C. 340*; *Tribe v Tribe [1996] Ch. 107*; and para.22-066 above.

57 *Fowkes v Pascoe (1875) 10 Ch. App. 343*. A payment made to discharge a moral obligation rather than from a purely philanthropic motive is nonetheless a gift: *Nishi v Rascal Trucking Ltd [2013] S.C.C. 33; [2013] 2 S.C.R. 438*.

58 *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at 708.

59 *Hoddinott v Hoddinott [1949] 2 K.B. 406*; *Calverley v Green (1984) 155 C.L.R. 242* at 250.

60 *Marshall v Crutwell (1875) L.R. 20 Eq. 328*; and see *Simpson v Simpson [1992] 1 F.L.R. 601*. Contrast *Re Figgis [1969] 1 Ch. 123*, where the initial ground of convenience had long ended.

61 *Garrett v Wilkinson (1848) 2 De G. & Sm. 244*.

62 *Shephard v Cartwright [1955] A.C. 431* at 445; *Antoni v Antoni [2007] UKPC 10*.

63 *M. v M. [2013] EWHC 2534 (Fam); (2013) 16 I.T.E.L.R. 391*; *E. Fung (2006) 122 L.Q.R. 651*.

64 *Stock v McAvoy (1872) L.R. 15 Eq. 55*; *Reddington v Reddington (1794) 3 Ridg. P.C. 106* at 182, 195; *Sidmouth v Sidmouth (1840) 2 Beav. 447*.

65 *Scawin v Scawin (1841) 1 Y. & C.C.C. 65*.

66 *Singh v Ali [1960] A.C. 167, 176; Patel v Mirza [2016] UKSC 42; [2017] A.C. 467* at [110]–[111].

67 e.g. *Tinsley v Milligan [1994] 1 A.C. 340*.

68 e.g. *Gascoigne v Gascoigne [1918] 1 K.B. 223*; *Tinker v Tinker [1970] P. 136*.

69 *Chettiar v Chettiar [1962] A.C. 294* (presumption of advancement between father and son).

70 *Patel v Mirza [2016] UKSC 42; [2017] A.C. 467* at [101], [120].

71 *Patel v Mirza [2016] UKSC 42; [2017] A.C. 467*; not following *Tinsley v Milligan [1994] 1 A.C. 340* on this point.

72 *Patel v Mirza [2016] UKSC 42; [2017] A.C. 467* at [87], [200].

End of Document

4. - Resulting Trust on Voluntary Transfer of Property

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Mainwork

Part 5 - Trusts

Chapter 25 - Resulting Trusts

Section 2. - Gratuitous Transfer

4. - Resulting Trust on Voluntary Transfer of Property

25-015 Related to the resulting trust that arises when one person purchases property in the name of another is the trust where the current owner property, A, makes a voluntary transfer of the property to another, B. The two kinds of transaction are fundamentally alike. Where A pays money to B for no consideration, B is immediately presumed to hold the money on resulting trust for A. When B then purchases the property, the effect of overreaching is that the trust transposes itself to the property acquired with the money. [73] The rules for rebutting the presumption of resulting trust are similar in the two kinds of case. [74]

However, statute has made the rules on voluntary conveyances more complicated than the rules applying to purchases in the name of another. Its effect has been to introduce a distinction in the effect of voluntary transfers of real or personal property. [75]

(a) Real property.

(1) Before 1926. [76]

25-016 Before 1926, if A conveyed freehold land to B without consideration and without expressing a use in favour of B, a resulting use was implied in favour of A. This use was executed (i.e. turned into a legal estate) by the Statute of Uses 1535, so that the conveyance passed no interest to B. It was therefore the practice of conveyancers before 1926 to make A convey "unto and to the use of" B. The expression of a use in favour of B prevented any resulting use being implied in favour of A; B took the legal estate, and the equitable interest also unless a trust was engrafted on the use. [77]

(2) After 1925.

25-017 As the Statute of Uses 1535 was repealed as from 1 January 1926, a legal estate in freehold land can now be conveyed by a voluntary conveyance without stating that the land is conveyed to the use of the grantee. Nor need a use be expressed in order to prevent a resulting trust from arising, for it is now provided that in a voluntary conveyance a resulting trust for the grantor is not to be implied "merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee". [78] This provision has been interpreted literally to mean that no resulting trust in favour of the grantor arises on a voluntary conveyance of a freehold estate. [79] This seems to be so as regards leaseholds also, for the section appears to apply to them. [80] The provision would seem not to exclude the creation of a resulting trust where property is expressly given on trusts which do not exhaust the whole beneficial interest.

This literal interpretation produces the anomaly that a resulting trust of real property would be precluded by the provision where on the same facts a trust of personal property would arise. The preferable interpretation would be that the provision merely introduces the possibility that the grantee may take the beneficial interest in the land even though the words "to the use or benefit of the grantee" are not expressed in the conveyance. That is to say, the provision was only intended as a conveyancing reform to simplify the words of limitation in the conveyance, not to preclude the application of the substantive law of resulting trust to voluntary conveyances of land. [81]

(3) Joint transfer.

25-018 Where land is transferred by A to A and B jointly for no consideration, there is even less occasion for a resulting trust for A alone. Subject to any express declaration of trust, the land will be held on trust for A and B as joint tenants. [82] The general inference that the parties intend the beneficial title to the property to follow the state of the legal title strengthens this conclusion. [83]

(b) Personal property.

(1) General.

25-019 For property other than land, the general law about the presumption of resulting trust applies unmodified. On a voluntary transfer of personal property the transferee is presumed to hold on a resulting trust for the transferor unless the presumption of advancement applies or the transferor is proved to have had an actual intention to make the transferee the beneficial owner of the property. [84] Where the voluntary transfer is made by a husband, father or other person in loco parentis the presumption of advancement will apply. [85]

(2) Joint transfer.

25-020 There is certainly a presumption of a resulting trust if A transfers stocks and shares voluntarily to himself and B. [86] Thus in *Vinogradoff*, [87] A transferred some War Loan into the joint names of herself and her granddaughter who was four years old and to whom A was not in loco parentis. [88] Farwell J held that there was a presumption that A intended the stock to be held on trust for herself, but surprisingly held that this was not rebutted by the circumstances. [89] The finding is unsatisfactory: it seems improbable that a person who was already the beneficial owner of property would wish to remain so while imposing the duties of trusteeship on herself and a young child. [90]

(3) Presumption rebutted in joint transfer cases.

25-021 Where personal property is transferred from A to A and B jointly and the presumption of resulting trust is rebutted, the question arises about the interest that B was intended to take in the property. There are three main possibilities, depending on the inferences drawn from circumstances and the nature of the property.

First, there may be an immediate gift to A and B jointly. This would be consistent with the approach that has been taken for real property where the court generally infers that the beneficial ownership of land is intended to follow the legal ownership of it.[91] Secondly, and more usually,[92] there may be a gift of the capital to B if B survives A, with A having the right to the income for the rest of his life. Thirdly, there may be merely a gift to B of such part of the capital as remains on A's death, A retaining the power to withdraw some or all of it during his life. If it is stock that is given, A may retain the right to the dividends but lose the power to dispose of the capital.[93] If it is money paid into a joint bank account, A will probably retain power to withdraw some or all of it during his life[94]; the gift to B may be explicable as being:

> "an immediate gift of a fluctuating and defeasible asset consisting of the chose in action for the time being constituting the balance in the bank account."[95]

Footnotes

73 See Ch.4.

74 See para.25-012 above.

75 See, e.g. *Coultwas v Swan (1871) 19 W.R. 485; affirming (1870) 18 W.R. 746*; *Rudkin v Dolman (1876) 35 L.T. 791*.

76 See Chambers, *Resulting Trusts* (1997), at 16–19; *W.J. Swadling (1996) 16 L.S. 110*; and *W.J. Swadling (2008) 124 L.Q.R. 72, 79–85*.

77 But see Maitland's Lectures on Equity, 2nd edn (1936) at 77 to the contrary.

78 LPA 1925 s.60(3).

79 *Lohia v Lohia [2001] 1 W.T.L.R. 101*; *Tinsley v Milligan [1994] 1 A.C. 340* at 371, per Lord Browne-Wilkinson where this literal interpretation of the provision was said to be "arguable". The authorities are gathered in Chambers, *Resulting Trusts* (1997), at 14–16.

80 See *Tinsley v Milligan [1994] 1 A.C. 340* at 371.

81 This preferable explanation was adopted in *National Crime Agency v Dong [2017] EWHC 3116 (Ch)*.

82 LPA 1925 s.36(1).

83 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [4], [56], [109].

84 See *Fowkes v Pascoe (1875) 10 Ch. App. 343* at 345, 348; *Lloyd v Spillit (1740) Barn. C. 384*; *George v Howard (1819) 7 Price 646* at 651; *Re Howes (1905) 21 T.L.R. 501*; *Re Muller [1953] N.Z.L.R. 879*; *Tinsley v Milligan [1994] 1 A.C. 340* at 371.

85 See, e.g. *Crabb v Crabb (1834) 1 My. & K. 511*; *Batstone v Salter (1875) 10 Ch. App. 431*. See para.25-009.

86 *Standing v Bowring (1885) 31 Ch. D. 282* at 287.

87 *Re Vinogradoff [1935] W.N. 68*.

88 Although after 1925 a minor cannot be appointed a trustee, he or she may hold, e.g. on a resulting trust, see below para.27-004.

89 For a similar case see *Re Muller [1953] N.Z.L.R 879* where the effect of the presumption was that children aged six and two held property as trustees for their aunt.

90 See *Fowkes v Pascoe (1875) 10 Ch. App. 343* at 348, 353; which was not cited in *Re Vinogradoff [1935] W.N. 68*.

91 *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432* at [4], [56], [109].

92 *Fowkes v Pascoe (1875) 10 Ch. App. 343* at 351.

93 *Fowkes v Pascoe (1875) 10 Ch. App. 343*; *Standing v Bowring (1885) 31 Ch. D. 282*.

94 *Re Harrison, Day v Harrison (1920) L.J.Ch. 186*; *Russell v Scott (1936) 55 C.L.R. 440*; *Re Figgis [1969] 1 Ch. 123*; and see *Young v Sealey [1949] Ch. 278* (no conflict with the Wills Act 1837).

95 *Re Figgis [1969] 1 Ch. 123* at 149, per Megarry J; see generally *M.C. Cullity (1969) 85 L.Q.R. 530*.

1. - General

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Mainwork

Part 5 - Trusts

Chapter 25 - Resulting Trusts

Section 3. - Failure of Express Trust to Exhaust Beneficial Interest Property

1. - General

25-022 A resulting trust may arise where property has been transferred on express trusts which do not dispose of the entire beneficial interest in property, or where an express trust fails at the outset. It has been said that a resulting trust arising from the failure of an express trust arises "automatically", irrespective of the transferor's intention. [96] This is apt to be misunderstood if taken to imply that the transferor's intentions are irrelevant. [97] The better view is that a resulting trust of this sort, like that arising from a gratuitous transfer of property, [98] arises by operation of law in circumstances where evidence of the transferor's actual intentions is uncertain. [99] It gives effect to a presumption that the transferor would not intend the transferee to take the property beneficially when the original trust fails to dispose of the entire interest in the property.

(a) Trusts not in fact exhaustive.

25-023 A resulting trust commonly arises where a settlor, A, conveys property upon trusts which in the event do not exhaust the whole of the beneficial interest in the property. An example would be where the trust is for B for life and then equally among his children, and B dies childless. Here, the beneficial interest results to A to the extent that it is has not been effectively disposed of. If A is dead it results to his residuary devisee or legatee, or the persons entitled under his intestacy. [100]

Similarly, if a voidable marriage is annulled, there is a resulting trust to the settlor of the property comprised in the marriage settlement. [101] Where donors subscribed to a purpose trust for the maintenance and support of two disabled people, the surplus remaining after the beneficiaries' death was held on a resulting trust for the subscribers. [102] The donors would take a share in the surplus proportionate to their contributions. [103]

This same rule has been extended, rather impractically, to appeals from the general public where donors have made many small, anonymous gifts. [104] The more tenable construction of the donors' intention may be that they meant to part with their entire interest in the money.

(b) Trusts partially expressed.

25-024 A resulting trust also arises where at the outset the settlor defines the trusts in a way that does not provide for the entire beneficial interest in the property. Thus, if a testator, A, bequeaths the residue of his property to T upon trust to pay the income to B for life without saying what is to be done with the property on B's death, when B dies T holds as trustee for the persons entitled on A's intestacy. The rationale here is that what an owner of property does not effectually dispose of remains vested in himself. [105]

(c) Failure of trusts from the outset.

25-025 Likewise, a resulting trust would arise where the original trust declared by the settlor fails from the outset. Examples would be where the trust breached the rule against perpetuities or where its objects were uncertain. By transferring the property expressly upon trust the settlor has shown that he does not intend the transferee to take it beneficially. [106] The presumption of resulting trust corresponds closely to what is likely to be the settlor's real intention.

(d) Resulting trust arising on rescission.

25-026 By analogy, a resulting trust may arise where a person rescinds a voidable transfer of property. [107] An example would be where a person was induced to pay money by a fraudulent misrepresentation. [108] Although the transferee would become the legal and beneficial owner of the money, he would hold it subject to the transferors' proprietary entitlement to rescind the transfer and have his interest re-vested in him. Once the court ordered rescission of the transaction, the transferee would hold his legal interest on resulting trust for the transferor. [109]

The trust is resulting in the sense that it arises to protect the transferor's right to be restored as the legal and beneficial owner of the property. The voidable transaction does not exhaust the transferor's entire interest in the property since they may elect to treat it as defeasible. Although the transferor does intend to pass his beneficial interest to the transferee, the effect of his intention is revoked once he rescinds the transaction.

Footnotes

96 *Re Vandervell's Trusts (No.2) [1974] Ch. 268* at 289, per Megarry J.

97 *Westdeutsche Bank v Islington LBC [1996] A.C. 669* at 708, per Lord Browne-Wilkinson.

98 See Chambers, *Resulting Trusts* (1997) n.4 at p.47; P. Birks and F. Rose (eds) Restitution and Equity, Vol.1, Resulting Trusts and Equitable Compensation (2000), Ch.1, Ch.3.

99 *Air Jamaica v Charlton [1999] 1 W.L.R. 1399* at 1412, per Lord Millett.

100 *Re West, George v Grose [1900] 1 Ch. 84*.

101 *Re Ames' Settlement [1946] Ch. 217*; explained in Westdeutsche *Bank v Islington LBC [1996] A.C. 669* at 715.

102 *Re The Trusts of the Abbott Fund [1900] 2 Ch. 326*; *Re Hobourn Aero Components Ltd's Air Raid Distress Fund [1946] Ch. 194*. The outcome differs where the trust was intended to confer absolute interests on the beneficiaries.

103 *Re British Red Cross Balkan Fund [1914] 2 Ch. 419*.

104 *Re Gillingham Bus Disaster Fund [1958] Ch. 300* (affirmed on grounds not affecting this point: [1959] Ch. 62); criticised by *P.S. Atiyah (1958) 74 L.Q.R. 190*.

105 See *Vandervell v IRC [1967] 2 A.C. 291* at 313, 315, considering the position of a grantee of an option; *Re Vandervell's Trusts (No.2) [1974] Ch. 269 CA*.

106 *Air Jamaica v Charlton [1999] 1 W.L.R. 1399*.

107 *El Ajou v Dollar Land Holdings Ltd [1993] 3 All E.R. 717* at 734, per Millett J; reversed on other grounds *[1994] 2 All E.R. 685*. See generally *S. Worthington [2002] R.L.R. 28*; D. O'Sullivan, S. Elliott, R. Zakzrewski, Law of Rescission (2007) Ch.16; and D. Fox, Property Rights in Money (2008) Ch.6.

108 See para.26-013 below.

109 *Daly v Sydney Stock Exchange Ltd (1986) 160 C.L.R. 371* at 388–391, per Brennan J; *Lonrho Plc v Fayed (No.2) [1992] 1 W.L.R. 1* at 11 per Millett J; *Bristol & West Building Society v Mothew [1998] Ch.1* at 22–23 per Millett LJ.

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2. - Rebutting the Presumption of Resulting Trust

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Mainwork

Part 5 - Trusts

Chapter 25 - Resulting Trusts

Section 3. - Failure of Express Trust to Exhaust Beneficial Interest Property

2. - Rebutting the Presumption of Resulting Trust

(a) General.

25-027 As in cases of gratuitous transfer, the presumption giving rise to the resulting trust may be rebutted by evidence of the settlor's intention to part with his beneficial interest in the property. This contrary intention could be established in three main ways.

The first is that the settlor intended the transferee to hold the property beneficially. The second is that the settlor intended to relinquish all interest in the property, with the result that it would pass as bona vacantia when the express trust failed. A third possibility is that no resulting trust arises because the primary express trust has not actually failed. A trust that may appear to confer only a limited interest on the beneficiaries may, on its proper construction, have been intended to give them an absolute interest.

(b) Beneficial gift to trustee.

25-028 This construction of the settlor's intention would not be easy for the trustee to establish. Since the settlor intended the transferee to be a trustee of the property, it would be unlikely that he meant him to take any beneficial interest in it, even after the failure of the original trust. Similarly, the presumption of advancement is unlikely to be relevant to establishing where the beneficial interest should lie after the failure of an express trust. A settlor does not generally mean to advance the interests of a person whom he chooses to be a trustee.

This construction would, however, be tenable, where it appeared that the testator meant to give the property to the trustee for his own benefit, subject merely to his carrying out the expressed trusts. The trustee would take the unexhausted residue beneficially. Thus, where a testator gave all his property to his sister absolutely on trust to pay his wife an annuity, and the income was more than enough to pay the annuity, the sister was held to be beneficially entitled to the balance. [110]

(c) Bona vacantia.

25-029 Where the settlor indicates that he has abandoned any beneficial interest in the trust property, it may pass as bona vacantia. [111] The intention may appear from an express term in the trust deed or by implication. [112] It is not enough, however, to cause property to pass as bona vacantia that the settlor attempts by legally ineffective means to rid himself of his beneficial interest in the property. [113] Nor will an intention to part with the entire interest in money be inferred where an employer has made

contributions to a pension scheme pursuant to a contractual duty. If the scheme fails at the outset or if there is a surplus on winding up, then in the absence of any express stipulation, the money will probably be held on a resulting trust for the employer. [114]

(d) Failure of beneficiary's interest.

(1) Trustees.

25-030 If trustees hold property absolutely for a person living when the trust is created, and that person then dies intestate leaving nobody entitled under his intestacy, there will be no resulting trust for the settlor. The settlor is taken to have parted with his entire interest. The equitable interest accordingly passes as bona vacantia, subject to the payment of debts. [115]

(2) Executors.

25-031 For deaths occurring after 1925, executors have lost any right they formerly had to take beneficially. If a testator fails to dispose of any part of his estate by will, that part will pass to the surviving spouse (if any) and other relatives entitled on intestacy, or failing them as bona vacantia unless the will shows that the executors are to take beneficially. The beneficial interest does not pass to the executor. [116]

(e) Absolute beneficial gift to original beneficiary.

25-032 A trust which appears to confer on the beneficiary a limited interest may be construed as actually making him the absolute beneficial owner of the property. [117] This excludes any resulting trust for the settlor or testator since there is actually no failure in the beneficial interest in the property. So, in a trust for the education of certain children, any surplus may be divided between the children when they become adults. The trust would in effect be for the children absolutely, and in requiring the property to be applied for their education, the settlor merely indicated the manner most useful to them, having regard to their age. [118] Similarly, there will be no resulting trust where the super-added directions are mere motives for the gift and not intended as express trusts. [119]

Footnotes

110 *Re Foord [1922] 2 Ch. 519*. See also *King v Denison (1813) 1 V. & B. 260*; *Croome v Croome (1889) 61 L.T. 814*.

111 *Westdeutsche Bank v Islington LBC [1996] A.C. 669* at 708, per Lord Browne-Wilkinson. The Crown is generally entitled to bona vacantia. The Duchies of Lancaster and Cornwall are entitled to bona vacantia in their respective areas.

112 *Re Hillier's Trusts [1954] 1 W.L.R. 9* at 22 (reversed on grounds not affecting this point: [1954] l W.L.R. 700); *Re Ulverston and District New Hospital Building Trusts [1956] Ch. 622* at 633, 634; *P.S. Atiyah (1958) 74 L.Q.R. 190 at 193*; *M.A. Hickling (1966) 30 Conv.(N.S.) 117*. For the interpretation of the provisions of a trust instrument which might have this effect, see *Air Jamaica v Charlton [1999] 1 W.L.R. 1399*. The rule that surplus property would pass as bona vacantia has been applied where the assets of an unincorporated association were wound up: *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts [1971] Ch. 1*. But the better approach is that when

only one member of a non-charitable unincorporated association remains, the assets should generally be taken to belong beneficially to him and free from the contractual restraints that bound them while the association still existed. Since they were intended to belong beneficially to the members of the association, there is no reason of principle why they should pass as bona vacantia: *Hanchett-Stamford v Attorney General [2008] EWHC 330 (Ch); [2009] Ch. 173*.

113 *Vandervell v IRC [1967] 2 A.C. 291*.

114 *Air Jamaica v Charlton [1999] 1 W.L.R. 1399* (failure at outset); *Davis v Richards & Wallington Ltd [1990] 1 W.L.R. 1511* (winding up).

115 *Re Bond [1901] 1 Ch. 15* (personalty); AEA 1925 ss.45, 46 (realty). For the rules governing realty before 1926, see the 28th edn of this work p.178.

116 Formerly, they were beneficially entitled to property in the estate that the testator did not expressly dispose of. For the position before 1926, see the 28th edn of this work pp.178–179.

117 The contrast is with trusts were the interest of the beneficiary is genuinely limited or where the trust is to apply for the fund for a binding purpose. Here a resulting trust arises once the primary express trust ceases to operate: see para.25-033 below.

118 *Re Andrew's Trust [1905] 2 Ch. 48*.

119 *Re Osoba [1979] 1 W.L.R. 247*.

Section 4. - Quistclose Trusts

Section 4. - Quistclose Trusts [120]

25-033 A trust may arise where one person, A, advances money to another, B, on the understanding that B is not to have the free disposal of the money and that it may only be applied for the purpose stated by A. The effect of the trust is to reserve in A the beneficial interest in the money, so providing him with some proprietary security for his advance. [121] This so-called "*Quistclose* trust" [122] shows some of the features of a resulting trust.

What follows is an analysis of the standard case recognised in the authorities where A lends money to B with the specific purpose that B should apply the money for the payment of his creditors, C. The general feature of this variety of trust is that one person uses a trust to retain a security interest in money which he has advanced to another subject to some binding restriction as to its use. The parties are also free to structure their transaction differently, so that the beneficial interest in the money and the rights to enforce the transaction would vest in someone other than the person in the standard case. [123] The recognition of the standard case does not preclude different forms of arrangement if the proper construction of the transactional documents indicates that this is what the parties intended.

Footnotes

120 See generally *P. J. Millett (1985) 101 L.Q.R. 269*; *M. Bridge (1992) 12 O.J.L.S. 333*; W.J. Swadling (ed), The Quistclose Trust: Critical Essays (2004). The section was cited with approval in *Freeman v Customs and Excise Commissioners [2005] EWHC (Ch) 582; [2005] 2 P. & C.R. DG7*.

121 For an analysis of *Quistclose* Trusts as security interests, see *K.C.F. Loy (2012) 128 L.Q.R. 412*.

122 Named after the case in which the House of Lords authoritatively articulated the nature of the trust: *Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567*.

123 For possible variations in structuring the transaction, see *Freeman v Customs and Excise Commissioners [2005] EWHC (Ch) 582; [2005] 2 P. & C.R. DG7* at [24].

End of Document

1. - Conditions for Creating Quistclose Trusts

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Mainwork

Part 5 - Trusts

Chapter 25 - Resulting Trusts

Section 4. - Quistclose Trusts [120]

1. - Conditions for Creating Quistclose Trusts [124]

25-034 It is not enough that A has some purpose or motive in advancing the money to B. A trust will not be imposed on B unless A intends to restrict B's freedom to dispose of the money by requiring that it should not be applied for any purpose other than that stipulated. [125] So a stipulation by A that B should apply the money solely for paying a dividend to B's shareholders, [126] or an undertaking by B that the money will be applied solely for acquisition of property and for no other purpose, [127] or to pay for a wedding [128] will have the effect of imposing a trust on B. The purpose may be abstract, as where A advances the money to allow B to purchase new equipment, [129] or for the benefit of an ascertainable class of persons, as where A advances money to enable to B to pay a certain debt or B's creditors generally. [130] A's intention needs to be communicated to B so that it is clear to B that the monies must be returned if A's purpose cannot be fulfilled. It is not fatal to finding the required intention that A contemplates that the money may eventually be mingled with B's general funds. [131] But a requirement that the money is to be kept unmixed in a special account strengthens the inference that B does not have it at his free disposal, and that he is not a simple contract debtor. [132] Unless A's intention to restrict B's free disposal of the money is demonstrated, then the money ordinarily belongs beneficially to B. This is consistent with the true default position that the transfer of the legal title ordinarily carries with it the beneficial interest. [133]

Footnotes

120 See generally *P. J. Millett (1985) 101 L.Q.R. 269*; *M. Bridge (1992) 12 O.J.L.S. 333*; W.J. Swadling (ed), The Quistclose Trust: Critical Essays (2004). The section was cited with approval in *Freeman v Customs and Excise Commissioners [2005] EWHC (Ch) 582; [2005] 2 P. & C.R. DG7*.

124 See *Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164* at [68], per Lord Millett; as elaborated in *Challinor v Juliet Bellis & Co [2015] EWCA Civ 59; [2016] W.T.L.R. 43*.

125 *Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164* at [73]–[76]; *Gabriel v Little [2013] EWCA Civ 1513; (2013) 16 I.T.E.L.R. 567* at [41]–[43]. The question depends on A's intention as gathered objectively from his words and conduct; *Cooper v PRG Powerhouse Ltd (In Liquidation) [2008] EWHC 498 (Ch), [2008] B.P.I.R. 492; [2008] 1 All E.R. (Comm) 964*; *Challinor v Juliet Bellis & Co [2015] EWCA Civ 59 at [57]–[60]; [2016] W.T.L.R. 43*.

126 *Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567*.

127 *Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164*.

128 *Haranand v Harilela (2004) 7 I.T.E.L.R. 450*.

129 *Re EVTR [1987] B.C.L.C. 646*; *General Communications Ltd v Development Finance Corp Ltd [1990] 3 N.Z.L.R. 406*. See also *Edwards v Glyn (1859) 2 El. & El. 29* (to prevent a run on a bank).

130 *Toovey v Milne (1819) 2 B. & Ald. 683*; *Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567*.

131 *Cooper v PRG Powerhouse Ltd (In Liquidation) [2008] EWHC 498 (Ch); [2008] B.P.I.R. 492; [2009] 1 All E.R. (Comm) 964*.

132 *Re Farepak Food and Gifts Ltd (In Administration) [2006] EWHC 3272 (Ch); [2008] B.C.C. 22*. See para.22-015 above.

133 *Challinor v Juliet Bellis & Co [2015] EWCA Civ 59; [2016] W.T.L.R. 43*.

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2. - Location of Beneficial Interest and Rights of Enforcement

25-035 B holds the legal interest in the money advanced on trust for A unless and until it is applied in accordance with his directions. B holds it subject to an equitable power to apply it according to the direction. The trust arises at the inception when A first advances the money. [134] In the standard case, therefore, it is not necessary to suppose a primary trust under which B holds the property for C or to fulfil the purpose, which then fails and brings into existence a secondary resulting trust for the benefit of A. [135] The beneficial interest in the money remains throughout in A. It provides a proprietary security for his advance until it is applied according to A's direction. In the event of B's insolvency, therefore, the money could be recovered by A by exercising his rights as the beneficiary of a bare trust absolutely entitled to the money. It could not be recovered by C whose rights are limited to those of the object of a mere power. A could by injunction prevent its misapplication, or, if actually misapplied, follow it to a third party receiving it with notice, [136] or trace it into a substituted asset. [137] C may also have a sufficient title to restrain the misapplication of the money or to enforce remedies based on following or tracing since he is the object of an equitable power. But he could not to compel the payment of the money to himself since this would put him in the position of the beneficiary of a trust and diminish A's security. Once the money is properly applied, A's interest is extinguished by overreaching. [138]

These default arrangements as to the beneficial interest in the money may be displaced if the terms of the transaction indicate a sufficiently clear intention. It may be, for example, that A intended to restrict B's free disposal of the money but also for C to have standing to compel payment of the money to himself. If so, B would hold the money on trust for C. [139]

Footnotes

120 See generally *P. J. Millett (1985) 101 L.Q.R. 269*; *M. Bridge (1992) 12 O.J.L.S. 333*; W.J. Swadling (ed), The Quistclose Trust: Critical Essays (2004). The section was cited with approval in *Freeman v Customs and Excise Commissioners [2005] EWHC (Ch) 582; [2005] 2 P. & C.R. DG7*.

134 *Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164* at [13], [81], [102]; *Challinor v Juliet Bellis & Co [2015] EWCA Civ 59 at [63]; [2016] W.T.L.R. 43*.

135 See *Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567* at 582.

136 *Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567*.

137 *Twinsectra Ltd v Yardley [1999] Lloyd's Rep. Bank. 438 CA*; reversed on other grounds [2002] UKHL 12; [2002] 2 A.C. 164.

138 See Ch.4.

139 A possible example may be *Charity Commission for England and Wales v Framjee [2014] EWHC 2507 (Ch); (2014) 17 I.T.E.L.R. 271*.

3. - Rationale of Quistclose Trusts

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Mainwork

Part 5 - Trusts

Chapter 25 - Resulting Trusts

Section 4. - Quistclose Trusts [120]

3. - Rationale of Quistclose Trusts

25-036 A standard *Quistclose* trust is a resulting trust which arises from the failure of the transfer of the legal title from A to B to exhaust A's entire beneficial interest in the money. [140] Where A's intention is merely to vest the bare legal title and a limited equitable power of disposition in B, a resulting trust arises. The trust is analogous to that which arises where a settlor defines the trusts at the outset in such a way that the entire beneficial interest in the property is not disposed of. Those other incidents of A's beneficial use remain in A, in the absence of evidence of his intention that they should vest in B.

It may be a fine question of construction to determine whether a trust having this effect is a resulting trust arising by operation of law, or an express trust arising through the positive expression of intention by A to retain his beneficial interest in the money advanced to B. For example, A may expressly stipulate that the residue of money which he has advanced to B is to be held on trust for A. [141] The express trust thus created is resulting in its effect. Whether the trust is categorised as resulting or express depends on the proper construction of the transactional documents. The conclusion that the trust is resulting may only be necessary where there are insufficient indications that A expressly intended to create a trust but where it is nonetheless clear that he did not intend B to have the free disposal of the money. The categorisation of the trust as express or resulting would rarely be significant. [142]

Footnotes

120 See generally *P. J. Millett (1985) 101 L.Q.R. 269*; *M. Bridge (1992) 12 O.J.L.S. 333*; W.J. Swadling (ed), The Quistclose Trust: Critical Essays (2004). The section was cited with approval in *Freeman v Customs and Excise Commissioners [2005] EWHC (Ch) 582; [2005] 2 P. & C.R. DG7*.

140 *Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164* at [92], [102].

141 *Latimer v Commissioner for Inland Revenue [2004] 1 W.L.R. 1466; [2004] UKPC 13*.

142 The distinction might only be practically important in the unlikely case where the property advanced is an interest in land, since the trust would need to be evidenced by writing signed by A or B: LPA 1925 s.53(1)(b), (2).

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Section 1. - General

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Mainwork

Part 5 - Trusts

Chapter 26 - Trusts Arising from Wrongs

Section 1. - General

26-001 A trust may sometimes arise from conduct which amounts to a legal or equitable wrong. The trust arising in this way is generally constructive since it arises by operation of law rather than through the expression of a settlor's intention. [1]

The imposition of the trust enables the claimant to assert an equitable proprietary claim to the property held by the defendant. As an absolutely entitled beneficiary under a bare trust, the claimant may direct the defendant to convey the property to him. The effect of the trust is therefore restitutionary, in that the defendant is stripped of the benefit accruing from his wrong. The imposition of the trust may also confer on the claimant a sufficient title to rely on the equitable rules of identification to follow or trace the property. It may therefore provide the foundation for a proprietary claim to traceable proceeds. [2]

Footnotes

1 *Muschinski v Dodds (1985) 160 C.L.R. 583* at 613, per Deane J and para.22-012 above. See para.25-026 where a resulting trust arises from a transaction induced by a fraudulent misrepresentation.

2 See Ch.30; cf. *El Ajou v Dollar Land Holdings Ltd [1993] 3 All E.R. 717*; *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at 715–716, per Lord Browne-Wilkinson.

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1. - Rationale

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Mainwork

Part 5 - Trusts

Chapter 26 - Trusts Arising from Wrongs

Section 1. - General

1. - Rationale

(a) No universal test.

26-002 In all such cases, the primary question is whether the defendant has committed the kind of wrong which is recognised in the authorities as giving rise to a constructive trust. It is not the case that every wrong recognised in the civil or criminal law has this effect. [3] Attempts have been made to generalise about situations in which a constructive trust will arise. It has been said, for example, that a constructive trust is imposed by equity in order to satisfy the demands of justice and good conscience, [4] or that it arises:

> "whenever the circumstances are such that it would be unconscionable for the owner of the property to assert his own beneficial interest in the property and deny the beneficial interest of another." [5]

But general formulae such as these merely describe the individual circumstances where the authorities have recognised that a constructive trust may arise. They may not be taken out of context and used as positive tests to determine when a defendant will hold property subject to a constructive trust. [6] In English law the situations where a trust will arise from wrongful conduct remain a matter of authority rather than of general principle.

(b) Overlap in rationale.

26-003 The distinctions between different categories of legal event which give rise to trusts are not absolute. The differences may be matters of degree. [7] For instance, one situation where a constructive trust may be imposed on property is where it gives effect to a person's informally expressed intention to transfer or make a gift of property, in circumstances where it would be fraudulent for the defendant to rely on that informality to claim the beneficial interest for himself. This instance illustrates that a variety of pragmatic reasons may explain the creation of a trust, rather than a single conceptual reason. In this book, such trusts arising from an informally expressed intention are treated in a separate chapter. [8] The present chapter is confined to trusts arising from wrongs, in circumstances where no intention has been expressed that the claimant should have a beneficial interest in the property.

Footnotes

3 It is not even the case that every civil or criminal wrong entitles the victim to a personal restitutionary claim to recover the benefits of the defendant's wrong: G. Virgo, Principles of the Law of Restitution, 2nd edn (OUP, 2006), Ch.15. Moreover where recovery is available, it may be analysed as the value of the claimant's lost opportunity to negotiate for a variation of a bargain breached by the defendant. The amount recovered is generally less than the full gain accruing to the defendant from his wrong. Compare, e.g. *Attorney General v Blake [2001] 1 A.C. 268*; and *Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323; [2003] 1 All E.R. (Comm) 830*.

4 This formulation was cited approvingly by Edmund Davies LJ in *Carl Zeiss Stiftung v Herbert Smith & Co (No.2) [1969] 2 Ch. 276* at 301.

5 *Paragon Finance Ltd v DB Thakerer & Co [1999] 1 All E.R. 400* at 409, per Millett LJ. See also *Muschinski v Dodds (1985) 160 C.L.R. 583* at 614; and *Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55; [2008] 1 W.L.R. 1752* at [17], [30].

6 *Muschinski v Dodds (1985) 160 C.L.R. 583* at 594; *Baumgartner v Baumgartner (1987) 164 C.L.R. 137* at 147.

7 See para.21-023.

8 See Ch.24.

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2. - Trust Property Needed

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Mainwork

Part 5 - Trusts

Chapter 26 - Trusts Arising from Wrongs

Section 1. - General

2. - Trust Property Needed

26-004 It follows from the nature of a constructive trust arising from a wrong that it is unnecessary to prove the expression of any intention to create it. The other requirements of certainty applying to private trusts nonetheless apply to it. Accordingly, a constructive trust could not arise if the trustee or beneficiary were not defined with sufficient certainty to enable the court to give effect to the claimant's right to have the trust property conveyed to him. [9] The same would be true if the subject-matter of the trust were not defined with sufficient certainty or if there did not exist any identifiable property that could be made the subject-matter of the trust. The relationship between the claimant and the supposed trustee would be a personal liability to account rather than trusteeship in any substantial sense. The need for a properly defined subject-matter is one of the main objections of principle to the recognition of a remedial constructive trust in English law. [10] The property on which the trust would be imposed would not be identifiable according to the formal rules of tracing as the traceable proceeds of an asset that once belonged to the claimant. [11]

It has traditionally been said that a person who dishonestly assists another to breach his fiduciary duty is a "constructive trustee". [12] The description is misleading if it is taken to imply that the defendant is a trustee of specific property for the claimant. The description of the defendant as a trustee merely indicates that he is liable to account for profits or losses accruing from his equitable wrong. It is "nothing more than a formula for equitable relief". [13] It is a fiction indicating that the defendant is accountable in equity as if he had been a true trustee of property and had breached their duties under the trust. It does not assume that he is a trustee in the true sense. [14]

Footnotes

9 *Muschinski v Dodds (1985) 160 C.L.R. 583* at 614; *Tackaberry v Hollis [2007] EWHC 2633 (Ch); [2008] W.T.L.R. 279* at [89.5] (constructive trust to effect informal common intention).

10 See para.26-015 below.

11 For example *Fortex Group Ltd v Macintosh [1998] 3 N.Z.L.R. 171*; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd [2005] EWCA Civ 722; [2006] 1 B.C.L.C. 78*.

12 For example *Barnes v Addy (1874) L.R. 9 Ch. App. 244* at 251–252; *C. Harpum (1986) 102 L.Q.R. 114 and 267*; and the 30th edn of this work at para.9-42.

13 *Selangor United Rubber Estates Ltd v Craddock (No.3) [1968] 1 W.L.R. 1555* at 1582; *Dubai Aluminium Co Ltd v Salaam [2003] 2 A.C. 366; [2002] UKHL 48* at [142].

14 See *P.J. Millett (1998) 114 L.Q.R. 399 at 400*; C. Mitchell, Ch.6 in Birks and Pretto (eds), Breach of Trust (Hart Publishing, 2002) at pp.146–150.

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3. - Duties of Constructive Trustee

26-005 Where a constructive trust arises from a wrong, the defendant holds the property as a bare trustee for the claimant. His primary duty is therefore to convey the property as the claimant directs. [15] In principle, the imposition of the constructive trust on the wrongdoing defendant does not cause him to be subject to the personal duties typically owed by an express trustee, including the fiduciary duties of loyalty. In this respect, he may be in a different position from a constructive trustee who has given an express but informal undertaking to hold property on trust. [16] The reason is that the defendant's status as a constructive trustee is not voluntarily assumed. The simple division of the legal and equitable title to the property does not make him a fiduciary in relation to that property. He may nonetheless owe fiduciary duties in relation to the property if for some other reason he is in a fiduciary position. [17]

Footnotes

15 See above para.21-027.

16 *Paragon Finance Plc v DB Thakerer & Co [1999] 1 All E.R. 400* at 409, per Millett LJ; see, e.g. the instances of persons holding property on informal trusts considered in Ch.24.

17 *P.J. Millett (1998) 114 L.Q.R. 399 at 403–406*; C. Rotherham, Proprietary Remedies in Context (Hart Publishing, 2002), pp.20–22.

1. - Profit in Breach of Fiduciary Duty

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Mainwork

Part 5 - Trusts

Chapter 26 - Trusts Arising from Wrongs

Section 2. - Wrongs from which trust may arise

1. - Profit in Breach of Fiduciary Duty

26-006 The main type of constructive trust arising from a wrong is where a fiduciary makes an unauthorised profit in breach of his fiduciary duty of loyalty. For convenience, the detail of this topic is considered along with the other remedies available where a person in a fiduciary position enters into a wrongful transaction. [18]

If the principal is to have a claim under a constructive trust, the fiduciary must have received a specific fund of property that is identifiable as the profit arising from his breach. Otherwise, the principal is limited to a personal claim for the monetary value of the fiduciary's profit. [19] Once the principal has established that the specific fund is held for him on a constructive trust, he may also enforce proprietary claims to its traceable proceeds. [20]

The constructive trust may attach to two kinds of profit. It may derive from the fiduciary's unauthorised dealings with a fund of property that was previously treated as the principal's equitable property. Alternatively, the constructive trust may attach to a fund of property that the fiduciary received from a third party, and for which he was liable to account to the principal by specifically delivering it up to him. [21]

Footnotes

18 See para.7-057.

19 See para.7-054 above.

20 *Attorney General for Hong Kong v Reid [1994] 1 A.C. 324*. See *P.J. Millett [1993] R.L.R. 7*.

21 *FHR European Ventures LLP v Cedar Capital Partners LLC [2014] UKSC 45; [2014] 3 W.L.R. 535*.

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2. - Unlawful Killing

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 26 - Trusts Arising from Wrongs

Section 2. - Wrongs from which trust may arise

2. - Unlawful Killing

(a) General.

26-007 There is a rule of public policy that one who kills another is not entitled to the benefits they would have acquired as a result of the death.[22] One device to achieve this result is to hold that a legal title which would otherwise have devolved on the wrongdoer does not pass to him.[23] An alternative analysis is to hold that the legal interest devolves in the ordinary way, but that in the hands of the wrongdoer it is impressed with a constructive trust for others.[24] By vesting the beneficial interest in another person, the wrongdoer is deprived of any benefit from his wrong. The trust is not strictly restitutionary in character since it does not necessarily preserve the beneficial interest in the property for those entitled to the victim's estate.

The effect of the rule is to bring about a forfeiture of the interest that would otherwise have accrued to the wrongdoer. The rule overrides statutory provisions regulating descent on death.[25] The automatic operation of the rule is now subject to statutory discretion allowing a court to modify its effect where the justice of the case so requires.[26]

(b) Joint tenancies.

26-008 Thus where one of two joint tenants murdered the other it was held that the murderer took by survivorship but subject to a constructive trust as to one-half in favour of the victim's next-of-kin.[27] Equity interferes to prevent the benefit of enlargement by survivorship accruing to the wrongdoer. Where there are only two joint tenants the result is a severance because the estate of the victim is the only alternative repository of the enlargement. But where there are three (or more) joint tenants, the wrongdoer holds the full extent of the enlargement on trust for the innocent survivor. The share that once belonged to the victim does not pass to his estate since the purpose of the trust is only to prevent any benefit accruing to the wrongdoer. The outcome is that one-third is severed and held for the innocent survivor, and he with the wrongdoing survivor will remain as joint tenants of the other two-thirds.[28]

Footnotes

22 *Cleaver v Mutual Reserve Fund Life Association [1892] 1 Q.B. 147*; *Davitt v Titcumb [1990] Ch. 110*. The rule also applies to a suicide pact: *Dunbar v Plant [1998] Ch. 412*. See generally *T.G. Youdan (1973) 89 L.Q.R. 235*.

23 *Re Sigsworth [1935] Ch. 89*.

24 *Rasmanis v Jurewitsch (1969) 70 S.R. (NSW) 407 CA*; *Rosenfeldt v Olson [1985] 2 W.W.R. 502* (payment of money by police for information earmarked for murderer's family impressed with trust for victim).

25 See the discussion by Youdan, at 251–253.

26 Forfeiture Act 1982 ss.1, 2, applied by the Court of Appeal in *Dunbar v Plant [1998] Ch. 412*.

27 *Schobelt v Barber [1967] 1 O.R. 519; 60. D.L.R. (2d) 519*; *Re Pechar [1969] N.Z.L.R. 574*; *Rasmanis v Jurewitsch (1969) 70 S.R. (NSW) 407 CA*; *Cawley v Lillis [2011] IEHC 515; (2011) 15 I.T.E.L.R. 359*.

28 *Rasmanis v Jurewitsch (1969) 70 S.R. (NSW) 407*. The actual order was guilty survivor one-third, innocent two-thirds as tenants in common, but this was because only the victim's personal representative and not the guilty survivor appealed from the declaration made in the court below.

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3. - Disposition of Land Subject to Unprotected Interest

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Mainwork

Part 5 - Trusts

Chapter 26 - Trusts Arising from Wrongs

Section 2. - Wrongs from which trust may arise

3. - Disposition of Land Subject to Unprotected Interest [29]

(a) Transferee's undertaking to be bound.

26-009 A constructive trust may be imposed on a person who takes a disposition of land subject to the unprotected interest of a third party, such as an interest under a trust, [30] an estate contract, [31] a tenancy [32] or possibly even a licence to occupy the land. [33] He becomes bound by a trust to give effect to the third party's interest if before the disposition he undertook to be bound by it. It would be unconscionable for him to deny that the interest was binding on them.

It is essential, however, that the transferee gives a clear and specific undertaking that the third party's interest will bind him. The mere fact that the land is expressed to be "subject to" the third party's interest does not imply that the transferee is undertaking any fresh obligation to him. [34] A reduction in the purchase price may support the inference that the transferee intended the third party's interest to bind him. [35] In any event, mere constructive notice of the third party's interest cannot be enough to bind the conscience of the transferee. It would subvert the policy of the title registration system to introduce issues of notice into dealings with registered land. [36]

(b) Priority of interests.

26-010 In all these instances, the claimant's right under the constructive trust is freshly created in response to the transferee's wrongful breach of undertaking. The claimant's right is not necessarily the same pre-existing interest in the land that the defendant undertook to recognise. As a result, it is not an objection to recognising the constructive trust that the claimant did not protect the priority of his interest under the Land Registration Act 2002. The claimant's right is independent of the Land Registration Act 2002. Indeed, the rules of priority in the Land Registration Act 2002 would generally have extinguished the prior interest that the transferee undertook to recognise. [37]

Footnotes

29 See generally *S. Bright [2000] Conv. 398*; *E. Cooke and P. O'Connor (2004) 120 L.Q.R. 640*; *B. McFarlane (2004) 120 L.Q.R. 667*.

30 *Bannister v Bannister [1948] 2 All E.R. 133*.

31 *Lyus v Prowsa Developments Ltd [1982] 1 W.L.R. 1044*.

32 *Binions v Evans [1972] Ch. 359*.

33 *Ashburn Anstalt v Arnold [1989] Ch. 1* at 23–25; qualifying *Binions v Evans [1972] Ch. 359*; *DHN Food Distributors Ltd v Tower Hamlets LBC [1976] 1 W.L.R. 852* at 859; and *Re Sharpe [1980] 1 W.L.R. 219*.

34 *Ashburn Anstalt v Arnold [1989] Ch.1* at 25, 26.

35 *Ashburn Anstalt v Arnold [1989] Ch.1* at 25, 26.

36 See *E. Cooke and P. O'Connor (2004) 120 L.Q.R. 640*; and D. Fox, Ch.2 in E. Cooke (ed), Modern Studies in Property Law Vol.3 (Hart Publishing, 2005).

37 Land Registration Act 2002 s.29; and para.4-006.

4. - Fraud

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 26 - Trusts Arising from Wrongs

Section 2. - Wrongs from which trust may arise

4. - Fraud

(a) No universal test.

26-011 It has been said that there is a:

> "jurisdiction by which a court of equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud."[38]

But in common with all other situations where a trust may be imposed by operation of law, it would be incorrect to interpret such a statement as a general test for when a constructive trust will be imposed. While the cases recognise many instances of fraud where a trust has been imposed, there is no "universal principle that wherever there is personal fraud the fraudster will become a trustee for the party injured by the fraud".[39] The cases where the defendant fraudulently relies on the informality of a transaction to deny the beneficial interest of the claimant have been considered elsewhere.[40] Some of the remaining instances are considered in this section.

(b) Fraudulent taking.

26-012 A distinction must be drawn between fraud consisting in the outright taking of a person's property, wholly without his consent, and a transaction induced by a fraudulent misrepresentation.[41] In the first case, it has been said that a thief who steals the property of another holds it on constructive trust for the claimant.[42] The thief's possessory title is subject to the claimant's equitable entitlement to have the property specifically restored to him so that he holds it as a constructive trustee.[43] The consequence is that the claimant need not rely on the less advantageous common law rules of tracing to recover his property.[44]

(c) Fraudulently induced transfer.

26-013 In the second case, where the claimant is the victim of a fraudulent misrepresentation which induces him to transfer his property to his defendant, the transaction is valid until the claimant elects to rescind it.[45] In the meanwhile, the defendant holds his legal interest in the property as beneficial owner, though subject to the claimant's equity to rescind. This right has a slight proprietary character, but only in the sense that the right of rescission may sometimes be exercised against a third person to whom the

defendant transfers the asset.[46] On rescission by the claimant, the defendant holds his legal interest in the property on resulting trust.[47] Since the trust arises only at that stage, the defendant cannot be taken to have owed duties qua trustee before then.[48] Nor can any misapplication of money by the defendant be treated as a breach of trust until after rescission.[49] The possibility of rescission leading to the imposition of a resulting trust will be barred if the claimant has elected to affirm the transaction.[50]

Footnotes

38 *McCormack v Grogan (1869) L.R. 4 H.L. 82* at 92, per Lord Westbury.

39 *Halifax Building Society v Thomas [1996] Ch. 217* at 228, per Peter Gibson LJ; *Box v Barclays Bank [1988] Lloyd's Law Rep. Bank. 185* at 200, per Ferris J; *Shalson v Russo [2003] EWHC 1637 (Ch); [2005] Ch. 281* at [115].

40 See Ch.24.

41 *Shalson v Russo [2003] EWHC 1637 (Ch); [2005] Ch. 281* at [108], [111]; and D. Fox, Property Rights in Money (OUP, 2008), paras 4.98–4.100.

42 *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at 715–716, per Lord Browne-Wilkinson; questioned in *Shalson v Russo [2003] EWHC 1637 (Ch); [2005] Ch. 281* at [110], [114]; but applied in *Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch); [2013] Ch. 156*. The imposition of a trust over stolen money has long been recognised in Australia: *Black v S Freedman & Co (1910) 12 C.L.R. 105*; *Creake v James Moore and Sons Pty Ltd (1912) 15 C.L.R. 426*; *Australian Postal Corp v Lutak (1991) 21 N.S.W.L.R. 584* and *Robb Evans of Robb Evans and Associates v European Bank Ltd (2004) 61 N.S.W.L.R. 75*. The authorities are gathered in *J. Tarrant (2006) 80 A.L.J. 531*.

43 For analysis of the proprietary titles, see D. Fox, Property Rights in Money (2008), paras 4.103–4.106.

44 See Ch.30.

45 *Daly v Sydney Stock Exchange Ltd (1986) 160 C.L.R. 371* at 388–391, per Brennan J; *Lonrho Plc v Fayed (No.2) [1992] 1 W.L.R. 1* at 11, per Millett J; *Bristol & West Building Society v Mothew [1998] Ch. 1* at 22–23, per Millett LJ.

46 *Shalson v Russo [2003] EWHC 1637 (Ch); [2005] Ch. 281* at [106]–[127]; *Re Crown Holdings (London) Ltd (In Liquidation) [2015] EWHC 1876 (Ch)*. See para.2-007 above.

47 *El Ajou v Dollar Land Holdings Ltd [1993] 3 All E.R. 717* at 734, per Millett J, reversed on other grounds *[1994] 2 All E.R. 685*.

48 *Lonrho Plc v Fayed (No.2) [1992] 1 W.L.R. 1*; *Halifax Building Society v Thomas [1996] Ch. 217*. It is unlikely in any event that a constructive trustee would owe substantial fiduciary duties: see para.26-005.

49 *Bristol & West Building Society v Mothew [1998] Ch. 1* at 22–23, per Millett LJ.

50 *Halifax Building Society v Thomas [1996] Ch. 217*; *Box v Barclays Bank [1998] Lloyds Law Rep. Bank. 185*; *Daraydan Holdings Ltd v Solland International Ltd [2004] EWHC 622 (Ch); [2005] 4 All E.R. 73* at [88], per Lawrence Collins J. See generally para.15-013.

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1. - Remedial and Substantive Constructive Trusts

26-014 In England, the constructive trust has generally been regarded as a substantive institution rather than a remedy. [51] The distinction between these two explanations of the trust is uncertain, owing to a lack of clear definition of the terms used. [52] The commonly accepted distinction is that an institutional constructive trust arises independently of any court order, once the facts on which the creation of the trust depends have occurred. [53] The function of the court is merely to declare its prior existence. [54] A constructive trust would be remedial if it depended on an order of the court for its creation. It might lie in the discretion of the court to determine its existence and the extent to which the equitable interest of the claimant under the trust should take priority over the interests of third parties. [55] It could also be imposed over property that was not identifiable as the proceeds of an original asset according to the conventional rules of following and tracing. [56]

Footnotes

51 See *Westdeutsche Bank v Islington LBC [1996] A.C. 669* at 714, 716; *Re Polly Peck (No.5) [1998] 3 All E.R. 812*; and see *Birks (1998) 12 Tru. L.I. 202*.

52 See *Muschinski v Dodds (1986) 160 C.L.R. 583* at 613, per Deane J; C. Rotherham, Proprietary Remedies in Context (2002) Ch.1.

53 In this sense, the constructive trusts arising from the informal expression of intention described in Ch.24 and from the recognised categories of wrongdoing described in this chapter would be called “institutional”.

54 *Westdeutsche Bank v Islington LBC [1996] A.C. 669* at 714; *Fortex Group Ltd v Macintosh [1998] 3 N.Z.L.R. 171* at 175.

55 See Ch.4.

56 *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd [2005] EWCA Civ 722; [2006] 1 B.C.L.C. 78*.

2. - Remedial Constructive Trust Not Recognised

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 26 - Trusts Arising from Wrongs

Section 3. - Remedial Constructive Trust

2. - Remedial Constructive Trust Not Recognised

26-015 At one time it was thought that a constructive trust might be used as a remedy and be "imposed by law whenever justice and good conscience require it". [57] So a son who added an extra bedroom to his house to be occupied by his mother who had paid the builder, was held to be a constructive trustee of the house to the extent necessary to reimburse his mother. [58]

More recent authorities, however, make it unlikely that this approach will be followed. [59] The courts have affirmed that general formulae such as inequitability and the prevention of unconscionable conduct may not be used as tests for the imposition of a trust. [60] For the present at least, this appears to preclude the recognition of the remedial constructive trust in English law. [61]

Footnotes

57 *Hussey v Palmer [1972] 1 W.L.R. 1286* at 1289, 1290, per Lord Denning MR.

58 *Hussey v Palmer [1972] 1 W.L.R. 1286*.

59 *Re Polly Peck International Plc (In Administration) (No.5) [1998] 3 All E.R. 812*.

60 *Muschinski v Dodds (1985) 160 C.L.R. 583* at 594; *Baumgartner v Baumgartner (1987) 164 C.L.R. 137* at 147; *Halifax Building Society v Thomas [1996] Ch. 217* at 228; *Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55; [2008] 1 W.L.R. 1752* at [37].

61 Though the possibility that it might be recognised in the future has not been completely ruled out: *Westdeutsche Bank v Islington LBC [1996] A.C. 669* at 716; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd [2005] EWCA Civ 722; [2006] 1 B.C.L.C. 78* (strike-out application); *Thorner v Major [2009] UKHL 18; [2009] 1 W.L.R. 776* at [20] (reference to remedial constructive trust possibly intended to mean constructive trust arising from informal common intention). Despite these indications, the main current of authority makes the recognition of a remedial constructive very unlikely.

Section 1. - Capacity to be a Trustee

27-001 In general, the ability to be a trustee is co-extensive with the capacity to hold property. Thus an alien may hold real and personal property of every description except a British ship, and so, with that exception, may be a trustee of any property. [1]

Two cases, however, require special mention.

Footnotes

1 Status of Aliens Act 1914 s.17, as amended by British Nationality Act 1948.

1. - Corporations

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Mainwork

Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 1. - Capacity to be a Trustee

1. - Corporations

(a) In general.

27-002 A corporation may be a trustee of pure personalty,[2] and of land also[3]; the former requirement[4] of either statutory authority to hold land[5] or else a licence in mortmain has now gone.[6] A corporation may in general be a trustee for any purpose (e.g. a trustee of a Friendly Society)[7]; and may be a co-trustee with an individual or another corporation, for the Bodies Corporate (Joint Tenancy) Act 1899 removed the former inability of a corporation to hold property in joint tenancy.[8] The capacity of a company formed and registered under the Companies Acts to be a trustee is now unlikely to be an issue, given that such a company now has unlimited capacity unless its constitution provides otherwise.[9]

(b) Trust corporations.

27-003 The appointment of certain corporations to be trustees is much encouraged by the Trustee Act 1925 and other Acts of 1925.[10] These corporations, known as "trust corporations", include the Public Trustee, the Treasury Solicitor, the Official Solicitor, certain charitable corporations, and corporations either appointed by the court in any particular case or entitled to act as custodian trustee under rules made under the Public Trustee Act 1906.[11] The corporations which are entitled to act as custodian trustee[12] include any corporation which:

(i)is constituted under the law of the United Kingdom or of any part thereof or under the law of any other Member State of the European Community or of any part thereof[13] and has a place of business in the UK,

(ii)is empowered by its constitution to undertake trust business; and

(iii)is either a company incorporated by special Act[14] or Royal Charter, or else a registered company with an issued capital of at least £250,000, of which at least £100,000 has been paid up in cash.[15]

A company which still exists as a legal entity and continues to satisfy this test as to its capital does not cease to be a trust corporation merely because it transfers its assets to another company on amalgamation.[16] The term "trust corporation" also includes a number of other corporations of a public or charitable nature such as Regional and Area Health Authorities.[17]

Footnotes

2 See *Attorney General v St John's Hospital Bedford (1865) 2 De G.J. & S. 621* at 635.

3 See *Re Thompson's Settlement Trusts [1905] 1 Ch. 229*; *Bankes v Salisbury Diocesan Council of Education Inc [1960] Ch. 631* (corporation sole).

4 Mortmain and Charitable Uses Act 1888 s.1.

5 e.g. Companies Act 1948 s.14.

6 Charities Act 1960 s.38.

7 *Re Pilkington Bros Ltd Workmen's Pension Fund [1953] 1 W.L.R. 1084*.

8 See *Re Thompson's ST [1905] 1 Ch.229*.

9 Companies Act 2006 s.31, which came into force on 1 October 2009.

10 See, e.g. below para.28-011.

11 TA 1925 s.68(18); LPA 1925 s.205(1)(xxviii); SLA 1925 s.117(1)(xxx); LP(Am)A 1926 s.3 (extending the definitions in the former Acts). Certain individuals such as trustees in bankruptcy and trustees under deeds of arrangement are also comprised in the term "trust corporation".

12 For the functions of a custodian trustee, see below para.27-027.

13 See *Re Bigger (Deceased) [1977] Fam. 203* (Bank of Ireland).

14 See, e.g. Methodist Church Act 1939 s.10.

15 Public Trustee Act 1906 ss.4(3), 14; Public Trustee Rules 1912 r.30. SI 1975/1189 amended by SI 1976/836, SI 1981/358, SI 1984/109, SI 1985/132, SI 1987/1891 and SI 1994/2519 contains the current form of r.30 of the Public Trustee Rules 1912.

16 *Re Skinner [1958] 1 W.L.R. 1043*.

17 See fn.14, above.

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2. - Minors

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Mainwork

Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 1. - Capacity to be a Trustee

2. - Minors

27-004 A minor cannot be appointed a trustee, [18] nor can a legal estate in land be held by a minor. [19] A purported conveyance of a legal estate to a minor on trust will operate only as a declaration of trust and will not pass any legal estate to him; but if the conveyance is made to him and another person of full age, the legal estate will vest in the other person alone. [20] There is nothing, however, to prevent a minor from holding property on an implied, resulting or constructive trust. [21]

Footnotes

18 LPA 1925 s.20.
19 LPA 1925 s.1(6).
20 Trusts of Land and Appointment of Trustees Act 1996 s.2, Sch.1 para.1.
21 See, e.g. *Re Vinogradoff [1935] W.N. 68*; para.25-020.

1. - Land

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 2. - Number of Trustees

1. - Land

27-005 Where a settlement of land or a trust of land is created, the number of trustees must not exceed four; and if more than four trustees are named, the first four named who are able and willing to act will alone be the trustees.[22] There is no minimum number of trustees; but except in the case of a trust corporation a sole trustee of settled land or of a trust of land cannot give a valid receipt for capital money.[23]

Footnotes

22 TA 1925 s.34(1). cf. SCA 1981 s.114, replacing JA 1925 s.160; considered in *In b Holland (1936) 105 L.J.P. 113* as to the number of personal representatives. Before 1926 there was no such restriction; for the relevant transitional provisions, see TA 1925 s.34(2).

23 See LPA 1925 s.27(2); SLA 1925 ss.18(1), 94; TA 1925 ss.14, 37. cf. SCA 1981 s.114 as to personal representatives (para.31-021).

End of Document

2. - Exceptions

27-006 As the limit of four trustees is confined to settled land and trusts of land, it does not apply to trusts of pure personalty. There are also three statutory exceptions to the rule [24] : it does not apply to:

(i)land, or the proceeds of sale of land, which is held in trust for charitable, ecclesiastical or public purposes;

(ii)a term of years limited by a settlement on trusts for raising money, e.g. portions; or

(iii)a term of years created under the statutory remedies for enforcing rentcharges. [25]

Footnotes

24 TA 1925 s.34(3).

25 The Rentcharges Act 1977 prohibits the creation of new rentcharges.

1. - Equity does not want for a Trustee

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Mainwork

Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 3. - Appointment of Trustees

1. - Equity does not want for a Trustee

27-007 The general rule is that a trust will not fail if the settlor or testator has failed to appoint trustees, or if the trustees appointed refuse or are unable to act,[26] or have ceased to exist.[27] A trust may, however, be so framed that its operation is conditional upon a specific trustee undertaking the trust, as where there was a charitable trust for medical students who were to be selected and closely supervised by the Royal College of Surgeons as trustees.[28]

Footnotes

26 *Moggridge v Thackwell (1803) 7 Ves. Jr. 36 (affirmed, 13 Ves. 416)*; *Re Willis [1921] 1 Ch. 44*; *Re Armitage [1972] Ch. 438*.

27 *Re Morrison, Wakefield v Falmouth (1967) 111 S.J. 758*.

28 *Re Lysaght (Deceased) [1966] Ch. 191*.

End of Document

2. - Initial Trustees

27-008 Normally the first trustees are appointed by the will or settlement. If, however, this fails to nominate them, or they disclaim, [29] or, being appointed by will, predecease the testator, the property will revert to the settlor, or remain in the personal representatives of the testator, as the case may be, to be held upon the trusts of the settlement or will. [30]

Footnotes

29 For disclaimer, see para.27-030.

30 *Mallot v Wilson [1903] 2 Ch. 494*.

3. - Subsequent Trustees

27-009 Unless and until new trustees are appointed, the property remains vested in the first trustees (or such of them as do not retire and are not removed [31]), and when one dies, the trust property devolves upon the survivors. On the death of a sole or sole surviving trustee, the trust property, whether real or personal, vests in his personal representatives, still subject to the trust. [32] Until new trustees are appointed, the personal representatives, though they are not bound to accept the position and duties of trustees, [33] are capable of exercising or performing any power or trust which the deceased trustee could have exercised or performed, unless the trust instrument (if any) contains a contrary direction. [34]

Footnotes

31 See paras 27–033 to 27–036.

32 AEA 1925 ss.1 and 3 replacing CA 1881 s.30.

33 *Re Bennett [1906] 1 Ch. 216*.

34 TA 1925 s.18(2) replacing CA 1911 s.8(1). See *P.W. Smith (1977) 41 Conv. (NS) 423* for the position where personal representatives die without appointing new trustees.

4. - Appointment of New Trustees

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Mainwork

Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 3. - Appointment of Trustees

4. - Appointment of New Trustees

27-010 Once the trust is duly constituted, the settlor has no power to appoint trustees unless he has reserved such a power. Those who can appoint new trustees fall into four categories.

(a) Express power.

27-011 The trust may confer an express power of appointing new trustees. The donee of such a power can appoint himself, [35] but should do so only in special circumstances, for the power is fiduciary. [36] Express powers are now unusual, for the statutory power set out below usually suffices, and the trust merely nominates the persons who may exercise that power.

(b) The Trustee Act 1925.

(1) The power.

27-012 The Trustee Act 1925 s.36, [37] confers wide powers to appoint new trustees (including Settled Land Act trustees [38]) whenever the trust was created, subject to any contrary provision in the trust instrument, if any. [39] A new trustee or trustees may be appointed in place of a trustee who falls within any of the following categories [40] :

(i)He is dead; and this includes a person nominated trustee in a will but dying before the testator. [41]

(ii)He remains outside the UK for a continuous [42] period exceeding 12 months.

(iii)He desires to be discharged from all or any of his trusts or powers.

(iv)He refuses to act; and this includes disclaimer. [43]

(v)He is unfit to act, e.g. because he is bankrupt. [44]

(vi)He is incapable of acting; this includes lunacy, [45] age and infirmity, [46] or, in the case of a corporation, dissolution, [47] but not absence in an enemy country. [48]

(vii)He is an infant (e.g. where the trust is implied, resulting or constructive). [49]

(viii)He is removed under a power in the trust instrument. [50]

(2) The appointment.

27-013 The appointment must be made in writing, [51] though it may not be made by the will of the last surviving trustee. [52] It may be made by the following persons [53] :

(i)By the person or persons nominated by the trust instrument for the purpose of appointing new trustees. This means the person or persons nominated generally [54] and not merely in certain specified events. [55] If several persons are nominated, the power cannot be exercised by the survivor or survivors [56] unless a contrary intention is shown, [57] or the property is vested in them [58] or they are trustees and hold the power as such [59] or the power was given to a class (e.g. "my sons") of whom at least two still exist. [60] If there is no person able and willing to act under this head (as where the persons nominated cannot be found, [61] or they disagree [62]), the appointment may be made under the next head; namely:

(ii)By the surviving or continuing trustees or trustee. This includes a refusing or retiring trustee, if willing to make the appointment, [63] but not a trustee removed against his will. [64] If there is no such trustee, the appointment may be made—

(iii)By the personal representative of the last surviving or continuing trustee, including the personal representatives of a sole trustee, [65] unless he is appointed by will and predeceases the testator [66] ;

(iv)If (and probably only if [67]) there is no person able to act, or it is doubtful whether he can act, [68] the court may appoint. [69]

When the appointment is made by the personal representatives, the concurrence of any executor who has renounced or who has not proved is not required [70] ; but the appointment may be made by a sole or last surviving executor intending to renounce, or all the executors where they all intend to renounce, without thereby accepting the office of executor. [71] Yet although the appointment may be made before probate, the new trustee's title to act will not be complete before the grant of probate (or letters of administration with will annexed if all renounce). [72] No appointment of a new trustee to take the place of a mentally defective trustee who is also entitled in possession to some beneficial interest in the trust property can be made by the continuing trustee or trustees without the leave of the appropriate authority under the Mental Health Act 1983. [73]

(3) The person appointed.

27-014 It is expressly provided that the person making the appointment may appoint himself. [74] He should not, however, appoint anyone whom the court would not appoint, [75] although the appointment is not necessarily invalid if he does, [76] nor, if he is a trustee, is such an appointment itself a breach of trust. [77] But if the appointor is a minor, the appointment will be closely scrutinised, and may be set aside. [78] There is no legal bar to the appointment of a person living abroad, but such an appointment is improper in the absence of special circumstances, as where the beneficiaries are themselves resident in a foreign country. [79]

(4) Number of trustees.

27-015 On an appointment of new trustees the number of trustees may be increased, subject to the statutory restrictions on the number of trustees, [80] and a separate set of trustees, not exceeding four, may be appointed for any part of the trust property held

on distinct trusts. [81] It is not obligatory (except as mentioned below) to appoint more than one trustee where only one was originally appointed, or to fill up the original number where more than two were originally appointed. [82] But (except where only one trustee was originally appointed and a sole trustee when appointed will be able to give valid receipts for all capital money) a trustee is not to be discharged unless there will be either a trust corporation or at least two persons to perform the trust. [83]

The exception placed in brackets in the last sentence will normally [84] only apply where the trust property consists entirely of pure personalty, for a sole trustee (other than a trust corporation) cannot give a receipt for capital money arising under a trust for sale of land or a settlement of land. [85] Nothing in the Act authorises the appointment of a sole trustee (not being a trust corporation) where the trustee, when appointed, would not be able to give valid receipts for all capital money arising under the trust. [86] Where new trustees of land are being appointed, the same persons must be appointed as are for the time being trustees of the settlement of the proceeds of sale. [87] An appointment of one trustee under s.36 of the Trustee Act 1925 cannot be effective to discharge two retiring trustees. [88]

(5) Additional trustees.

27-016 Even if no occasion has arisen for the appointment of new trustees, and so long as there are not more than three trustees, an additional trustee or trustees may be appointed, provided the number of trustees is not thereby increased above four. [89] There is no obligation to make such an appointment unless the trust instrument (if any) or statute [90] so requires. [91] The appointment must be made by the person nominated by the trust instrument (if any) for the purpose of appointing new trustees, or, if there is no such person, or no such person able and willing to act, by the trustee or trustees for the time being. Unlike the power of filling vacancies [92] this power, by an accident of drafting, does not enable the appointor to appoint himself. [93]

(c) Trusts of Land and Appointment of Trustees Act 1996.

27-017 Section 19 of the Trusts of Land and Appointment of Trustees Act 1996 entitles the beneficiaries to appoint new trustees or to require existing trustees to retire in certain circumstances. The power is exercisable only where no person is nominated for the purpose of appointing trustees by the trust deed and where the beneficiaries are of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust. [94] Section 20 provides that where a trustee is incapable of performing his functions as trustee, and there is no-one able and willing to appoint a replacement under s.36(1) of the Trustee Act 1925 the beneficiaries may (if they are of full age and capacity and, taken together, are absolutely entitled to the property subject to the trust) appoint a replacement trustee. Sections 19 and 20 can be excluded by express provision in the trust deed in the case of trusts created since 1 January 1997. They can also be excluded in the case of trusts created by disposition before that date by deed made by the settlor or surviving settlors. [95]

(d) The court.

(1) Trustee Act 1925.

27-018

Under the Trustee Act 1925 [96] the court has a wide power of appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. [97] The appointment can be made whenever it is expedient to appoint a new trustee and it is found "inexpedient, difficult or impracticable so to do without the assistance of the court", e.g. when a trustee is imprisoned, or is mentally defective, or is bankrupt, or is a corporation which is in liquidation or has been dissolved. The section authorises the displacement of a trustee against his will. [98] The court also has very extensive powers of making vesting orders with regard to trust land, and orders vesting the right to transfer trust stock or sue for trust things in action. [99] Applications for the appointment of a new trustee and for such vesting orders may be made by any beneficiary or trustee. [100]

(2) The person appointed.

27-019 In making an appointment, the court considers the wishes of the settlor and the beneficiaries, [101] whether the interests of the proposed trustee conflict with those of the settlor or any of the beneficiaries, and whether the appointment will promote or impede the execution of the trust. [102] The court will not appoint a person under disability, nor a person living abroad (unless the trust property or all the beneficiaries are also abroad), [103] nor as a rule a beneficiary or a beneficiary's solicitor or husband or wife, owing to the fact that the trustee may be placed in a position in which his duty and his interest, or two inconsistent duties, conflict [104]; but where there are advantages to be gained from such an appointment, and no disadvantages, the court may make it, [105] though it will be slow to do so. [106]

(3) Judicial Trustees Act 1896.

27-020 The Judicial Trustees Act 1896 [107] gives the court a further power of appointing a trustee. On an application by the settlor or a trustee or a beneficiary, the court may appoint any fit and proper person nominated in the application, [108] or an official of the court (usually the Official Solicitor), to be a judicial trustee to act alone or jointly [109] with any other person and, if sufficient cause is shown, in place of all or any existing trustees. The Act allows the court to appoint a judicial trustee to be a Settled Land Act trustee, [110] or to administer the estate of a testator or intestate instead of the executor or administrator, [111] though not to administer part of the estate, since an executorship is indivisible. [112] In all cases the appointment of a judicial trustee is absolutely discretionary. [113] The object of the Act:

> "was to provide a middle course in cases where the administration of the estate by the ordinary trustees had broken down and it was not desired to put the estate to the expense of a full administration"

by the court. [114] Until recently the Act offered the only way of replacing a personal representative once a grant had been made and he had begun the administration. [115] The jurisdiction is commonly resorted to where, for reasons not necessarily involving fault on the part of the representative (e.g. illness or conflicting interest), it is expedient to replace him.

A judicial trustee differs from an ordinary trustee in a number of respects. He is an officer of the court, and as such is subject to its control and supervision; he can at any time obtain the court's directions as to the way in which he is to act, without the necessity of a formal application; he is entitled to such remuneration as the court allows him; every year he must prepare accounts for examination by the court, [116] although a corporate trustee [117] need only submit such accounts to such persons as the court directs [118]; and he cannot appoint a successor under the statutory power [119] for this would usurp the function of the court. [120] In other respects he is in the position of any other trustee, and so, for example, he can compromise claims. [121]

(4) Public Trustee Act 1906.

27-021 Lastly, by the Public Trustee Act 1906, [122] on the application of any trustee or beneficiary, the court has power to appoint the Public Trustee to be a new or additional trustee, even though the trust instrument contains a direction that he is not to be appointed. [123]

Footnotes

35 *Montefiore v Guedalla [1903] 2 Ch. 723*; *Re Papadimitriou [2004] W.T.L.R. 1141* (Isle of Man).
36 *Re Skeats' Settlement (1889) 42 Ch.D. 522*; *Re Newen [1894] 2 Ch. 297*; *Re Osiris Trustees Ltd [2000] W.T.L.R. 933* (Isle of Man). For self-appointments under the statutory powers, see para.27-014.
37 Replacing TA 1893 s.10.
38 See *Re Dark [1954] Ch. 291*.
39 TA 1925 s.69(2).
40 TA 1925 s.36(1).
41 TA 1925 s.36(8).
42 See *Re Walker [1901] 1 Ch. 259* (return for a week breaks continuity).
43 *Re Birchall (1889) 40 Ch. D. 436*.
44 *Re Roche (1842) 2 Dr. & War. 287* at 289; *Re Hopkins (1881) 19 Ch. D. 61* at 69.
45 *Re East (1873) 8 Ch. App. 735*; *Re Blake [1887] W.N. 173*.
46 *Re Lemann's Trusts (1883) 22 Ch. D. 633*.
47 TA 1925 s.36(3), a retrospective provision.
48 *Re May's Will Trust [1941] Ch. 109*.
49 See para.27-004.
50 TA 1925 s.36(2).
51 TA 1925 s.36(1).
52 *Re Parker's Trusts [1894] 1 Ch. 707*.
53 TA 1925 s.36(1).
54 *Re Walker & Hughes' Contract (1883) 24 Ch. D. 698*.
55 *Re Wheeler & De Rochow's Contract [1896] 1 Ch. 315*; *Re Sichel's Settlements [1916] 1 Ch. 358*.
56 See *Bersel Manufacturing Co Ltd v Berry [1968] 2 All E.R. 552* at 554, 557.
57 *Re Harding [1923] 1 Ch. 182*.
58 See *Re Bacon [1907] 1 Ch. 475*.
59 TA 1925 s.18(1); and see *Re Smith, Eastwick v Smith [1904] 1 Ch. 139*.
60 *Jefferys v Marshall (1870) 19 W.R. 94*; but see *Sykes v Sheard (1863) 2 De G.J. & S. 6*.
61 *Cradock v Witham [1895] W.N. 75*.
62 *Re Sheppard's ST [1888] W.N. 234*.
63 TA 1925 s.36(8).
64 *Re Stoneham's Settlement Trusts [1953] Ch. 59*.
65 *Re Shafto's Trusts (1885) 29 Ch. D. 247*.
66 *Nicholson v Field [1893] 2 Ch. 511*.
67 *Re Gibbon's Trusts (1882) 30 W.R. 287* (undesirable); *Re Hodson's Settlement (1851) 9 Hare 118*; *Re Higginbottom [1892] 3 Ch. 132* (probably no jurisdiction).
68 *Re May's Will Trust [1941] Ch. 109* (absence in enemy territory).

69 TA 1925 s.41; para.27-018.
70 TA 1925 s.36(4).
71 TA 1925 s.36(5).
72 *Re Crowhurst Park [1974] 1 W.L.R. 583*.
73 TA 1925 s.36(9), as amended by Mental Health Act 1959 s.149(1) and Sch.7 and further amended by Mental Health Act 1983 s.148(1) and Sch.4 para.4(a).
74 TA 1925 s.36(1), altering on this point TA 1893 s.10; see *Re Sampson [1906] 1 Ch. 435*. Compare the position under express powers (para.27-011) and contrast the power of appointing additional trustees (para.27-016).
75 See para.27-019.
76 *Forster v Abraham (1874) L.R. 17 Eq. 351* (tenant for life); *Re Earl of Stamford [1896] 1 Ch. 288* (solicitor to tenant for life); *Re Coode (1913) 108 L.T. 94* (husband of tenant for life); and see *Re Cotter [1915] 1 Ch. 307*.
77 *Briggs v Parsloe [1937] 3 All E.R. 831*.
78 *Re Parsons [1940] Ch. 973*; quaere what this case decided: see *(1941) 57 L.Q.R. 25*.
79 *Re Whitehead's Will Trusts [1971] 1 W.L.R. 833*.
80 See above paras 27-005 to 27-006.
81 TA 1925 s.37(1).
82 TA 1925 s.37(1).
83 TA 1925 s.37(1)(c) used to provide that a trust corporation or at least two individuals must be appointed. The word "individuals" meant "natural persons" and did not include a corporation: *Jasmine Trustees Ltd v Wells & Hind (a firm) [2007] EWHC 238 (Ch); [2007] W.T.L.R. 489*. The provision was amended to replace the word "individuals" with the word "persons" (which would include a corporation) by the Trusts of Land and Appointment of Trustees Act 1996 s.25(1), Sch.3 para.3(12) (with ss.24(2), 25(4)) with effect on and from 1 January 1997 (SI 1996/2974 art.2).
84 Consider, e.g. land held on a bare trust.
85 TA 1925 s.14 and LPA 1925 ss.2, 27; para.28-011.
86 TA 1925 s.37(2).
87 LPA 1925 s.24; TA 1925 s.35(1).
88 *Adam and Co International Trustees Ltd v Theodore Goddard [2000] W.T.L.R. 349*.
89 TA 1925 s.36(6).
90 See, e.g. LPA 1925 s.27(2); SLA 1925 ss.30(3), 94; TA 1925 s.14(2).
91 TA 1925 s.36(6).
92 TA 1925 s.36(1); para.27-014.
93 *Re Power's Settlement Trust [1951] Ch. 1074*.
94 TLATA 1996 s.19(1).
95 TLATA 1996 s.21(5), (6).
96 TLATA 1996 s.41, replacing TA 1893 s.25.
97 In *Bridge Trustees Ltd v Noel Penny [2008] EWHC 2054 (Ch); 2008 P.L.R. 345* it was held that this power can only be used to appoint a trustee properly so called, and this does not include an independent trustee under a pension scheme, albeit that the court might appoint him under its inherent power (in that case for the purpose of distributing surplus assets).
98 *Re Henderson (Charles) [1940] Ch. 764*. cf. *Titterton v Oates [2001] W.T.L.R. 319* (Australia), where it was held that similar Australian legislation did not authorise the court to remove a trustee against his will.
99 TA 1925 ss.44–56, replacing TA 1893 ss.26–41.
100 TA 1925 s.58.
101 *Re Dickinson's Trusts [1902] W.N. 104* (differing views of beneficiaries: majority prevails).
102 *Re Tempest (1866) 1 Ch. App. 485*.
103 *Re Freeman's Settlement Trusts (1887) 37 Ch.D. 148*; *Re Liddiard (1880) 14 Ch. D. 310*.
104 *Ex p. Clutton (1853) 17 Jur. 988*; *Re Orde (1883) 24 Ch. D. 271* at 272; *Re Kemp's Settled Estates (1883) 24 Ch. D. 485*; *Re Coode (1913) 108 L.T. 94*.
105 e.g. *Re Marquis of Ailesbury [1893] 2 Ch. 345* at 360.
106 See *Re Earl of Stamford [1896] 1 Ch. 288* at 299; and see *Re Spencer's Settled Estates [1903] 1 Ch. 75*.
107 Judicial Trustees Act 1896 s.1; and see Judicial Trustee Rules 1983 (SI 1983/370), replacing with amendments Judicial Trustee Rules 1972 (SI 1972/1096).
108 See *Douglas v Bolam [1900] 2 Ch. 749*.

109 It is not, however, desirable for a judicial trustee and a private trustee to hold office jointly: *Re Martin [1900] W.N. 129*.

110 *Re Marshall's Will Trusts [1945] Ch. 217*.

111 *Re Ratcliff [1898] 2 Ch. 352*.

112 *Re Wells [1968] 1 W.L.R. 44*.

113 *Re Ratcliff [1898] 2 Ch. 352*.

114 *Re Ridsdel [1947] Ch. 597* at 605, per Jenkins J.

115 See now Administration of Justice Act 1985 s.50 (power of court to appoint substitute for, or remove, personal representative), para.34-015.

116 Judicial Trustee Rules 1983 rr.9, 10, 12. A yearly audit was formerly required: Judicial Trustees Act 1896 s.1(6), partially repealed by Administration of Justice Act 1982 s.75(1) and Sch.9 Pt I.

117 Judicial Trustee Rules 1983 r.2(1).

118 Judicial Trustee Rules 1983 r.13.

119 TA 1925 s.36, para.27-012.

120 *Re Johnston (1911) 105 L.T. 701*.

121 *Re Ridsdel [1947] Ch. 597*; for the power of compromise, see para.28-026.

122 Public Trustee Act 1906 s.5.

123 See further as to the Public Trustee, paras 27-025 to 27-029.

1. - Vesting Declarations

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Mainwork

Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 4. - Vesting of Trust Property

1. - Vesting Declarations

27-022 The mere appointment of a person as trustee does not by itself vest the trust property in him; the office of trustee is one thing, the trust property another. On every appointment of a trustee it is accordingly necessary to provide for the vesting of the trust property in the new trustee, either alone (if he is the sole trustee) or jointly with his co-trustees. By virtue of the Trustee Act 1925 s.40, [124] this can often be done without any express conveyance or assignment. The section applies to all trusts, whenever created, unless negatived by the trust instrument, if any [125] ; but it does not apply to property held by personal representatives in the course of administration. [126] If the appointment is made by deed, a mere vesting declaration in it suffices to vest the property in those who have become the trustees [127] ; and where the deed is made after 1925, then, subject to any express provision to the contrary, it operates as if it contained such a declaration even if none is actually inserted. [128]

Footnotes

124 Replacing TA 1893 s.12.
125 TA 1925 s.69(2).
126 *Re King's Will Trusts [1964] Ch. 542*; sed quaere; see para.21-055.
127 TA 1925 s.40(1), (3).
128 TA 1925 s.40(1).

2. - Exceptions

27-023 There are three classes of property to which the section does not apply. They are as follows [129] :

(i)land held by the trustees by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock;

(ii)land held under a lease which contains a covenant not to assign without consent, unless before the execution of the deed the requisite consent has been obtained, or unless by virtue of any statute or rule of law the vesting declaration, express or implied, would not operate as a breach of covenant or give rise to a forfeiture; and

(iii)any share, stock, annuity, or property which is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

These forms of property must be vested in the trustee by the appropriate form of conveyance or transfer. The reason for the first exception is to avoid bringing the trusts on to the title; for otherwise on redemption the mortgagor would have to investigate the title to the mortgage, including, e.g. appointments of new trustees, in order to see that he is paying the right persons. The second exception is to avoid accidental breaches of the terms of the lease; and the third exception is made necessary by the normal mode of transferring such property.

Footnotes

129 TA 1925 s.40(4).

3. - Vesting Orders

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Mainwork

Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 4. - Vesting of Trust Property

3. - Vesting Orders

27-024 If it is difficult or impossible to procure the transfer of the trust property to the trustees, the court has power to make a vesting order. [130]

Footnotes

130 See para.27-018.

1. - Appointment and Powers

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Mainwork

Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 5. - The Public Trustee

1. - Appointment and Powers

27-025 The difficulty frequently experienced in times past of finding a person willing to act as trustee was met by the Public Trustee Act 1906, which established a Public Trustee. The chief advantages derived from appointing him to act as a trustee are as follows. First, being a corporation sole, [131] the office has perpetual existence, despite the death or retirement of the individual from time to time holding it; secondly, the Lord Chancellor's Department is responsible for any loss to the trust estate caused by his breaches of trust [132]; and thirdly, he has a wide experience in trust matters, and yet his fees are moderate. He may act as a custodian trustee, as an ordinary trustee, or as a judicial trustee, and may act alone or jointly with another person or other persons; and he may hold land. [133]

Footnotes

131 Public Trustee Act 1906 s.1.

132 Under s.7 of the Public Trustee Act 1906 the liability was that of the Consolidated Fund. Section 7 was repealed by Public Trustee (Liability and Fees) Act 2002, with result that the liability is now that of the Lord Chancellor's Department: see 390 HL Official Report (6th series) col.261.

133 *Re Leslie's Hassop Estates [1911] 1 Ch. 611*.

End of Document

2. - Limits to Powers

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Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 5. - The Public Trustee

2. - Limits to Powers

27-026 There are certain limits to the functions of the Public Trustee. [134] He may decline to accept any trust, except that he must not decline solely on the ground of the smallness of the trust property. Further, he cannot accept any trust exclusively for religious or charitable purposes, [135] nor any except an English trust, [136] nor any trust under a deed of arrangement for the benefit of creditors; nor can he undertake the administration of any estate known or believed by him to be insolvent. He also, as ordinary trustee, cannot carry on a business without the leave of the Treasury, unless he is satisfied that it can be carried on without risk of loss, and he carries it on:

(i)for not more than 18 months; and

(ii)with a view to sale, disposition, or winding up.

Footnotes

134 Public Trustee Act 1906 s.2; Public Trustee Rules 1912 r.7. As to the rules, see para.27-003, fn.15.

135 See *Re Hampton (1919) 88 L.J.Ch. 103*. See para.23-064 for the Official Custodian for Charities.

136 *Re Hewitts Settlement [1915] 1 Ch. 228*.

End of Document

3. - As Custodian Trustee

3. - As Custodian Trustee [137]

27-027 The appointment of the Public Trustee to act as custodian trustee may be made by the court, or by the settlor, or by the person who has power to appoint new trustees. When appointed, the trust property must be transferred to him as if he were sole trustee, and all the securities and documents of title relating to the trust property are to be in his sole custody. Further, all sums payable to or out of the income of the trust property are to be paid to or by him, except that he may allow the dividends and other income to be paid to the other trustees (called the "managing trustees"), or as they may direct. The management of the trust property and the exercise of any power or discretion exercisable by the trustees under the trust remain vested in the managing trustees. [138] Instead of the Public Trustee, certain other corporations may be appointed as custodian trustee, [139] even if the trust is religious or charitable. [140] The court has power to determine a custodian trusteeship if it is expedient, [141] e.g. when it is desirable for the trustee to become an ordinary trustee. [142]

Footnotes

137 See generally *S. G. Maurice (1960) 24 Conv. (N.S.) 196*.
138 Public Trustee Act 1906 s.4.
139 See para.27-003.
140 *Re Cherry's Trusts [1914] 1 Ch. 83*.
141 Public Trustee Act 1906 s.4.
142 *Re Squires Settlement (1945) 115 L.J.Ch. 90*.

4. - As Ordinary Trustee

27-028 The Public Trustee may be appointed to be an ordinary trustee, either as an original or a new trustee or as an additional trustee, in the same cases and in the same manner and by the same persons or court as if he were a private trustee; and even if the trustees originally appointed were two or more, the Public Trustee may be appointed sole trustee. [143] The Public Trustee may be appointed as sole trustee and exercise all the powers of the trustees under the trust despite a direction in the trust instrument that on appointment of new trustees the number shall not be reduced below three [144] and despite a direction that no discretion vested in the trustees may be exercised at any time when there are less than two trustees. [145] But if the trust instrument prohibits his appointment he may not be appointed a new or additional trustee unless the court otherwise orders. [146] Further, if it is proposed to appoint him as a new or additional trustee, notice must be given to the beneficiaries; and on the application of any beneficiary, the court may prohibit the appointment if it considers it expedient to do so having regard to the interests of all the beneficiaries. [147]

Footnotes

143 Public Trustee Act 1906 s.5(1).
144 *Re Moxon [1916] 2 Ch. 595*.
145 *Re Duxbury's Settlement Trusts [1995] 1 W.L.R. 425*.
146 Public Trustee Act 1906 s.5(3).
147 Public Trustee Act 1906 s.5(4); see *Re Firth (No.1) [1912] 1 Ch. 806*.

5. - As Personal Representative

27-029 The Public Trustee is also given power to obtain probate of a will or letters of administration. [148] Further, with the leave of the court an executor who has obtained probate, or an administrator who has obtained letters of administration, may transfer to the Public Trustee the whole future administration of the estate, and in that way escape all liability in respect of the further administration. [149]

Footnotes

148 Public Trustee Act 1906 s.6(1); Public Trustee Rules 1912 r.6.

149 Public Trustee Act 1906 s.6(2).

1. - Disclaimer

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Mainwork

Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 6. - Determination of Trusteeship

1. - Disclaimer

(a) Mode of disclaimer.

27-030 A person appointed trustee is not bound to act, but may disclaim the trust at any time before he has done anything showing his acceptance of it. [150] Further, he may disclaim even though he had previously agreed to accept the office. [151] But a disclaimer of an interest under a will before the death of the testator is ineffective. [152] The disclaimer is usually effected by deed, though a deed is not essential. It may even be by word of mouth or inferred from conduct, [153] or from the fact that a long time has elapsed since the appointment and the trustee has done nothing, [154] but if informal it must be unequivocal, [155] and may be withdrawn before another party has acted on it. [156]

(b) Limits to disclaimer.

27-031 A trustee who has accepted the trust cannot afterwards disclaim it; and if a person appointed both executor and trustee proves the will, he is deemed to have accepted the trusts of the will, [157] whereas if he renounces probate, he does not necessarily disclaim the trust, although the renunciation is some evidence of disclaimer. [158] Further, a disclaimer must be of the whole of the trusts; a disclaimer of part, even though distinct and separate from the rest, is ineffectual. [159]

(c) Effect on property.

27-032 A disclaimer of the trust operates also as a disclaimer of the property, which thereupon reverts to the settlor or his representatives, if the person disclaiming is a sole trustee, or, if there are other trustees, remains in them. [160]

Footnotes

150 See *Re Sharman's Will Trusts [1942] Ch. 311* at 314; and see generally on disclaimer *Re Stratton's Disclaimer [1958] Ch. 42* (beneficial gift by will).

151 See *Doyle v Blake (1804) 2 Sch. & Lef. 231* at 239 (executor).

152 *Smith v Smith (Disclaimer of Interest under will) [2001] 3 All E.R. 552*.

153 *Stacey v Elph (1833) 1 My. & K. 195*; and see *Re Paradise Motor Co Ltd [1968] 1 W.L.R. 1125* (gift of shares).

154 *Re Clout and Frewer's Contract [1924] 2 Ch. 230*; but see *Re Birchall (1889) 40 Ch. D. 436*.

155 *Re Boyd [1966] N.Z.L.R. 1109*.

156 See *Re Cranstoun's Will Trusts [1949] Ch. 523*; *Re Boyd [1966] N.Z.L.R. 1109* (benefits under will); *Re Duke of Norfolk's Settlement Trusts [1979] Ch. 37* at 60 (unaffected by the reversal of the decision by CA: *[1982] Ch. 61*).

157 *Mucklow v Fuller (1821) Jac. 198*.

158 See *Re Gordon (1877) 6 Ch. D. 531*.

159 *Re Lord and Fullerton's Contract [1896] 1 Ch. 228*.

160 *Re Birchall (1889) 40 Ch. D. 436*; *Mallet v Wilson [1903] 2 Ch. 494*.

End of Document

2. - Retirement

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Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 6. - Determination of Trusteeship

2. - Retirement

(a) Mode of retiring.

27-033 A trustee may obtain a release from his trusteeship in various ways. He may by deed retire from the trust, provided that after his discharge there will be either a trust corporation or at least two persons to perform the trust, and provided that his co-trustees and the person, if any, entitled to appoint new trustees consent by deed to his retirement. [161] This power applies to all trusts, whenever created, unless negatived by the trust instrument, if any. [162] However, where the Public Trustee has been appointed a trustee, a co-trustee may retire without leaving two trustees and without the consents mentioned above [163] ; and a judicial trustee may retire on giving notice to the court stating what proposals he makes as to the appointment of a successor. [164] A trustee may also be required to retire in certain circumstances by the beneficiaries. [165]

(b) Vesting of property.

27-034 Where a trustee retires under s.39 of the Trustee Act 1925 or s.19 of the Trusts of Land and Appointment of Trustees Act 1996, everything requisite for vesting the trust property in the continuing trustees alone must be done. [166] If the deed of retirement contains a vesting declaration by the retiring and continuing trustees, and by the other person (if any) empowered to appoint new trustees, it will vest the trust property in the continuing trustees alone, [167] except in the case of those properties which cannot be made to vest in this way on the appointment of a new trustee. [168] Where the deed is made after 1925, a vesting declaration is implied unless the contrary is stated. [169]

Footnotes

161 TA 1925 s.39, replacing TA 1893 s.11. cf. *Katz v Moore (1997/98) 1 O.F.L.R. 500*, Manx SGD. Before 1893 he could not retire in the absence of an express power, consent of the beneficiaries, or an order of the court: *Manson v Baillie (1855) 2 Macq. 80*.

162 TA 1925 s.69(2). For the situation where the terms of a trust itself allow the trustee to resign, see *Custodial Ltd v Cardinal Financial Services Ltd (2005) 7 I.T.E.L.R. 512*.

163 Public Trustee Act 1906 s.5(2).

164 Judicial Trustees Act 1896 s.4.

165 See para.27-017.

166 TA 1925 s.39(2); TLATA 1996 s.19(4).
167 TA 1925 s.40(2), (3).
168 TA 1925 s.40(4); see paras 27-022 to 27-023.
169 TA 1925 s.40(2).

End of Document

3. - Replacement

27-035 A trustee may be released from his trust by being replaced on the appointment of a new trustee. [170]

Footnotes

170 See para.27-012.

4. - Removal

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Mainwork

Part 5 - Trusts

Chapter 27 - Appointment, Retirement and Removal of Trustees

Section 6. - Determination of Trusteeship

4. - Removal

27-036 Apart from statute, the court has an inherent jurisdiction to remove a trustee (including a trustee of a foreign trust [171]) and to appoint a new one in his place. As the interests of the trust are of paramount importance to the court, this jurisdiction will be exercised whenever the welfare of the beneficiaries requires it, [172] even if the trustees have been guilty of no misconduct. [173] The welfare of the beneficiaries is also the court's guide in exercising its statutory powers of removal, e.g. on bankruptcy. [174] A bankrupt trustee ought to be removed from his trusteeship whenever the nature of the trust is such that he has to receive and deal with trust funds so that he can misappropriate them; but if there is no danger to the trust property, bankruptcy by itself will not necessarily induce the court to remove him. [175]

Footnotes

171 *Chellaram v Chellaram [1985] Ch. 409*.

172 *Re Wrightson [1908] 1 Ch. 789*; *Miller v Cameron (1936) 54 C.L.R. 572 (Aus H.C.)*; *Titterton v Oates [2001] W.T.L.R. 319 (Australia)*.

173 *Letterstedt v Broers (1884) 9 App. Cas. 371*.

174 TA 1925 s.41.

175 *Re Barker's Trusts (1875) 1 Ch. D. 43*; *Re Adam's Trust (1879) 12 Ch. D. 634*.

The Powers

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

The Powers

28-001 The general features of equitable powers were in Ch.10. This Chapter considers the powers that a trustee or personal representative must have to carry out his duties. Many of these powers have been conferred on him by statute; and most of these are now contained in the Trustee Act 1925 or the Trustee Act 2000. Except where otherwise stated, the powers apply whenever the trust was created, but only so far as a contrary intention is not expressed in the trust instrument, if any. [1]

Footnotes

1 Trustee Act 1925 s.69(1), (2).

End of Document

Exercise of Powers

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Exercise of Powers

28-002 In general, any power or trust must be exercised by all the trustees. A majority has no power to bind the minority in the context of a private trust,[2] unless the settlement expressly so provides.[3] But if a trustee dies, any power or trust given to the trustees jointly may be exercised or performed by the survivors or survivor of them for the time being,[4] even in the case of discretionary powers.[5] Further, trustees must exercise their powers in the light of the circumstances existing at the time[6]; they cannot bind themselves or their successors,[7] either directly or indirectly,[8] as to how they will[9] or will not[10] exercise a power at any future date.[11] In exercising powers concerned with the administration of the trust estate, their duty is to consider the estate as a whole; they are under no duty to consider the effect of the exercise as between some beneficiaries and others.[12]

Footnotes

2 *Luke v South Kensington Hotel Co (1879) 11 Ch. D. 121* at 125; but see para.23-063 as regards Charitable trusts.
3 See *Re Butlin's Settlement Trusts (1974) 118 S.J. 757* (further proceedings, see paras 16-005, 16-013 and 16-021).
4 TA 1925 s.18(1), replacing TA 1893 s.22(1), which replaced CA 1881 s.38.
5 *Re Smith [1904] 1 Ch. 139*; cf. *Re Harding [1923] 1 Ch. 182*.
6 *Weller v Ker (1866) L.R. 1 Sc. & D. 11*.
7 *Re Hirst [1954] Q.S.R. 344* (see (1955) 71 L.Q.R. 464).
8 *Oceanic Steam Navigation Co v Sutherberry (1880) 16 Ch. D. 236* (grant of future option held bad).
9 *Moore v Clench (1875) 1 Ch. D. 447*.
10 *Chambers v Smith (1878) 3 App. Cas. 795* at 815; *Saul v Pattinson (1886) 54 L.T. 670*.
11 See also para.22-004.
12 *Re Charteris [1917] 1 Ch. 377*; *Re Hayes' Will Trusts [1971] 1 W.L.R. 758*.

End of Document

1. - Power of Sale

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Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 1. - Sale

1. - Power of Sale

(a) Land.

28-003 Trustees of land have all the powers of an absolute owner in relation to the land. [13] This includes the power of sale. The trustee's powers may not be exercised in contravention of any enactment or of any rule of law or equity. [14] The statutory duty of care under s.1 of the Trustee Act 2000 applies to the exercise of trustees of these powers. [15] In exercising these powers the trustees must have regard to the rights of the beneficiaries. [16] Where the beneficiaries under a trust of land are of full age and capacity and absolutely entitled the trustees can convey the land to them even against their wishes. [17] A trustee is under a duty to sell land purchased in breach of trust, [18] unless all the beneficiaries are sui juris and direct him to retain the land. [19] The trustee's power in relation to land may be excluded by the terms of the disposition creating the trust (save in the case of charitable, ecclesiastical or public trusts) and the exercise of any power may be made subject to requiring any consent to be obtained. [20]

(b) Chattels.

28-004 The general rule is that if chattels are settled upon persons in succession, the duty of the trustees is to hold the chattels; they cannot sell them. But in certain cases statute has conferred powers of sale.

(1) Chattels devolving with settled land.

28-005 If chattels are settled to devolve with settled land, the tenant for life may sell them with the leave of the court. The purchase-money is payable to the trustees as capital money arising under the Settled Land Act 1925, and must be dealt with as such, or by purchasing other chattels. [21]

(2) Chattels not settled with land.

28-006 (i)If chattels are settled for an entailed interest, the trustees may sell them with the consent of the usufructuary for the time being if of full age. [22] The purchase-money must be held on the same trusts as the chattels. [23]

(ii)If the chattels are not settled for an entailed interest, but, e.g. on A for life with remainder to B, the trustees have no power to sell them unless:

(a)they are authorised to apply capital money for some specific purpose, when they may raise the money by selling any part of the trust estate, e.g. the chattels, [24] or

(b)they are authorised by the court under the Trustee Act 1925 s.57, to sell the chattels. [25]

(c) General.

28-007 Where trustees are authorised by the trust instrument or by law to apply capital money for any purpose or in any manner, they have, and are deemed always to have had, power to raise the money required by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession. [26] This applies notwithstanding a contrary direction in the trust instrument (if any), but does not apply to trustees of a charity or to Settled Land Act trustees. [27] This power cannot be used to raise money by mortgaging existing assets in order to acquire additional assets. [28]

Footnotes

13 Trusts of Land and Appointment of Trustees Act 1996 s.6(1).
14 TLATA 1996 s.6(6) and see s.6(8).
15 TLATA 1996 s.6(9), as inserted by s.40(1), Sch.2 para.45 of TA 2000. See also para.29-003.
16 TLATA 1996 s.6(5); and see *Ferris and Battersby (2009) Conv 39*.
17 TLATA 1996 s.6(2).
18 *Re Patten and Edmonton Union (1883) 52 L.J.Ch. 787*.
19 *Wright v Morgan [1926] A.C. 788* at 799. See para.29-033.
20 TLATA 1996 s.8.
21 SLA 1925 s.67. See *Re Hope [1899] 2 Ch. 679* ("the Hope diamond"); *Re Waldegrave (1899) 81 L.T. 632* (proceeds directed to be applied in renovation of other chattels). cf. *Re Earl of Mount Edgcumbe [1950] Ch. 615*.
22 LPA 1925 s.130(5). The power is not available where a testator who died before 1926 attempted to settle chattels for an entailed interest, as entailed interests in personal estate could not be created before 1926: *Re Hope's Will Trusts [1929] 2 Ch. 136*.
23 LPA 1925 s.130(5).
24 See TA 1925 s.16(1), below.
25 See paras 29-046–29-047.
26 TA 1925 s.16(1).
27 TA 1925 s.16(2).
28 *Re Suenson-Taylor's Settlement Trusts [1974] 1 W.L.R. 1280* (note possible exception at 1283, 1284, acquisition of small piece of land to protect existing land).

End of Document

2. - Mode of Sale

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Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 1. - Sale

2. - Mode of Sale

28-008 A trustee who has a duty or power to sell property may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, together or in lots, by public auction or by private contract, and subject to such conditions of sale as he thinks fit.[29] A duty or power to sell or dispose of land includes a duty or power to sell or dispose of part thereof, whether the division is horizontal, vertical, or made in any other way,[30] so that since 1925 a trustee has been able to sell surface and minerals separately.[31] An express power to sell settled land can be exercised only by the tenant for life or statutory owner, for such a power of sale is taken away from the trustee and added to the powers of the tenant for life or statutory owner under the Settled Land Act 1925.[32]

In the case of a trust for sale of land created by disposition, a power to postpone sale is always implied despite any provision to the contrary in the disposition and the trustees for sale are not liable in any way for postponing the sale for an indefinite period.[33]

Footnotes

29 TA 1925 s.12(1).

30 TA 1925 s.12(2).

31 For the position before 1926 see TA 1893 s.44; and as to personal representatives, see *Re Chaplin and Staffordshire Potteries Waterworks Co Ltd's Contract [1922] 2 Ch. 824*.

32 See TA 1925 s.12(3); SLA 1925 ss.108, 109. See *Re Ball, Jones v Jones [1930] W.N. 111 at 120*.

33 TLATA 1996 s.4(1).

3. - The Price

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 1. - Sale

3. - The Price

28-009 Trustees are bound to sell at the best price reasonably obtainable,[34] so that even if negotiations for a sale are so nearly complete that ordinary commercial morality precludes them from honourably withdrawing, they still must not reject a better[35] offer without first probing it.[36] Nevertheless, they have a discretion and are not bound automatically to reject the lower offer; they may "pray in aid the common-sense rule underlying the old proverb: 'A bird in the hand is worth two in the bush'".[37] There is authority suggesting that trustees cannot sell at a price to be fixed by a valuer,[38] for that would be an unauthorised delegation.[39] With the advance of the science of valuation, it is doubtful whether that strict view would be imposed today.[40]

Footnotes

34 *Marley v Mutual Security Merchant Bank and Trust Co Ltd [1991] 3 All E.R. 198*.

35 The suggestion that a trustee was bound to probe a lower offer to see if it would be raised was rejected in *Davis v Administrator-General (1965) 9 W.I.R. 100* at 114 (Sup. Ct. Jamaica).

36 *Buttle v Saunders [1950] 2 All E.R. 193*: there may thus be a fiduciary duty to "gazump".

37 *Buttle v Saunders [1950] 2 All E.R. 193* at 195, per Wynn-Parry J.

38 *Peters v Lewes and East Grinstead Railway (1881) 18 Ch. D. 429* at 436, 437; *Re Earl of Wilton's Settled Estates [1907] 1 Ch. 50* at 55.

39 For delegation, see paras 28-016–28-025.

40 See *[1985] Conv. 44* (G. Lightman). And in any event, such delegation would most likely be within the implied powers to delegate conferred by TA 2000.

End of Document

4. - Conditions of Sale

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 1. - Sale

4. - Conditions of Sale

28-010 Trustees must be careful not to sell under unnecessarily depreciatory conditions,[41] for if the purchase price is thereby rendered inadequate, the beneficiaries can interfere to stop the sale at any time before completion. After completion, the beneficiaries can hold the trustees personally liable for the loss, but the title of the purchaser will be indefeasible unless he acted in collusion with the trustees.[42]

Footnotes

41 See *Dunn v Flood (1885) 28 Ch. D. 586*.

42 TA 1925 s.13, replacing TA 1893 s.14.

End of Document

5. - Receipt for Purchase-Money

28-011 A purchaser from a trustee is not bound to see to the application of the purchase-money; the trustee's receipt in writing for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power is a sufficient discharge for the same.[43] But except where the trustee is a trust corporation, this provision does not enable a sole trustee to give a valid receipt for the proceeds of sale or other capital money arising under a trust for sale of land, or for capital money arising under the Settled Land Act 1925. The section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust. Further, no purchaser or mortgagee paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees is concerned to see that such money is wanted, or that no more is raised than is wanted.[44]

Footnotes

43 TA 1925 s.14, replacing TA 1893 s.20; slightly amended by LP(Am.)A 1926 Sch. See also *Elliot v Merryman (1740) Barn. Ch. 78*.

44 TA 1925 s.17.

1. - Land

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 2. - Partition

1. - Land

28-012 Apart from a joint tenancy of settled land, land held for persons as joint tenants or tenants in common is subject to a trust of land.[45] The Trusts of Land and Appointment of Trustees Act 1996[46] provides that:

> "the trustees of land may, where the beneficiaries of full age are absolutely entitled in undivided shares to land subject to the trust, partition the land, or any part of it, and provide (by way of mortgage or otherwise) for the payment of any equality money."

The trustees must obtain the consent of the beneficiaries concerned before exercising this power.[47] The trust deed may exclude the power to partition (save in the case of charitable, ecclesiastical or public trusts) or make it subject to the obtaining of any consent.[48]

If a mental patient is entitled to a share, the consent of his receiver will be sufficient to protect the trustees.[49] Similarly, if a minor is absolutely entitled to a share, the trustees may act on his behalf and retain land or other property to represent his share in trust for him.[50] For this power of partitioning to apply, the persons in whom undivided shares in land are absolutely vested need not be beneficially interested; they may be trustees or personal representatives.[51] And the court may intervene if the trustees refuse to exercise their powers.[52]

Footnotes

45 LPA 1925 ss.34, 36 and AEA 1925 s.33 as amended by TLATA 1996 s.5, Sch.2.
46 TLATA 1996 s.7(1).
47 TLATA 1996 s.7(3).
48 TLATA 1996 s.8.
49 See Halsbury's Laws of England 4th edn Vol.30 para.1463.
50 TLATA 1996 s.7(5).
51 *Re Brooker [1934] Ch. 610*.
52 See paras 29-039–29-042.

End of Document

2. - Chattels

28-013 "Where any chattels belong to persons in undivided shares, the persons interested in a moiety or upwards may apply to the court for an order for division of the chattels or any of them, according to a valuation or otherwise, and the court may make such order and give any consequential directions as it thinks fit." [53]

Footnotes

53 LPA 1925 s.188.

1. - Power to Insure

28-014 Trustees are not bound to insure the trust property against loss or damage by fire unless the trust instrument imposes such an obligation upon them.[54] Trustees have a power to insure against any kind of risk, and in respect of any kind of property.[55] Special provision is made for bare trusts, permitting the beneficiaries to give directions as to whether and how far it is to be exercised.[56] Trustees are under the statutory duty of care imposed by the Trustee Act 2000 when exercising the power to insure.[57]

Footnotes

54 *Bailey v Gould (1840) 4 Y. & C. 221*.

55 TA 1925 s.19 (as substituted by s.34 of TA 2000) which came into force on 1 February 2001: see TA 2000 (Commencement) Order (SI 2001/49).

56 TA 1925 s.19(2).

57 TA 2000 s.2 and Sch.1 para.5. See para.29-003.

2. - Application of Insurance Money

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 3. - Insurance

2. - Application of Insurance Money

28-015 The Trustee Act 1925 [58] provides that money received after 1925 by trustees or any beneficiary under a policy of insurance [59] against the loss or damage of any property subject to a trust or to a settlement within the Settled Land Act 1925, whether by fire or otherwise, is to be capital money if the policy has been kept up under any trust in that behalf, or under any power (statutory or otherwise) or in performance of any covenant or of any obligation (statutory or otherwise) or by a tenant for life impeachable for waste. [60] If the money is receivable in respect of settled land or any building or works thereon, it must be applied like other capital money arising under the Settled Land Act; if receivable in respect of personal chattels settled as heirlooms within the meaning of the Settled Land Act 1925, the money is to be treated as money arising from a sale of the chattels [61] ; if receivable in respect of land subject to a trust of land or personal property held on trust for sale, it must be treated like the proceeds of sale; and in any other case the money must be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it is payable. [62]

The money may also be applied in rebuilding, reinstating, replacing and repairing the property lost or damaged, but only with the consent of any person whose consent is required to the investment of money subject to the trust. [63] The section does not prejudice the right of any person to require the money to be applied in rebuilding, or the rights of any mortgagee, lessor or lessee, whether under any statute or otherwise. [64]

Footnotes

58 TA 1925 s.20, apparently suggested by *Re Quicke's Trusts [1908] 1 Ch. 887*.

59 This phrase excludes value payments under the War Damage Act 1943 from the section: *Re Scholfield's WT [1949] Ch. 341*.

60 TA 1925 s.20(1); and see s.20(2) for the duties of a person other than the trustees by whom the money is receivable.

61 See SLA 1925 s.67; see para.28-005.

62 TA 1925 s.20(3).

63 TA 1925 s.20(4).

64 TA 1925 s.20(5).

Section 4. - Delegation

28-016 The office of trustee is one of personal confidence, and so, in general, cannot be delegated; for trustees who take upon themselves the management [65] of the trust property have no right to shift their duty on to other persons. For example a trustee of a trust estate which includes a controlling block of shares in a private company will be liable if he fails properly to supervise the directors. [66] Delegatus non potest delegare. But this rule is subject to important qualifications. [67]

Footnotes

65 For delegation of powers, see para.11-021.

66 *Re Lucking's Will Trusts [1968] 1 W.L.R. 866*; *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*; *Bogg v Raper (1998/1999) 1 I.T.E.L.R. 267*.

67 The court may confer a wider power of delegation than the statutory powers following: see *Steel v Wellcome Custodian Trustees Ltd [1988] 1 W.L.R. 167* at 174.

1. - Employment of Agents

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 4. - Delegation

1. - Employment of Agents

(a) Before 1926.

28-017 Trustees have always been entitled to employ agents (at the cost of the trust funds) to act for them when there was any moral or legal necessity for this, [68] e.g. a solicitor to do conveyancing work, or a stockbroker to buy and sell stocks and shares. But in the original selection of the agent and in the subsequent supervision of his acts the trustees were bound to act as reasonable men, and so would be liable if they employed him in work outside his usual business. [69]

(b) After 1925.

28-018 The Trustee Act 1925 s.23 extended and modified this rule. It provided that subject to any contrary provision in the trust instrument [70] :

> "trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith." [71]

(c) Part IV of the Trustee Act 2000.

28-019 The provisions of s.23 of the Trustee Act have now been repealed and replaced by Pt IV of the Trustee Act 2000. [72] Section 11 of the Trustee Act 2000 provides that the trustees of a trust may authorise any person to exercise any or all of their delegable functions as agent. In the case of a non-charitable trust delegable functions consist of any function other than:

> "(a)any functions relating to whether or in what way any assets of the trust should be distributed;
>
> (b)any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital;

> (c)any power to appoint a person to be a trustee of the trust; or
>
> (d)any power conferred by any other enactment or the trust instrument which permits the trustees to delegate their functions or to appoint a person to act as a nominee or custodian."

In the case of charitable trusts, the trustees' delegable functions are defined more narrowly by s.11 as:

> "(a)any function consisting of carrying out a decision that the trustees have taken;
>
> (b)any function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, managing the land and creating or disposing of an interest in the land);
>
> (c)any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose;
>
> (d)any other function prescribed by an order made by the Secretary of State."

The trustees may appoint any person (including one of their number) to be an agent. But they cannot appoint a beneficiary as their agent even if the beneficiary is also a trustee. [73]

An agent to whom the trustees have delegated any of their functions is generally subject to any specific duties or restrictions attached to the functions had the function been exercised by the trustees themselves. [74] But this does not apply to any requirement to obtain advice if the agent is himself the kind of person from whom it would have been proper to obtain advice. [75] It also does not apply to the duty of trustees of land under s.11 of the Trusts of Land and Appointment of Trustees Act 1996 to consult the beneficiaries and give effect to their wishes. That duty is not delegable. [76]

Generally the trustees may appoint an agent on such terms as they may determine. This is subject to two qualifications. First, terms which permit the agent to appoint a substitute, restrict the liability of the agent or his substitute, or which permit the agent to act in circumstances capable of giving rise to a conflict of interest may be agreed only where it is reasonably necessary to do so. [77] Secondly the trustees must not authorise a person to exercise any of their asset management functions unless it is covered by an agreement in writing and unless they have prepared a policy statement which must also be in writing and with which the agent must comply giving guidance as to how the functions should be exercised. [78]

The powers of the trustees to appoint agents is subject to the terms of the trust instrument which may enlarge or restrict those powers. [79] Subject to that the provisions apply to trusts whether created before or after the commencement of the Act. [80]

A trustee is not liable for any act or default of an agent so long as he has complied with his statutory duty of care [81] in entering into arrangements to appoint him or in complying with his duty under s.22 to review those arrangements from time to time. [82]

Footnotes

68 *Ex p. Belchier (1754) Amb. 218*; *Speight v Gaunt (1883) 9 App. Cas. 1*; *Re De Pothonier [1900] 2 Ch. 529*; *Field v Field [1894] 1 Ch. 425*.

69 *Speight v Gaunt (1883) 9 App. Cas. 1*; *Learoyd v Whiteley (1887) 12 App. Cas. 727*; *Fry v Tapson (1884) 28 Ch. D. 268*; *Re Weall (1889) 42 Ch. D. 674*.

70 TA 1925 s.69(2).

71 TA 1925 s.23(1).

72 TA 2000 s.40(1) and Sch.2 para.23. For transitional provisions see s.40(2) and Sch.3 paras 5 and 6. For a treatment of s.23 of TA 1925 see the previous edition of this work, paras 12-16 to 12-18.

73 TA 2000 s.12.

74 TA 2000 s.13(1).

75 TA 2000 s.13(2).
76 TA 2000 s.13(4), (5).
77 TA 2000 s.14(2), (3).
78 TA 2000 s.15.
79 TA 2000 s.26.
80 TA 2000 s.27.
81 As to which see para.29-003.
82 TA 2000 s.80.

End of Document

2. - Valuation of Securities

(a) Valuation and advice.

28-020 The provisions of ss.1 and 3 to 5 of the Trustee Act 2000 regarding the trustees' duty to obtain and consider proper advice before making investment decisions, their duty of care in doing so, the standard investment criteria to be used and the duty to review investments, are now the rules governing valuation and advice concerning investments in securities, unless the terms of the trust make other provision.

It used to be the case under the Trustee Act 1925 s.8 that a trustee lending money on the security of any property on which he could properly lend would not be chargeable with breach of trust by reason of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made if it appeared to the court:

(i)that the trustee in making the loan was acting upon a report as to the value of the property made by a person (whether or not a local man) whom he reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property [83] ;

(ii)that the amount of the loan did not exceed two third [84] parts of the value of the property as stated in the report; and

(iii)that the loan was made under the advice of the surveyor or valuer expressed in the report.

These provisions have, however, now been repealed. [85]

Footnotes

83 *Shaw v Cates [1909] 1 Ch. 389*.

84 Formerly the maximum was two-thirds for freehold land and half for houses; generally even half was excessive for buildings used in trade: see *Re Olive (1886) 34 Ch. D. 70*.

85 See s.40(1) and Sch.2 para.23 of TA 2000. For transitional provisions see s.40(2) and Sch.3 paras 5 and 6. For a treatment of s.8 of TA 1925, see the previous edition of this work, paras 12-20 and 12-21.

3. - Temporary Delegation

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Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 4. - Delegation

3. - Temporary Delegation

(a) The power.

28-021 There is a wide statutory power of temporary delegation. This formerly applied only to trustees intending to remain outside the United Kingdom for over a month, but since 1 October 1971, this restriction has been removed.[86] The power applies to all trustees,[87] including tenants for life, statutory owners and personal representatives.[88] Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding 12 months the execution or exercise of all or any of the trusts, powers or discretions vested in him as trustee either alone or jointly with any other person or persons.[89] Delegation may take the form of a "lasting power of attorney",[90] i.e. one which survives the mental incapacity of the donor of the power.[91] A trustee may delegate to a trust corporation.[92]

(b) Exercise.

28-022 Before, or within seven days after, giving the power of attorney, the trustee must give written notice of its date of operation, its duration, the reason for it, and, where only some trusts, powers or discretions are delegated, details of those delegated, to the other trustees and to any person having power to appoint a new trustee.[93] Failure to give notice does not invalidate acts done or instruments executed by the delegate.[94]

(c) Effect.

28-023 The trustee exercising the power remains liable for the acts and defaults of the delegate as if they were his own.[95] The delegate may exercise any of the powers conferred on the trustee by statute or by the trust instrument, including power to delegate to an attorney the power to transfer any inscribed stock.[96] He may not, however, himself delegate this general power of delegation.[97] A delegate who acts after the power has been revoked will not on that account, if he is unaware of the revocation, incur any liability to the trustee or any other person.[98] Similarly, where a power has been revoked and a person unaware of the revocation deals with the delegate, the transaction will be as valid as if the power were still in existence.[99]

Footnotes

86 See Powers of Attorney Act 1971 ss.9, 11(4).

87 TA 1925 s.25, as amended by Trustee Delegation Act 1999 s.5.

88 TA 1925 s.25(10).

89 TA 1925 s.25(1), (2), as substituted by the Trustee Delegation Act 1999 s.5. For a full treatment of the Trustee Delegation Act 1999 see Whitehouse and Hassall, Trusts of Land, Trustee Delegation and the Trustee Act 2000 (London: Butterworths, 2001).

90 Mental Capacity Act 2005 s.18(1)(i) and Sch.1.

91 TA 1925 s.1.

92 TA 1925 s.25(3).

93 TA 1925 s.25(4). And see s.25(10) for notices to be given by personal representatives, tenants for life and statutory owners.

94 TA 1925 s.25(4).

95 TA 1925 s.25(7).

96 TA 1925 s.25(8). And see s.25(9), authorising banks and companies to ignore the notice of the trust contained in the power of attorney.

97 TA 1925 s.25(8).

98 Powers of Attorney Act 1971 s.5(1).

99 TA 1925 s.5(2).

End of Document

4. - Delegation by Trustee of Land

4. - Delegation by Trustee of Land

28-024 Under the Trusts of Land and Appointment of Trustees Act 1996 s.9, the trustees of land may, by power of attorney, delegate to any beneficiary of full age and beneficially entitled to an interest in possession in land subject to the trust any of their functions as trustees which relate to the land. The statutory duty of care under s.1 of the Trustee Act 2000 applies to trustees of land in deciding whether to delegate any of their functions under s.9 of the 1996 Act and to the duty which is imposed on them to review that delegation from time to time. [100]

Footnotes

100 TLATA 1996 s.9A, as inserted by TA 2000 s.40(1), Sch.2 para.47. For the statutory duty, see para.29-003.

5. - Delegation by Trustee with Beneficial Interest in Land

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 4. - Delegation

5. - Delegation by Trustee with Beneficial Interest in Land

28-025 Section 3(3) of the Enduring Powers of Attorney Act 1985 was designed to enable a co-owner of land to delegate to his co-trustee his power of selling the property. The provision appeared to have a much wider effect however. The Trustee Delegation Act 1999 [101] repealed s.3(3) [102] subject to various transitional provisions. [103] It provides [104] that a trustee with a beneficial interest in land, the proceeds of land or in the income thereof may delegate his powers in relation to the land, the proceeds or the income by power of attorney for an indefinite period. It enables one co-owner of land to delegate powers to his co-trustee but also enables such delegation to a third party and enables a trustee with a beneficial interest in land to delegate his powers even where his co-trustee has no beneficial interest in the land. This power of delegation may be excluded or restricted by the trust instrument [105] or by the power of attorney itself. [106] Subject to the terms of the trust instrument the trustee remains liable for the acts or defaults of the donee of the power of attorney. [107] A purchaser dealing with a donee of a power of attorney is not required to investigate whether the trustee had a beneficial interest in the property so as to entitle him to exercise the power of delegation under this Act: the purchaser may rely on an appropriate written statement by the donee to that effect. [108]

Footnotes

101 The Act came into force on 1 March 2000 (SI 2000/216).
102 TDA 1999 s.12, Sch.
103 TDA 1999 s.4.
104 TDA 1999 s.1(1).
105 TDA 1999 s.1(5).
106 TDA 1999 s.1(3).
107 TDA 1999 s.1(4).
108 TDA 1999 s.2.

End of Document

1. - Compromise of Claims

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Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 5. - Compromise and Valuation

1. - Compromise of Claims

28-026 The Trustee Act 1925 [109] gives wide powers of compromise and valuation to a personal representative, to two or more trustees acting together, to a judicial trustee, [110] or (subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation) to a sole acting trustee where by the instrument (if any) creating the trust or by statute [111] a sole trustee is authorised to execute the trusts and powers imposed in him. These persons may, if and as they or he think or thinks fit:

(i)accept any property before the time at which it is made transferable or payable; or

(ii)sever and apportion any blended trust funds or property; or

(iii)pay or allow any debt or claim on any evidence that he or they think sufficient; or

(iv)accept any composition or security for any debt or for any property claimed; or

(v)allow any time of payment of any debt; or

(vi)compromise, compound, abandon, submit to arbitration or otherwise settle any debt or claim.

These powers are to be given a wide construction. [112] In compromising a claim to property in the hands of a beneficiary the trustees may accept a surrender of his interest in satisfaction of the claim, if satisfied that such a course is expedient for the trust as a whole. [113] A composition of this kind does not amount to a variation or rearrangement of the trusts of the settlement. [114]

Due attention should be paid to the views of the beneficiaries, but the decision rests with the trustees upon a view of all the circumstances. [115] Yet they must exercise an active discretion, and not just passively fail to take proper steps, e.g. to collect debts. [116] These powers enable an executor to compromise a claim by his co-executor against the estate. [117] They also allow a trustee under a deed of arrangement to treat a debt as preferential. [118]

Footnotes

109 TDA 1999 s.15, replacing TA 1893 s.21.
110 *Re Ridsdel [1947] Ch. 597*.
111 For example, a trustee of a deed of arrangement: see *Re Shenton [1935] Ch. 651*.
112 *Re Earl of Strafford [1980] Ch. 28* at 47, 51.
113 *Re Earl of Strafford [1980] Ch. 28*.
114 *Re Earl of Strafford [1980] Ch. 28* at 47, 48, 51. See para.29-044.
115 *Re Ezekiel's Settlement Trusts [1942] Ch. 230*; *Re Earl of Strafford [1980] Ch. 28*.
116 *Re Greenwood, Greenwood v Firth (1911) 105 L.T. 509*.
117 *Re Houghton [1904] 1 Ch. 622*. But see *Re Boyle [1947] I.R. 61*.

118 *Re Shenton [1935] Ch. 651*.

End of Document

2. - Reversionary Interests

(a) Powers.

28-027 Where trust property includes any share or interest in property not vested in the trustees, or the proceeds of sale of any such property, or any other thing in action, the trustees, on the same falling into possession or becoming payable or transferable, may:

(i)agree or ascertain the amount or value thereof in such manner as they may think fit; or

(ii)accept any authorised investments in or towards satisfaction thereof; or

(iii)allow any deductions for duties, costs, charges and expenses which they may think proper or reasonable; or

(iv)execute any release, without being responsible in any such case for any loss occasioned by any loss occasioned by any act or thing so done by them in good faith. [119]

(b) Protection.

28-028 In such cases the trustees are under no obligation:

(i)to place any distringas notice or apply for any stop or other like order [120] upon any securities or other property out of or on which such share or interest or other thing in action is derived, payable or charged; or

(ii)to take any proceedings on account of any act, default or neglect on the part of the persons in whom such securities or other property is or has been vested,

unless required in writing so to do by any beneficiary, and unless satisfactory provision is made for payment of the costs of proceedings. [121]

Footnotes

119 TA 1925 s.22(1).

120 For stop orders and distringas (or stop) notices, see CPR Pt 50 r.50.1 and Sch.1, RSC Order 50 rr.10.

121 TA 1925 s.22(2).

End of Document

3. - Valuation of Trust Property

28-029 For the purpose of giving effect to the trust or any of the provisions of the instrument (if any) creating the trust or of any statute, trustees may from time to time (by duly qualified agents) ascertain and fix the value of any trust property in such manner as they think proper, and any valuation so made if they have discharged the duty of care set out in s.1(1) of the Trustee Act 2000 will be binding upon all persons interested under the trust. [122]

Footnotes

122 TA 1925 s.22(3), as amended by TA 2000 s.40(1), Sch.2 para.22(b).

1. - Payment into Court

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 6. - Protection Against Claims

1. - Payment into Court

28-030 In case of difficulty, trustees or personal representatives may obtain a discharge by paying into court any trust money or securities in their hands or under their control [123] ; and the receipt or certificate of the proper officer is a sufficient discharge. [124] If they are unanimous, they may make the payment into court merely on filing an affidavit or witness statement [125] ; but if only a majority wish to make payment in, they can do so by obtaining an order of the court. [126] Trustees should make a payment in only when there is no other way of obtaining a discharge, as where they cannot obtain a valid receipt [127] ; thus a doubt as to which of several persons are entitled to the trust fund should be resolved by instituting proceedings in which those persons are named as defendants. [128] Life assurance companies have a somewhat similar power of paying policy moneys into court in cases of difficulty. [129]

Footnotes

123 TA 1925 ss.63(1), 68(17), replacing TA 1893 ss.42, 50, which replaced earlier legislation. TA 1925 s.63(1) was slightly amended by the Administration of Justice Act 1965 s.36(4), Sch.3.

124 TA 1925 s.63(2).

125 CPR Pt 37, PD 9.1; Court Funds Rules 1987 r.14(1)(ii)(b). A personal representative may make a written request for payment in: above r.15(1)(ii)(b).

126 TA 1925 s.63(3). See s.63(4) for ancillary powers.

127 See, e.g. *Re Parker's Will (1888) 39 Ch. D. 303*.

128 See *Re Birkett (1878) 9 Ch. D. 576*; *Re Giles (1886) 55 L.J.Ch. 695*.

129 Life Assurance Companies (Payment into Court) Act 1896.

End of Document

2. - Advertisement for Claimants

(a) Advertisement.

28-031 With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the Trustee Act 1925 s.27, [130] authorises the trustees of a settlement, trustees of land, trustees for sale of personal property or personal representatives, to advertise for claimants, stating their intention to make the conveyance or distribution, and requiring any person interested to send in particulars of his claim within a stated time, not being less than two months. The advertisement must be inserted in the *London Gazette* and in a newspaper circulating in the district in which the land is situated [131] ; and such other like notices, including notices elsewhere than in England or Wales, [132] must be given as would in any special case have been directed by the court in an administration action. If the trustees or personal representatives are in doubt as to what notices should be given, they should apply to the court for directions. [133]

(b) Effect of advertisement.

28-032 After the expiration of the time fixed by the notice, the trustees or personal representatives may convey or distribute the property to or among the persons entitled of whose claims (whether formal or not) they have notice, without being liable to other persons. [134] The section offers protection against belated claims not only from creditors but also from next-of-kin or beneficiaries under a will. [135] But it does not prejudice the right of the claimants to follow the property, or any property representing it, into the hands of any person except a purchaser, nor does it free the trustees or personal representatives from any obligation to make searches which an intending purchaser would be advised to make. [136] The section applies notwithstanding anything to the contrary in the will or trust instrument, if any.

Footnotes

130 As slightly amended by LP(Am.)A 1926 Sch., and by TLATA 1996 s.25(1) and Sch.3 para.3(7). The section takes the place of LP(Am.)A 1859 s.29, which applied only to personal representatives.

131 If no land is concerned, the practice is to advertise in a newspaper circulating in the district most likely to be affected, e.g. that in which the deceased lived.

132 See *Re Achillopoulos [1928] Ch. 433*; and see para.33-006.

133 *Re Letherbrow [1935] W.N. 34 at 48*; *Re Holden, Isaacson v Holden [1935] W.N. 52*.

134 TA 1925 s.27(2). See *Guardian Trust and Executors Co of New Zealand Ltd v Public Trustee of New Zealand [1942] A.C. 115*.

135 *Re Aldhous [1955] 1 W.L.R. 459* at 462.

136 TA 1925 s.27(2).

End of Document

3. - Future Liabilities

(a) Need for protection.

28-033 Where a trust estate or the estate of a deceased person included a lease, or land held subject to a rentcharge, the trustees or personal representatives were formerly often in the difficulty that they could not safely distribute the remainder of the estate to those entitled without first setting aside a fund to meet any future liability that might accrue under the lease or rentcharge. This might result in large sums being withheld from the beneficiaries for a long period, especially as the estate of an original lessee might remain liable under the covenants in the lease throughout its term. This difficulty can be avoided either by distributing the estate under an order of the court or by taking advantage of the Trustee Act 1925 s.26, [137] a provision which cannot be excluded by anything to the contrary in the will or trust instrument. [138]

(b) The protection.

28-034 Section 26 of the Trustee Act 1925 is of limited benefit, for it applies only to the liabilities of personal representatives "as such". This refers, for example, to the representative liability of personal representatives, and not to the personal liability as assignees that they incur if, as is usual, they take possession of the property. [139] The personal representative or trustee must:

(i)satisfy all liabilities under the lease or grant which have accrued and have been claimed; and

(ii)where necessary, set apart a sufficient sum to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property; and

(iii)convey the property to a purchaser, legatee, devisee, or other person entitled to call for a conveyance thereof. For this purpose, a person who is paid to take an assignment is probably not a "purchaser". [140]

On doing this, the personal representative or trustee may distribute the estate to those entitled without setting aside any further fund, and he will not be personally liable in respect of any subsequent claim under the lease or grant. [141] But this does not prejudice the right of the lessor or grantor to pursue his claim by following the assets into the hands of those who have received them. [142]

Footnotes

137 Replacing and extending LP(Am.)A 1859 ss.27, 28: amended by LP(Am.)A 1926 Sch., and Landlord and Tenant (Covenants) Act 1995 s.30(1) and Sch.1.

138 TA 1925 s.26(2).

139 *Re Owers, Public Trustee v Death (No.2) [1941] Ch. 389*; *Re Bennett, Midland Bank Executor and Trustee Co Ltd v Fletcher [1943] 1 All E.R. 467*. In practice, trustees sometimes insure against such risks.

140 So held in *Re Lawley [1911] 2 Ch. 530*, on the Act of 1859; and this may still apply under the Act of 1925; see Hood & Challis, Property Acts 8th edn (1938) p.626.

141 TA 1925 s.26(1).

142 TA 1925 s.26(2).

End of Document

4. - Authority of Court

28-035 In certain cases the courts may authorise trustees to do what would otherwise be a breach of trust. This is discussed below. [143]

Footnotes

143 See para.29-040.

Section 7. - Maintenance and Advancement

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 7. - Maintenance and Advancement

28-036 Settlements frequently contained powers authorising trustees to apply the income or capital of the trust funds towards the maintenance or advancement of a beneficiary who was still a minor or whose interest was still contingent. Express powers are still to be found, but they have been largely supplanted by statutory powers.

End of Document

1. - Express Powers

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 7. - Maintenance and Advancement

1. - Express Powers

(a) Maintenance.

28-037 Provisions for maintenance may take the form of a mere discretionary power for the trustees to apply the income of a fund for the maintenance and education of children, or they may amount to an express trust for such purposes. Moreover, without being contrary to public policy, such provisions may prohibit any payments being made while the child is in the father's custody or control or while the father has "anything to do with his education or bringing up". [144]

Under a power to apply income for maintenance, the trustees must honestly exercise their discretion; if they do the court will not interfere. [145] But if the trustees pay over the whole fund to the father without exercising their discretion at all, he may be called upon to refund all that he has received. [146] Moreover, they cannot delegate to others a discretionary power of maintenance which is given to them personally. [147] On the other hand, under a trust in a marriage settlement to apply income for the maintenance and education of the children, the father is entitled to have the income so applied without reference to his ability or inability to maintain and educate them, for this is a matter of contract. [148]

(b) Advancement.

28-038 Powers to apply capital are sometimes limited to the "advancement" of a minor or contingent beneficiary, or they may extend to the "advancement or benefit" of such a beneficiary. "Advancement" has been said to be "a word appropriate to an early period of life", [149] and thus suggests the establishing of a beneficiary in life. [150] This is too restrictive, for it is better regarded as making some permanent provision for a child or other beneficiary. [151] It extends to advances for the purchase of a house for a general medical practitioner, [152] or for a settlement on marriage, [153] but not for the payment of debts of the husband of the beneficiary. [154] "Benefit" is a word of wider import than "advancement" [155]; it authorises payments for the maintenance [156] of a beneficiary, [157] the discharge of his debts, [158] a loan for setting up the beneficiary's husband in business, [159] the making of settlements on beneficiaries in no immediate need, with a view to saving estate duty [160] or avoiding other risks of depleting the trust funds, [161] and even the making of charitable donations in discharge of moral obligations felt by a wealthy beneficiary. [162] Yet however wide the power is, and even if it authorises out-and-out payments to the person advanced, the trustees must have a good reason for making the advance, and see that its purpose is carried out. [163]

Footnotes

144 *Re Borwick's Settlement [1916] 2 Ch. 304*.

145 *Bryant v Hickley [1894] 1 Ch. 324*.

146 *Wilson v Turner (1883) 22 Ch. D. 521*.

147 *Re Greenslade [1915] 1 Ch. 155*; distinguished in *Re Mewburn's Settlement [1934] Ch. 112*.

148 *Murdy v Earl Howe (1793) 4 Bro. C.C. 223*; and see *Re Peel [1936] Ch. 161*.

149 *Re Kershaw's Trusts (1868) L.R. 6 Eq. 322* at 323, per Malins VC.

150 Similar questions arise as to the meaning of "portions": see the previous edition of this work para.34-14.

151 *Hardy v Shaw [1976] Ch. 82* (on the meaning of advancement in AEA 1925 s.47).

152 *Re Williams' Will Trusts [1953] Ch. 138*.

153 *Roper-Curzon v Roper-Curzon (1871) L.R. 11 Eq. 452*.

154 *Molyneux v Fletcher and Clark [1898] 1 Q.B. 648*. See also *Talbot v Marshfield (1868) 3 Ch.App. 622*.

155 *Lowther v Bentinck (1874) L.R. 19 Eq. 166* at 169, 170; and see *Netherton v Netherton [2000] W.T.L.R 1171*. Compare *Re Livesey [1953] 1 W.L.R. 1114* ("advancement or preferment").

156 *Re Breeds' Will (1875) 1 Ch. D. 226*.

157 *Re Peel cf. [1936] Ch. 161* at 164, 165.

158 *Lowther v Bentinck (1874) L.R. 19 Eq. 166*. The partial discharge of a person's debts is not necessarily for his benefit: *Abacus (CI) Ltd v Al Sabah (2002) 4 I.T.E.L.R. 55*.

159 *Re Kershaw's Trusts (1868) L.R. 6 Eq. 322*.

160 *Re Ropner's Settlement Trust [1956] 1 W.L.R. 902*.

161 *Re Wills' Will Trusts [1959] Ch. 1*; and see para.28-052.

162 *Re Clore's Settlement Trust [1966] 1 W.L.R. 955*. Under the New Zealand equivalent statutory provision it has been held to be of benefit to a young child to make a capital payment to the mother to enable her to provide the child with a home: *Re Gerbich [2002] N.Z.L.R. 791*. *Re Clore's Settlement Trusts* was applied in *X v A [2006] 1 W.L.R. 741*, and in *Farnsworth v Leigh [2006] W.T.L.R. 477*.

163 *Re Pauling's Settlement Trusts (No.1) [1964] Ch. 303*.

End of Document

2. - Statutory Power of Maintenance

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 7. - Maintenance and Advancement

2. - Statutory Power of Maintenance

28-039 A statutory power of maintenance was conferred by the Conveyancing Act 1881, [164] and this power, in an amended form, is now contained in the Trustee Act 1925 s.31. [165] The power under the Act of 1881 still applies to instruments coming into operation after 1881 but before 1926, whereas the power under the Act of 1925 applies only to instruments which came into operation after 1925. [166] An appointment made after 1925 under a power of appointment created before 1926 is subject to the Act of 1925. [167] The amendments to the statutory power made by s.8 of the Inheritance and Trustees' Powers Act 2014 apply only to trusts created after commencement of s.8, or to trusts created after such commencement by the exercise of any power. [168]

(a) The power.

28-040 Section 31 of the Act of 1925 provides that where any property is held by trustees (including personal representatives [169]) in trust for any person for any interest whatsoever, whether vested or contingent, during the infancy of the beneficiary (if his interest so long continues), the trustees may, at their sole discretion, pay to his parent or guardian or otherwise apply for or towards his "maintenance, education or benefit" the whole or such part of the income of the property (i) as may in all the circumstances be reasonable (if the version of s.31 under which the application is made is the version before amendment by s.8 of the Inheritance and Trustees' Powers Act 2014); or (ii) as the trustees may think fit (if the version of s.31 under which the application is made is the version amended by s.8 of the Inheritance and Trustees' Powers Act 2014). If on attaining full age, namely 18, [170] or 21 if the interest arises under an instrument made before 1970, [171] the beneficiary still has no vested interest [172] in the income, the trustees "shall thenceforth" pay the whole of the income to him until he either attains a vested interest in it or dies, or until failure of his interest. [173] The section applies to all types of property, including settled land. [174]

(b) Contrary intention.

28-041 These provisions apply only so far as no contrary intention is expressed. [175] This is so both as to the discretionary power and as to the apparently imperative direction to pay the income to any beneficiary of full age. [176] An express direction to accumulate income until the attaining of a certain age, whether the age of majority [177] or a greater age, [178] will usually, [179] but perhaps not necessarily, [180] show a contrary intention sufficient to prevent payments being made under the statutory power. This is so even if the direction is void [181]; and such an intention is also shown by deferring a gift, e.g. by giving property to X "after the death of Y". [182]

(c) Right to income.

28-042 Before the power of maintenance can apply there must be income available for the purpose under the section. There must accordingly be "property held by trustees in trust" for the minor [183]; and although a vested annuity is for this purpose to be treated as the income of such property, [184] a share of income allocated to a minor under a discretionary trust is not. [185] Further, the power takes effect subject to any prior interests or charges affecting the property, [186] so that even if the minor has a vested interest in capital, there may be no income available for his maintenance, e.g. because there is a prior life interest in the capital. Where the minor's interest is contingent, it is also necessary to ascertain that the limitation or trust is of a type which carries the intermediate income of the property. [187] This question is considered later, but in general it may be said that all testamentary gifts carry the intermediate income (unless it is otherwise disposed of), with the exception of deferred residuary gifts and contingent pecuniary legacies; and even these latter carry the intermediate income in some important classes of case. [188]

(d) Gifts to a class.

28-043 Where personalty is given to a class of persons contingently on their attaining the age of majority, the fact that one of the class has acquired a vested interest by attaining full age does not prevent the trustees from applying the income derived from the shares of those who are still under full age for their maintenance. [189] Each member of the class is maintainable only out of the portion of income attributable to the time when he is living. [190] But in the case of realty it was held before 1926 that unless the gift expressly referred to income as well as corpus, [191] the whole interest vested in the first member of the class who acquired a vested interest, so that he took the whole income until another share vested. [192] If, however, the gift of realty is contained in the will of a person dying after 1925, this decision appears to be overruled by the statutory provision whereby a contingent specific or residuary devise carries the intermediate income from the death of the testator. [193]

(e) Extent of trustees' discretion.

28-044 All payments are made at the trustees' sole discretion; and they may be made whether or not there is another fund available for the same purposes or there is any other person bound by law to provide for the maintenance or education of the beneficiary. [194] So long as the trustees have regard exclusively to the interests of the beneficiaries, they may exercise their discretion so as to provide a sum for the beneficiaries' education and maintenance notwithstanding that in so doing this has the incidental and unintended benefit of relieving the settlor from an obligation under a court order to provide for the maintenance of the beneficiaries. [195] However, if the trustees are acting under the version of s.31 as it stood before amendment by s.8 of the Inheritance and Trustees' Powers Act 2014, then they are limited to making payments which in all the circumstances are reasonable; and they are directed to have regard to the age of the minor and his requirements, and generally to the circumstances of the case and in particular to what other income is available. Moreover, where they have notice that the income of more than one fund is available, as far as practicable only a proportionate part of the income of each fund should be applied. [196] If, by contrast, the trustees are acting under the version of s.31 as amended by s.8 of the Inheritance and Trustees' Powers Act 2014, then they may make such payments as they may think fit.

(f) Accumulation of surplus income.

28-045 So far as the income arising during infancy is not expended by the trustees under their statutory power, it must be accumulated by investing it, and any profits from so investing it in authorised investments, although the accumulations may be applied for maintenance as if they were current income. [197] Where the minor's interest in the income is vested, he is absolutely entitled to the accumulations on attaining full age [198] or marrying under that age, and in that latter case he can give a valid receipt for them despite his minority. [199] He is also absolutely entitled to the accumulations if at full age [200] or marriage he is entitled to the property in fee simple (whether absolute or determinable), or absolutely, or for an entailed interest. [201] But in other cases, e.g. if the minor has a contingent life interest, or a vested life interest but he dies unmarried under full age, or an absolute interest in personalty that is liable to defeasance (as by the exercise of a power of appointment), the accumulations are an accretion to the capital of the property or share whence they are derived and are subject to the same trusts and powers. [202] When a minor with a vested interest in income dies unmarried, his title to the accumulated income is gone, so that his interest was in substance merely contingent, rather than being vested subject to defeasance. [203] But such a result will not follow if the settlement discloses an intention that the income as and when it falls due shall be held indefeasibly for the beneficiaries. [204] And in the case of a vested annuity, accumulations made during the minority of the annuitant are in any case to be held in trust for the annuitant or his personal representatives absolutely. [205]

Footnotes

164 Conveyancing Act 1881 s.43.

165 See generally *B.S. Ker (1953) 17 Conv. (N.S.) 273* as to the unamended version of TA 1925 s.31.

166 TA 1925 s.31(5).

167 See *Re Dickinson's Settlement [1939] Ch. 27* (special power). Contrast the statutory power of advancement; see para.28-046.

168 Inheritance and Trustees' Powers Act 2014 ss.10(1), (4) and (5). These provisions were brought into force on 1 October 2014: Inheritance and Trustees' Powers Act 2014 (Commencement) Order 2014 (SI 2014/2039) art.2.

169 TA 1925 s.68(17).

170 The age of 18 was substituted for 21 by the Family Law Reform Act 1969 s.1(3), Sch.1. The Act came into force on 1 January 1970: see s.28(3); SI 1969/1140.

171 TA 1925 s.31(1)(ii); Family Law Reform Act 1969 s.1(4), Sch.3 para.5(1), preserving the age of 21 years in such cases.

172 As distinct from having a vested interest liable to defeasance: *Re McGeorge [1963] Ch. 544*.

173 TA 1925 s.31(1); see *Re Jones' Will Trusts [1947] Ch. 48*.

174 See TA 1925 s.31(2)(ii); contrast para.28-047.

175 TA 1925 s.69(2), replacing CA 1881 s.43(3).

176 *Re Turner's Will Trusts [1937] Ch. 15*.

177 See *Re Reade-Revell [1930] 1 Ch. 52*.

178 *Re Turner's Will Trusts [1937] Ch. 15*.

179 *Re Turner's Will Trusts [1937] Ch. 15*; *Re Reade-Revell [1930] 1 Ch. 52*; *Re Stapleton [1946] 1 All E.R. 323*.

180 *Re Thatcher's Trusts (1884) 26 Ch. D. 426*; and see *Re Leng (Deceased) [1938] Ch. 821*.

181 *Re Ransome [1957] Ch. 348*; *Re Erskine's Settlement Trusts [1971] 1 W.L.R. 162*. See the critical comment of *J.G. Riddall [1979] Conv. 423*.

182 *Re McGeorge [1963] Ch. 544*.

183 TA 1925 s.31(1).

184 TA 1925 s.31(4).

185 *Re Baron Vestey's Settlement [1951] Ch. 209*.

186 TA 1925 s.31(1).
187 TA 1925 s.31(3), adopting the rule as established under CA 1881 by *Re George (1877) 5 Ch. D. 837*; *Re Dickson (1885) 29 Ch. D. 331*; *Re Eyre, Johnson v Williams [1917] 1 Ch. 351*; *Re Boulter (No.1) [1918] 2 Ch. 40*. See also *Re Raine [1929] 1 Ch. 716*; *Re Reade-Revell [1930] 1 Ch. 52*.
188 See paras 35-031–35-043.
189 *Re Holford [1894] 3 Ch. 30*; *Re King [1928] Ch. 330*.
190 *Re Joel's Will Trusts [1967] Ch. 14*, applying Apportionment Act 1870. For the Act, see paras 35-045–35-056.
191 *Re Stevens [1915] 1 Ch. 429*; *Re Bird [1927] 1 Ch. 210*.
192 *Re Averill [1898] 1 Ch. 523*.
193 LPA 1925 s.175; para.35-040.
194 TA 1925 s.31(1).
195 *Fuller v Evans [2000] 1 All E.R. 636*.
196 TA 1925 s.31(1) proviso. These limits are often expressly removed.
197 TA 1925 s.31(2), as amended by TA 2000 s.40(1), Sch.2 para.25.
198 See above para.28-040.
199 TA 1925 s.31(2).
200 See above para.28-040.
201 TA 1925 s.31(2).
202 *Re Joel's Will Trusts [1967] Ch. 14*; *Re Sharp's Settlement Trusts [1973] Ch. 331*. Under the Conveyancing Act 1881 s.43, the accumulations were simply directed to be held for the person who ultimately became entitled: see *Re Bowlby [1904] 2 Ch. 685*; *Re King [1928] Ch. 330*.
203 *Stanley v IRC [1944] K.B. 255*.
204 *Re Delamere's Settlement Trusts [1984] 1 W.L.R. 813* (revocation of trusts appointed in exercise of power).
205 TA 1925 s.31(4).

End of Document

3. - Statutory Power of Advancement

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Mainwork

Part 5 - Trusts

Chapter 28 - Specific Powers: The Administrative Powers of Trustees

Section 7. - Maintenance and Advancement

3. - Statutory Power of Advancement

28-046 Trustees and personal representatives formerly had no power to use capital (as opposed to income) for the benefit of either a minor or an adult, except under the authority of an express provision in the settlement or will or under an order of the court. But by the Trustee Act 1925 s.32, a statutory power of advancement is incorporated in trusts created or constituted after 1925.[206] This includes trusts under a will made before 1926 by a testator who dies after 1925,[207] and trusts declared by an appointment made after 1925 under a general[208] (though not a special[209]) power created before 1926. The power may be excluded by an expressed[210] contrary intention,[211] as where there is a trust for accumulation,[212] or a power to raise sums not exceeding a specified amount for the benefit of the beneficiaries.[213]

(a) The power.

28-047 Under the section any capital money subject to a trust may at any time or times be paid or applied by trustees or personal representatives[214] for "the advancement or benefit" of any person entitled to the capital of the trust property or of any share thereof. Although the section refers to "capital money", assets can be conveyed in specie to avoid the circuitous course of advancing money to the beneficiary and then selling the assets to him.[215] This is confirmed by recent amendments to the power.[216] Further, capital is "applied" even if the beneficiary is merely given a life interest in the income of the capital fund.[217] The power applies[218] whether the beneficiary is entitled absolutely or contingently on his attaining any specified age or on the occurrence of any other event, including a double contingency, such as attaining the age of 21 years and surviving a life tenant.[219] It also applies where his interest is subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether it is in possession or in remainder or reversion, and even if it is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs.[220] But it applies only where the trust property consists of money or securities, or property held upon trust for sale,[221] and does not apply to capital money arising under the Settled Land Act 1925.[222]

(b) Limitations on the power.

28-048 There are some important limitations on the power,[223] though these can be and frequently are removed or modified by express provisions in the settlement.[224]

(1) Possible limit of one-half.

28-049 As originally enacted, the power prescribed that not more than half of the beneficiary's vested or presumptive share may be advanced. Therefore, once the limit is reached, no further advance can be made even if the retained half increases in value. [225] This limitation is removed prospectively by s.9(3)(b) of the Inheritance and Trustees' Powers Act 2014. This amendment to the power applies only to trusts created after commencement of s.9(3)(b), or to trusts created after such commencement by the exercise of any power. [226]

(2) Bringing into account.

28-050 If the beneficiary is or becomes absolutely and indefeasibly entitled to a share in the trust property, the advance must be brought into account as part of the share. Under the power as originally enacted, it appeared that apart from this provision, a payment under the section appears to take the money out of the settlement altogether, [227] so that the recipient is under no liability to repay it or bring it into account, [228] e.g. if he is entitled only contingently and dies before the contingency occurs. Section 9(6) of the Inheritance and Trustees' Powers Act 2014 inserts a new sub-s.(1A) into the power, which provides that:

> "if trustees have exercised their power of advancement under section 32(1) of the Trustee Act 1925, the money or other property advanced to a beneficiary may be treated as a percentage of the overall value of the trust (as opposed to strictly according to their monetary value) when it is brought into account. Trustees may exercise their choice to treat advancements in this way either expressly, for example in writing in the trust deed itself or in an implied way, for example through the act of dividing up the trust fund amongst the beneficiaries." [229]

This new provision was brought into force on 1 October 2014, and applies prospectively thereafter to all trusts, whenever created or arising. [230]

(3) Prior interests.

28-051 No advance can be made to the prejudice of a person entitled to a prior life or other interest, whether vested or contingent, unless he is in existence [231] and of full age and gives a written consent. The section does not require the consent of a person who is merely one of an indefinite number of objects of a discretionary trust, [232] even if the trust has come into operation [233]; but the court has no power to dispense with the consent of a person with whom it is impossible to communicate. [234]

(c) The trustees' discretion.

28-052 The trustees may pay or apply the money for the "advancement or benefit" of the beneficiary "in such manner as they may, in their absolute discretion, think fit". [235] In construing the term "advancement or benefit" the courts are guided by the decisions on express powers. [236] "Benefit" is "the widest possible word one could have", [237] and so in a proper exercise of their discretion trustees may not only provide for the education of the beneficiary [238] but also make a payment directly to him [239] or make a

settlement on him and his family, either for their immediate or their future benefit.[240] This is so even where the members of the family are not objects of the original trust; for it can be a benefit to a person that his family is provided for.[241]

The rule against perpetuities applies to exercises of the statutory power as if it were a special power of appointment contained in the settlement.[242] Yet if parts of such a sub-settlement are void for perpetuity, the advance will be valid if what remains is within the scope of the power, if the trustees have directed their minds to the right considerations and if the result can be regarded as beneficial to the person intended to be advanced.[243]

Footnotes

206 TA 1925 s.32(3).

207 *Re Darby, Farrell v Fargus (1943) 59 T.L.R. 418*; *Re Taylor's Will Trusts (1950) 66 (2) T.L.R. 507*.

208 *Re Bransbury [1954] 1 W.L.R. 496*.

209 *Re Batty (Deceased) [1952] Ch. 280*; criticised by *J.H.C. Morris at (1952) 68 L.Q.R. 319*. Contrast the statutory power of maintenance, para.28-039.

210 See *Re Rees (Deceased) [1954] Ch. 202*.

211 TA 1925 s.69(2).

212 *IRC v Bernstein [1961] Ch. 399*; and see para.29-045.

213 *Re Evans's Settlement [1967] 1 W.L.R. 1294*.

214 See TA 1925 s.68(17).

215 *Re Collard's Will Trusts [1961] Ch. 293* (see *(1961) 77 L.Q.R. 161*); *Pilkington v IRC [1964] A.C. 612* at 639; and see para.5-029.

216 The relevant provisions, Inheritance and Trustees' Powers Act 2014 s.9(1)–(2), (3)(a) and (4)–(5), were brought into force on 1 October 2014: see Inheritance and Trustees' Powers Act 2014 (Commencement) Order 2014 (SI 2014/2039) art.2. Once in force these provisions apply prospectively to any trusts, whenever created or arising: Inheritance and Trustees' Powers Act 2014 s.10(2).

217 *Re Hastings-Bass [1975] Ch. 25*.

218 TA 1925 s.32(1).

219 *Re Garrett [1934] Ch. 477*.

220 TA 1925 s.32(1).

221 *Re Stimpson's Trusts [1931] 2 Ch. 77*.

222 TA 1925 s.32(5). Contrast above para.28-040. Settlements of land usually contain provisions for portions.

223 TA 1925 s.32(1), proviso.

224 See TA 1925 s.69(2).

225 *Re Marquess of Abergavenny's Estate Act Trusts [1981] 1 W.L.R. 843*.

226 Inheritance and Trustees' Powers Act 2014 s.10(3)–(5). These provisions were brought into force on 1 October 2014: see Inheritance and Trustees' Powers Act 2014 (Commencement) Order 2014 (SI 2014/2039) art.2.

227 *Pilkington v Inland Revenue Commissioners [1959] Ch. 699* at 705; and see SC on appeal, sub nom. *Pilkington v Inland Revenue Commissioners [1964] A.C. 612* at 638. cf. *Hart v Briscoe [1979] Ch. 1*; *Hoare Trustees v Gardner [1979] Ch. 10* (charge to capital gains tax).

228 See *Re Fox [1904] 1 Ch. 480* (express power of advancement).

229 Explanatory Notes to the Inheritance and Trustees' Powers Act 2014, at [47].

230 Inheritance and Trustees' Powers Act 2014 s.10(2) and Inheritance and Trustees' Powers Act 2014 (Commencement) Order 2014 (SI 2014/2039) art.2.

231 See *IRC v Bernstein [1961] Ch. 399* at 411.

232 *Re Harris' Settlement (1940) 162 L.T. 358*.

233 *Re Beckett's Settlement [1940] Ch. 279*.

234 See *Re Forster's Settlement [1942] Ch. 199* (express power of advancement).

235 TA 1925 s.32(1).

236 *Pilkington v IRC [1964] A.C. 612* at 634; see para.28-046. *Pilkington v IRC* was considered in *Re Pinto's Settlement [2004] W.T.L.R. 879* (Jersey).

237 *Re Moxon's Will Trusts [1958] 1 W.L.R. 165* at 168, per Danckwerts J.

238 Assumed in *Re Garrett [1934] Ch. 477*.

239 *Re Moxon's Will Trusts [1958] 1 W.L.R. 165*. See generally *D.W.M. Waters (1958) 22 Conv.(N.S.) 413*.

240 *Pilkington v IRC [1964] A.C. 612*.

241 *Re Hastings-Bass [1975] Ch. 25* at 39.

242 *Pilkington v IRC [1964] A.C. 612*.

243 *Re Hastings-Bass [1975] Ch. 25* (advancement upheld); contrast *Re Abrahams' Will Trusts [1969] 1 Ch. 463* (whole advancement bad). See also the interpretation of these (and other) cases by the Supreme Court in *Pitt v Holt [2013] UKSC 26; [2013] 2 A.C. 108; [2013] 2 W.L.R. 1200*.

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4. - The Court

(a) Inherent jurisdiction.

28-053 The court has power to allow a minor's property to be used for his maintenance. Usually only income will be used for this purpose,[244] but there are exceptions. Thus "in order to provide bread for the infant"[245] the court may break into the capital of a legacy if it is small[246] or there is no other source of maintenance,[247] or if payment has to be made for past maintenance.[248] The court will normally make no allowance to the father for this purpose, since a father is bound to maintain his children.[249] An allowance has been made to the mother, however, on the ground that the court does not recognise her as being under a similar obligation[250]; and even the father will have an allowance made to him if he is not able to give the child an upbringing suitable to the child's expectant fortune.[251] The court may order maintenance despite an express direction to accumulate.[252]

A father may be ordered to refund any payments made out of his child's property for its maintenance if they are made in circumstances in which he would not have been allowed anything for maintenance; on the other hand, where he has applied his own property for the child's maintenance in circumstances in which he would have been allowed something for that purpose, he will receive a sum in respect of such past maintenance.[253]

(b) Extent of maintenance.

28-054 In allowing maintenance for a minor, regard will be had to the state and condition of his family. Thus, where one of several children is entitled to property, the court will make a liberal allowance to him out of his property in order that he may be the better able to maintain his brothers and sisters and so derive indirectly a greater benefit from their society.[254] A liberal allowance will also sometimes be made for minors in order to relieve or assist their parents where the latter are in comparatively distressed circumstances.[255] In all these cases it is the minor's benefit which is considered, although the benefit he derives may sometimes seem somewhat remote.[256]

(c) Statutory jurisdiction.

28-055 The court has a special statutory power to dispose of the property of a minor in order to provide funds for his maintenance.[257]

> "Where an infant is beneficially entitled to any property the court may, with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant, make an order—
>
> (a)appointing a person to convey such property; or
>
> (b)in the case of stock, or a thing in action, vesting in any person the right to transfer or call for a transfer of such stock, or to receive the dividends or income thereof, or to sue for and recover such thing in action, upon such terms as the court may think fit."[258]

Thus even if a minor is entitled only in remainder the court can authorise a mortgage of his entailed interest in order to raise money for his maintenance, just as if he had barred the entail.[259] Similarly, the court may appoint a person to convey a minor's entailed interest on sale with a view to resettling the proceeds, for this is a single transaction and is an "application" of the proceeds, for the minor's benefit.[260] Yet although "maintenance, education, or benefit" are words of the widest import, there must be an intention to apply the money for these purposes before the court can authorise a sale of the minor's interest for cash.[261]

Footnotes

244 See *Re Swanston (1887) 31 S.J. 427*; *Re De Teissier's Settled Estates [1893] 1 Ch. 153*.
245 *Harvey v Harvey (1722) 2 P.Wms. 21* at 23, per Jekyll MR.
246 *Barlow v Grant (1684) 1 Vern. 255*.
247 *Harvey v Harvey (1722) 2 P.Wms. 21*. See generally Simpson on Infants, 4th edn (1926) pp.206, 208.
248 *Re Howarth (1873) 8 Ch. App. 415*.
249 *Fawkner v Watts (1741) 1 Atk. 408*.
250 *Douglas v Andrews (1849) 12 Beav. 310*.
251 *Buckworth v Buckworth (1784) 1 Cox Eq. 80*.
252 See para.29-045.
253 See *Re Evans (1884) 26 Ch. D. 58*.
254 *Bradshaw v Bradshaw (1820) 1 Jac. & W. 647*.
255 *Heysham v Heysham (1785) 1 Cox Eq. 179*.
256 See *Brown v Smith (1878) 10 Ch. D. 377*; *Re Walker, Walker v Duncombe [1901] 1 Ch. 879*.
257 See generally *O. R. Marshall (1957) 21 Conv. (NS) 448*.
258 TA 1925 s.53.
259 *Re Gower's Settlement [1934] Ch. 365*.
260 *Re Meux [1958] Ch. 154*; *Re Bristol's Settled Estates [1965] 1 W.L.R. 469*; *Re Lansdowne's Will Trusts [1967] Ch. 603*. In the last two cases, the order was a prelude to a variation of trusts under the Variation of Trusts Act 1958; for the Act, see para.29-047.
261 *Re Heyworth's Contingent Reversionary Interest [1956] Ch. 364*.

The Cares of Office

29-001 The office of trustee is onerous.

> "A trust is an office necessary in the concerns between man and man, and, if faithfully discharged, attended with no small degree of trouble and anxiety", so that "it is an act of great kindness in any one to accept it." [1]

Footnotes

1 *Knight v Earl of Plymouth (1747) Dick. 120* at 126, per Lord Hardwicke LC.

Duties and Discretions

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Mainwork

Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Duties and Discretions

29-002 A trustee has to perform a number of duties and exercise a number of discretions. In discharging his duties he must observe the utmost diligence, or exacta diligentia, in order to escape liability for any loss sustained by the trust estate. He must obey the trust instrument and the rules of equity unless the court otherwise orders. [2] Some of his most important duties are considered below. The limits on his discretion are considered in Chs 11 and 28 above.

Footnotes

2 For example, under Trustee Act 1925 s.57, para.29-046.

End of Document

Duties at Common Law and under the Trustee Act 2000

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Duties at Common Law and under the Trustee Act 2000

29-003 The duties of trustees are many. The following is only a selection. Those who are asked to become trustees:

> "are bound to inquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers to ascertain what notices appear among them of incumbrances and other matters affecting the trust." [3]

In carrying out the trusts they must take due care of the trust property by investing it prudently and in the manner directed [4]; they must give information to the beneficiaries when required, [5] and in some cases submit to their directions [6]; they must comply with any directions of the court and when in difficulty seek its aid [7]; and, finally, they must make no profit out of the trust unless authorised. [8]

Section 1 of the Trustee Act 2000 imposes a statutory duty of care and skill on trustees in certain circumstances in addition to the duty at common law. The Act was brought into force on 1 February 2001. [9] It applies to trusts created both before and since its commencement.

The duty imposed by the Act is a duty to "exercise such care and skill as is reasonable in the circumstances". In considering the extent of a trustee's duty in any case regard in particular is to be had:

> "(a)to any special knowledge or experience that he has or holds himself out as having, and
>
> (b)if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession."

The statutory duty of care applies only in the circumstances set out in Sch.1 to the Act. These include when a trustee is exercising a power of investment; when exercising a power to acquire land; when making arrangements for the appointment of an agent, nominee or custodian and when reviewing such arrangements; when exercising any power of compromise under s.15 of the Trustee Act 1925 or otherwise; when exercising a power to insure property; and when exercising the powers in relation to reversionary interests, valuations or audits under s.22(1) or (3) of the Trustee Act 1925 or any equivalent powers. Although the statutory duty applies to a wide range of circumstances in which a trustee is exercising a discretionary power it does not generally apply to a failure to exercise such power.

The statutory duty of care can be excluded or modified by the trust instrument. [10]

Not all trustees are subject to the same rules. Thus the duties of a trustee in bankruptcy to the bankrupt are not those of an ordinary trustee towards a beneficiary, even though the bankrupt is entitled to any surplus assets; for a trustee in bankruptcy is primarily not a trustee for the bankrupt, but an assignee of his assets for the benefit of his creditors. [11]

Footnotes

3 *Hallows v Lloyd (1888) 39 Ch. D. 686* at 691, per Kekewich J.

4 Below. Quaere whether he is bound to reside in leasehold property which is subject to a covenant that the tenant should personally inhabit it: see *Lloyds Bank Ltd v Jones [1955] 2 Q.B. 298* at 323, 324.

5 See para.29-030.

6 See para.29-034.

7 See para.29-038.

8 See Ch.7, paras 7-041 to 7-050.

9 TA 2000 (Commencement) Order 2001 (SI 2001/49). For detailed treatments of the Act see P. Reed and R. Wilson, The Trustee Act 2000 (Jordans, 2001); and Whitehouse and Hassall, Trusts of Land, Trustee Delegation and the Trustee Act 2000 (London: Butterworths, 2001).

10 TA 2000 Sch.1 para.7.

11 See *Re A Debtor, Ex p. the Debtor v Dodwell [1949] Ch. 236* at 240–243: *Re Leadbitter (1878) 10 Ch. D. 388*.

End of Document

1. - Reduction into Possession

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 1. - The Trust Property

1. - Reduction into Possession

29-004 The primary duty of a trustee is to carry out the directions of the person creating the trust. The directions may be mandatory or permissive, as where a trustee is empowered to retain an asset in the interest of persons not beneficiaries. [12] Subject to any such direction, the overriding duty of a trustee is to place the trust property in a state of security. Thus, if the trust fund be an equitable interest, of which the legal interest cannot for the moment be got in, it is the trustee's duty to lose no time in giving notice to the person in whom the legal interest is vested. Again, if the trust fund be a thing in action which may be reduced into possession, it is the trustee's duty to get it in; and if he neglects to do so for so long that the debt becomes statute-barred or otherwise irrecoverable, he will be liable unless he can show a well-founded belief that an action would have been fruitless. [13]

The same rule applies to an executor. He ought not to allow the assets of the testator to remain outstanding on personal security, even if the debt was a loan by the testator himself on what he deemed an eligible investment; and without good reason he ought not to leave money on loan to bankers for too long a period after the debts and expenses have been paid and more than a year after the testator's death has elapsed. [14] So also a trustee may be in breach of duty if he fails to exercise an option to purchase the reversion contained in a lease held by him as trustee. [15] Similarly, where a wife covenanted to settle after-acquired property, the trustee of the settlement was bound to act upon notice or reasonable suspicion that such property had come to her. [16]

There is, however, no positive rule that executors or trustees must, without exercising their own judgment in the matter, call in their testator's mortgages within 12 calendar months from the death, even if the security is risky; nor is there any rule that trustees who retain a security authorised by their trust are liable to make good a loss sustained through any fall in the value of the security. [17] The question in every case is whether the trustees have acted honestly and prudently and in the belief that they were doing what was best for all parties. [18]

If the trustee takes the same care of the trust property as a man of ordinary prudence would take of his own, [19] he will not be liable for accidental loss, such as a theft of the property while in his possession [20] or in the possession of others to whom it has been entrusted in the ordinary course of business, [21] or a depreciation in the value of the securities upon which the trust funds have been rightfully invested. [22]

Footnotes

12 *Hayim v Citibank NA [1987] A.C. 730*.

13 *Re Brogden (1888) 38 Ch. D. 546*. But see TA 1925 s.22(2), para.28-026.

14 See, e.g. *Darke v Martyn (1839) 1 Beav. 525*; and see below para.31-013.

15 *Elder's Trustee and Executor Co Ltd v Higgins (1963) 113 C.L.R. 426*.

16 *Re Strahan (1856) 8 De G.M. & G. 291*.

17 Quaere whether they are obliged to act on "insider" information which may come their way: see *B.A.K. Rider [1978] Conv. 114*.

18 *Re Chapman [1896] 2 Ch. 763*; *Rawsthorne v Rowley (1907) [1909] 1 Ch. 409n.*; contrast *Re Brookes [1914] 1 Ch. 558*.
19 See *Re Lucking's Will Trusts [1968] 1 W.L.R. 866* at 874.
20 *Morley v Morley (1678) 2 Ch. Cas. 2*.
21 *Speight v Gaunt (1883) 9 App. Cas. 1*; and see para.29-003.
22 *Re Chapman [1896] 2 Ch. 763*.

2. - Joint Control by All Trustees

2. - Joint Control by All Trustees

29-005 Where there are two or more trustees, the trust property should be reduced into the joint control of all the trustees, and it will be a breach of trust for the trustees to leave one of their number in sole control of it. Trustees must not be too trusting, even of their fellow trustees. For instance, if the trust funds were invested in bearer bonds, and A and B, the two trustees, agreed each to hold half of the bonds, B would be liable for the loss if A made away with the bonds in his custody. [23]

Footnotes

23 *Lewis v Nobbs (1878) 8 Ch. D. 591*.

3. - Nominees and Custodians

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 1. - The Trust Property

3. - Nominees and Custodians

29-006 Section 16 of the Trustee Act 2000 empowers trustees to appoint a nominee in relation to any assets of the trust other than settled land. Section 17 empowers them to appoint a person to act as a custodian of any assets of the trust. These appointments must be made in writing. They do not apply to any trust having a custodian trustee or in relation to any assets vested in the official custodian of charities.

Where the trustees have investments in bearer securities they must appoint a custodian of such securities unless the trust instrument or any enactment or subordinate legislation permits them to retain the investments themselves. [24]

A person may not be appointed as a nominee or custodian unless that person carries on business which includes acting as nominee or custodian, or the person is a body corporate controlled by trustees or is a body corporate recognised under s.9 of the Administration of Justice Act 1985. The trustees may appoint one of their number to be a nominee or custodian if it is a trust corporation or two or more if they are to act as joint nominees of custodians. [25]

The trustees may appoint a nominee or custodian on such terms (including remuneration) as they may determine. However, unless it is reasonably necessary for them to do so those terms must not permit the nominee or custodian to appoint a substitute, restrict the liability of the nominee or custodian or his substitute, or permit the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest. [26]

The powers of trustees to appoint nominees or custodians are subject to the terms of the trust instrument which may enlarge or restrict those powers. [27] Subject to that the Trustee Act 2000 applies to trusts whether created before or after the commencement of the Act. [28]

A trustee is not liable for any act or default of a nominee or custodian so long as he has complied with his statutory duty of care in entering into arrangements to appoint him or in complying with his duty under s.22 to review those arrangements from time to time. [29]

Footnotes

24 TA 2000 s.18.
25 TA 2000 s.19.
26 TA 2000 s.20.
27 TA 2000 s.26.
28 TA 2000 s.27.
29 TA 2000 s.23.

End of Document

4. - Investment and Pt II of the Trustee Act 2000

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 1. - The Trust Property

4. - Investment and Pt II of the Trustee Act 2000

29-007 The trustees' investment powers must be exercised in accordance with the purpose of the trust. Prima facie the purpose of the trust is best served by seeking the maximum return consistent with commercial prudence. However where, as in the case of a charity, particular investments might hamper the work of the trust or alienate potential beneficiaries the trustees are entitled to have a policy which excludes such investments so long as this does not cause significant financial detriment. [30] The trustees must not, however, allow their own social or political views to affect their investments. [31] Originally the only proper investments were mortgages, Government Funds ("Consols") and any other investments authorised by the settlement. The range of authorised investments was substantially extended by a series of statutes, beginning with the Law of Property Amendment Act 1859, [32] and including the Trustee Act 1893, [33] and the Trustee Act 1925 s.1. These permitted trust funds to be invested in a substantial number of securities issued by the Government and various public bodies.

In the years which followed the war of 1939–1945, however, this range of securities proved increasingly inadequate, and criticism grew. In particular, in the absence of special powers of investment, a trustee could not invest trust funds in good ordinary shares (or "equities") which, by increasing in capital value, could offset the progressive fall in the purchasing power of the pound. The Trustee Investments Act 1961, which was passed and came into force on 3 August 1961, repealed and replaced the Trustee Act 1925 s.1, and established a list of authorised investments for trustees and personal representatives in the absence of any contrary intention in the trust instrument. [34]

In due course the provisions of the Trustee Act 1961 were regarded as unduly complex and restrictive. They were replaced by Pt II of the Trustee Act 2000 which was brought into effect on 1 February 2001. [35]

Section 3(1) of the Act provides that a trustee "may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust". This so called "general power of investment" (see s.3(2)) applies both to existing trusts and to trusts created after the commencement of the Act. [36]

The general power of investment is in addition to any other power of investment conferred on the trustees. [37] However it is subject to any restrictions or exclusions imposed by the trust instrument save that restrictions or exclusions contained in trust instruments made before 3 August 1961 are to be disregarded. [38]

The general power of investment does not permit a trustee to make investments in land other than in loans secured on land (see s.3(3)) although s.8 of the Act confers a power on a trustee to acquire land for investment and other purposes.

Where a trustee is exercising a power of investment (whether or not it is the general power of investment conferred by s.3 or otherwise) he must have regard to the "standard investment criteria", that is:

> "(a)the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind and
>
> (b)the need for diversification of investments of the trust in so far as is appropriate to the circumstances of the trust."

The trustee must also review the investments from time to time and consider, having regard to the standard investment criteria, whether they should be varied. [39] If the trustee is a majority shareholder, he will not, as a prudent businessman, be content with only such information on the company's activities as a minority shareholder would expect to receive. [40]

Before exercising any power of investment or when reviewing the investments of the trust, the trustee must obtain and consider proper advice, that is advice of a person who is reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment. There is one exception to this duty to take advice: a trustee need not do so if he reasonably concludes that in the circumstances it is unnecessary or inappropriate. [41]

In considering whether a trustee is in breach of trust an objective test is to be applied. So a trustee will only be in breach of duty in retaining rather than selling a particular investment if no reasonably prudent trustee would have retained the investment in such circumstances. [42]

Footnotes

30 *Harries v Church Commissioners [1992] 1 W.L.R. 1241*.
31 *Cowan v Scargill [1985] Ch. 270*.
32 See Law of Property Amendment Act 1859 s.32.
33 See TA 1893 s.1.
34 See the 32nd edition of this work at paras 11-07 to 11-21 for a treatment of the Trustee Investments Act 1961.
35 Trustee Act 2000 (Commencement) Order 2001 (SI 2001/49).
36 TA 2000 s.7(1).
37 TA 2000 s.6(1)(a).
38 TA 2000 s.6(1)(b) and s.7(2).
39 TA 2000 s.4(2).
40 *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*.
41 TA 2000 s.5.
42 *Wight v Olswang (No.2) [2000] Lloyd's Rep. PN 662* (reversed on appeal but without affecting this point: *[2001] Lloyd's Rep. PN 269*).

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Section 2. - Rules on Apportionment: Introduction

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 2. - Rules on Apportionment: Introduction

The default rules that apply to determine how receipts of income and capital are to be apportioned between beneficiaries in the absence of any express term of the trust dealing with the point have recently been changed radically by statute, namely s.1 of the Trusts (Capital and Income) Act 2013. The changes in s.1 of the Act are prospective only: they apply only to "new trusts", that is, trusts created or arising on or after commencement of s.1 on 1 October 2013, and including trusts created or arising on or after that day under a power conferred before that day.[43] Consequently, other "old" trusts remain subject to the old rules, save as varied by the terms of the trust. Other provisions of the Act classifying certain corporate distributions as capital and giving trustees a power to apportion such a distribution between capital and income (ss.2 and 3 of the Act) apply on or after 1 October 2013 to all trusts whenever created.[44] Paragraphs 29-009 to 29-020 deal with the old law concerning the apportionment of income and capital receipts. Paragraph 29–022 deals with the new law on apportionment. Paragraph 29-023 deals with the new law that is applicable to all trusts on the classification of certain corporate distributions as capital and giving trustees a power to apportion such a distribution between capital and income.

Footnotes

43 Trusts (Capital and Income) Act 2013 s.1(1), (2) and (5) and the Trusts (Capital and Income) Act 2013 (Commencement No.1) Order 2013 (SI 2013/676) art.4.

44 Trusts (Capital and Income) Act 2013 ss.2 and 3 and the Trusts (Capital and Income) Act 2013 (Commencement No.1) Order 2013 (SI 2013/676) s.4.

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1. - The Old Law: Statement of the Rule—Duty to Convert

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 2. - Rules on Apportionment: Introduction

1. - The Old Law: Statement of the Rule—Duty to Convert

29-008 As has already been mentioned, it is the duty of a trustee to preserve the trust property. It is also his duty to hold the scales evenly between the beneficiaries, and not to favour one at the expense of another.[45] Accordingly, under the rule in *Howe v Earl of Dartmouth*,[46] where there is a residuary bequest of personal estate to be enjoyed by persons in succession, the trustees must, unless the will shows a contrary intention, realise such parts of the estate as are of a wasting character (e.g. copyrights) or of a reversionary nature (e.g. interests subject to subsisting life interests), or are otherwise not investments authorised by the general law or by the will, and invest the proceeds in some authorised security.

The trustees must do this despite the absence of any express direction to convert in the will; for in the absence of a contrary intention, the court assumes that the testator intended his legatees to enjoy the same thing in succession, and so requires the property to be converted into permanent investments of a recognised character.[47] Wasting and hazardous securities are to be converted in the interest of the remaindermen, reversionary interests for the benefit of the tenant for life. But this duty to convert does not arise where the property is settled by deed,[48] nor where the bequest is not residuary but specific; nor does the duty apply to realty[49] or to property passing on intestacy. In this case, however, statute[50] imposes a trust with power to sell.[51] Where the duty exists, the conversion must, in general, be effected within a year from the testator's death.[52]

Footnotes

45 *Lloyds Bank Plc v Duker [1987] 1 W.L.R. 1324* at 1330, 1331, citing this passage.

46 *Howe v Earl of Dartmouth (1802) 7 Ves. 137*; *Macdonald v Irvine (1878) 8 Ch. D. 101*. For a general survey of the rule, see S.J. *Bailey (1943) 7 Conv. (N.S.) 128, 191*; and for an examination of the actual decision, see *L.A. Sheridan (1952) 16 Conv. (N.S.) 349*. The rule has been considered by the Law Commission: see Consultation Paper No.175, Capital and Income in Trusts: Classification and Apportionment.

47 See *Hinves v Hinves (1844) 3 Hare 609* at 611.

48 *Re Van Straubenzee [1901] 2 Ch. 779*.

49 See *Re Woodhouse [1941] Ch. 332*; and see Trusts of Land and Appointment of Trustees Act s.4.

50 AEA 1925 s.33(1) as amended by TLATA 1996 s.5(1), Sch.2 para.5.

51 See para.31-014.

52 See *Grayburn v Clarkson (1868) 3 Ch. App. 605*.

2. - The Old Law: Exclusion of the Rule

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 2. - Rules on Apportionment: Introduction

2. - The Old Law: Exclusion of the Rule

29-009 The duty to convert may be excluded either by an express direction to the contrary in the will, or by a sufficient indication in the will of the testator's intention to exclude [53] it, the burden of proof resting on the person who says it is not to arise. [54] For example, the duty to convert does not arise where the testator expressly authorises the retention of unauthorised investments, [55] or where he gives the trustees a discretionary power to sell when and as they shall deem expedient. [56] Nor does it apply where he gives the income of the residue to be enjoyed in specie either expressly [57] or impliedly, as by directing his estate to be divided into certain portions at the death of the life tenant, [58] or (if the estate comprises leaseholds but no freeholds) by directing the trustees to pay the rents to the tenant for life. In the last-mentioned case the trustees would have to retain the leaseholds [59]; but if the testator left freeholds as well as leaseholds, there would be no implied gift of the leaseholds in specie, since the word "rents" could be satisfied by being applied to the freeholds. [60]

The rule does not apply to foreign leaseholds if the foreign law allows the tenant for life to enjoy them in specie. [61]

Footnotes

53 In *Re Gough [1957] Ch. 323* the indications were very tenuous.
54 *Macdonald v Irvine (1878) 8 Ch. D. 101*; *Re Evans' Will Trusts [1921] 2 Ch. 309*.
55 *Brown v Gellatly (1867) 2 Ch. App. 751*.
56 *Re Pitcairn [1896] 2 Ch. 199*.
57 *Re Wilson [1907] 1 Ch. 394*.
58 *Re Barratt [1925] Ch. 550*; and see *Alcock v Sloper (1833) 2 My. & K. 699*.
59 *Goodenough v Tremamondo (1840) 2 Beav. 512*.
60 *Re Wareham [1912] 2 Ch. 312*; approving *Re Game [1897] 1 Ch. 881*.
61 *Re Moses [1908] 2 Ch. 235*.

3. - The Old Law: Express Trust to Convert

29-010 Sometimes a will imposes an express trust for sale. In such cases, there is no room for the duty to convert implied by *Howe v Earl of Dartmouth*, and the scope and effect of the trust for sale depends on the terms of the will. [62]

Footnotes

62 See *Re Berry [1962] Ch. 97* at 110, 111.

4. - The Old Law: Apportionment Between Capital and Income

29-011 Where residuary personalty is given to persons in succession, and the trustees do not at once convert the property, questions often arise as to the respective rights of the tenant for life and remaindermen until conversion. If the testator has expressly or impliedly given the tenant for life the whole of any income arising before conversion, neither more nor less, no question arises. [63] But where he has not done so the following rules apply except so far as the will excludes them. [64]

Footnotes

63 *Re Chancellor (1884) 26 Ch. D. 42*; *Rowlls v Bebb [1900] 2 Ch. 107*; *Re Godfree [1914] 2 Ch. 110*.

64 See, e.g. *Re Hey's Settlement Trusts [1945] Ch. 294*.

(a) - The old law: authorised investments

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 2. - Rules on Apportionment: Introduction

4. - The Old Law: Apportionment Between Capital and Income

(a) - The old law: authorised investments

29-012 The tenant for life is entitled as from the death to the actual income of so much of the residue as is at the testator's death invested in authorised securities. Where there is no express direction to convert, any investment which the trustees retain under a power to retain is treated as an authorised investment, even if it is wasting or hazardous. [65] This is so even if there is an express trust for conversion with an independent power to retain, [66] although it is otherwise if the power to retain investments is only ancillary or subsidiary to the trust for conversion. [67]

Footnotes

65 *Re Bates [1907] 1 Ch. 22*; *Re Nicholson [1909] 2 Ch. 111*.

66 *Re Inman [1915] 1 Ch. 187*.

67 *Re Chaytor [1905] 1 Ch. 233*; *Re Berry [1962] Ch. 97* (it is arguable that the business held unauthorised was in fact authorised: see *Re Crowther [1895] 2 Ch. 56*, para.31-030, not cited in *Re Berry*). See also *Re Rudd's Will Trusts [1952] 1 All E.R. 254*.

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(b) - The old law: unauthorised pure personalty

(1) Apportionment of income.

29-013 Where the securities are not authorised and there is a duty to sell, whether under the rule in *Howe v Earl of Dartmouth*, [68] or under an express direction to sell, [69] the income is adjusted so that the tenant for life receives a fair yield. [70] If the actual income exceeds the fair yield, as is often the case with wasting or speculative shares, the surplus income is treated as capital, although the tenant for life is entitled to any income which it subsequently produces. [71] If, on the other hand, the actual income is less than the fair yield, the tenant for life is entitled to have his income made up to this yield out of any excess income in future (but not past) years, and, if necessary, out of any capital when it is realised. [72]

(2) The "four per cent" rule.

29-014 Originally the "fair yield" was taken as being the income which would have been produced had the securities been realised and the proceeds invested in Consols. [73] Later, when the range of authorised investments had become greatly extended, [74] 4 per cent on the value of the securities was taken instead, [75] and after this had for a period been reduced to 3 per cent, [76] it was again raised to 4 per cent, [77] a figure which was held to be still applicable where the testator died in 1936. [78] A higher figure would probably now be fixed. [79]

(3) Date of valuation.

29-015 Where there is no power to postpone sale, then whether the duty to sell is express [80] or implied under *Howe v Earl of Dartmouth*, [81] the interest must be calculated on the value of the property one year after the testator's death [82] for, having regard to the "executor's year", [83] this is when the conversion should have been made. [84] If, however, the securities are in fact sold within the year, the net proceeds of sale must be taken instead [85]; and if sale is properly [86] postponed under a power to postpone sale, the valuation must be made as at the testator's death, for lack of any other appropriate moment. [87]

Footnotes

68 *Meyer v Simonsen (1852) 5 De G. & Sm. 723*; *Brown v Gellatly (1867) 2 Ch. App. 751*.
69 *Gibson v Bott (1802) 7 Ves. 89*; *Dimes v Scott (1827) 4 Russ. 195*.
70 See *Re Fisher [1943] Ch. 377*; *Re Eaton (1894) 70 L.T. 761*; and cases in preceding note.
71 *Re Woods [1904] 2 Ch. 4*.
72 *Re Fawcett [1940] Ch. 402*.
73 *Howe v Earl of Dartmouth (1802) 7 Ves. 137*.
74 *Re Fawcett [1940] Ch. 402* at 407.
75 *Meyer v Simonsen (1852) 5 De G. & Sm. 723*.
76 *Re Woods [1904] 2 Ch. 4*.
77 *Re Owen [1912] 1 Ch. 519*; *Re Beech [1920] 1 Ch. 40*.
78 *Re Parry [1947] Ch. 23*; and perhaps even in 1947; see *Re Lucas [1947] Ch. 558* at 563, 564.
79 See para.30-020.
80 *Re Parry [1947] Ch. 23*.
81 *Brown v Gellatly (1867) 2 Ch. App. 751*.
82 *Dimes v Scott (1827) 4 Russ. 195*.
83 AEA 1925 s.44.
84 See *Re Parry [1947] Ch. 23* at 40.
85 *Re Fawcett [1940] Ch. 402*.
86 See *Wentworth v Wentworth [1900] A.C. 163*.
87 *Re Parry [1947] Ch. 23*; cf. *Wentworth v Wentworth [1900] A.C. 163*.

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(c) - The old law: Re Earl of Chesterfield's Trusts

(1) Duty to apportion.

29-016 The duty of apportionment under the rule in *Howe v Earl of Dartmouth*, which prevents injustice to the reversioner, is complemented by the rule in *Re Earl of Chesterfield's Trusts*,[88] which prevents injustice to the tenant for life.[89] For if a reversion or other interest which is producing no income[90] is retained, the rule requires that when eventually it falls in or is realised, the sum received should be apportioned between capital and income; and this is so even if part of the sum received consists of interest or other income.[91] The rule has been applied to a mortgage debt with arrears of interest,[92] arrears of an annuity with interest,[93] compensation and interest for loss of the development value of land,[94] moneys payable on a life policy,[95] the price on a sale payable by instalments,[96] and other similar interests,[97] but an income-producing asset in possession is not brought within the rule merely because it is subject to a charge for a fluctuating amount of income.[98]

(2) The old law: mode of apportionment.

29-017 The apportionment is made by ascertaining the sum which, put out at 4 per cent interest on the day of the testator's death and accumulating at compound interest calculated at that rate, with yearly rests and deducting income tax, would, with the accumulations of income, have produced the amount actually received. The sum so ascertained is treated as capital and the rest as income.[99] At one time the rate of interest was reduced to 3 per cent[100] though later 4 per cent was restored,[101] and it may be that a higher figure should now be taken.[102] But this rule does not apply if the will shows an intention that the tenant for life is to have the actual income produced by the residue, in which case he gets no income in respect of property which is yielding none.[103] The rule does, however, apply on an intestacy.[104]

Footnotes

88 *Re Earl of Chesterfield's Trusts (1883) 24 Ch. D. 643*.
89 See *Re Woodhouse [1941] Ch. 332* at 335.
90 *Re Chance's Will Trusts [1962] Ch. 593* at 613.
91 *Re Chance's Will Trusts [1962] Ch. 593*.

92 *Re Hubbuck [1896] 1 Ch. 754*; *Beavan v Beavan (1869) 24 Ch. D. 649n*.
93 *Beavan v Beavan (1869) 24 Ch. D. 649n*.
94 *Re Chance's Will Trusts [1962] Ch. 593*.
95 *Re Fisher [1943] Ch. 377*.
96 *Re Hollebone [1919] 2 Ch. 93*.
97 See, e.g. *Re Payne (1943) 113 L.J. Ch. 46*; *Re Guinness's Settlement [1966] 1 W.L.R. 1355* (payments resulting to the testator's estate after a disclaimer of a life interest under a settlement made by him).
98 *Re Holliday (Deceased) [1947] Ch. 402*.
99 *Re Earl of Chesterfield's Trusts (1883) 24 Ch. D. 643*; and see *Re Fisher [1943] Ch. 377*.
100 *Rowlls v Bebb [1900] 2 Ch. 107*.
101 *Re Baker [1924] 2 Ch. 271*.
102 See para.30-020.
103 *Mackie v Mackie (1845) 5 Hare 70*; *Rowlls v Bebb [1900] 2 Ch. 107*.
104 *Re Fisher [1943] Ch. 377*.

(d) - The old law: realty

29-018 These rules as to apportionment apply only to personalty and not to realty.[105] Even where there is an express direction to convert realty, the tenant for life is entitled to the whole net income produced by it until sale.[106] On the other hand, if the realty is not actually producing income he will have no other claim to any part of the proceeds when it is sold.[107]

Footnotes

105 *Re Woodhouse [1941] Ch. 332*.
106 *Re Searle [1900] 2 Ch. 829*; *Re Oliver [1908] 2 Ch. 74*.
107 *Yates v Yates (1860) 28 Beav. 637*.

(e) - The old law: exclusion of the rules

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 2. - Rules on Apportionment: Introduction

4. - The Old Law: Apportionment Between Capital and Income

(e) - The old law: exclusion of the rules

29-019 In order to avoid complicated accounting, wills often contain a provision excluding the rule in *Howe v Earl of Dartmouth* in all its branches. [108] Such a provision will exclude both the duty to convert and the rules for apportionment, including *Re Earl of Chesterfield's Trusts*. An express power to postpone conversion will not by itself exclude the rules for apportionment [109]; but a power to postpone conversion coupled with a direction that the tenant for life is to receive the income in specie pending conversion will, if the power is duly exercised, exclude both branches of the rule. [110] It is otherwise if the trustees merely fail to exercise the power of postponement, whether through supineness or ignorance of the existence of the asset to be converted. [111]

Where *Howe v Earl of Dartmouth* does not apply, a tenant for life can retain the whole of the income which he receives from any unauthorised investments, provided the capital fund is not diminished by reason of such investments; this principle holds good even if the tenant for life happens also to be the sole trustee, or one of the trustees. [112]

Footnotes

108 See, e.g. *E. F. and J. H. George (1946) 10 Conv. (N.S.) 125 at 129*; and even without such a provision, often in practice no apportionment is made.

109 *Re Berry [1962] Ch. 97*; not following *Re Fisher [1943] Ch. 377* at 385, 386.

110 *Rowlls v Bebb [1900] 2 Ch. 107*; paras 29-010, 29-013; and see para.31-014 for the statutory trust with power to sell on intestacy.

111 *Re Fisher [1943] Ch. 377*; *Re Hey's Settlement Trusts [1945] Ch. 294*; *Re Guinness's Settlement [1966] 1 W.L.R. 1355*.

112 *Slade v Chaine [1908] 1 Ch. 522*; *Re Hoyles [1912] 1 Ch. 67*.

End of Document

5. - The New Law on Apportionment

29-020 The old rules discussed above are complex, inefficient and almost always excluded in a well drawn trust instrument. Consequently, reform of this area of the law was referred to the Law Commission. It produced a consultation paper, [113] and subsequently a report, recommending reform. [114] On 22 March 2009, the Government accepted the Law Commission's recommendations and announced that the Ministry of Justice would consult on the report and its implementation. Following this consultation, reforming legislation was forthcoming, which became the Trusts (Capital and Income) Act 2013.

Footnotes

113 Capital and Income in Trusts: Classification and Apportionment (Law Com Consultation Paper 175).

114 Capital and Income in Trusts: Classification and Apportionment (Law Com No.315).

(a) - Apportionment

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 2. - Rules on Apportionment: Introduction

5. - The New Law on Apportionment

(a) - Apportionment

For trusts created or arising on or after 1 October 2013, [115] including trusts created or arising on or after that day under a power conferred before that day, statutory apportionment under the Apportionment Act 1870 is abolished, as is apportionment under the rules in *Howe v Earl of Dartmouth*, [116] the rule in *Re Earl of Chesterfield's Trusts* [117] and the rule in *Allhusen v Whittell*. [118] The only equitable rule of apportionment that survives the Act is the rule in *Re Atkinson*, which provides that where a mortgage or debenture or other security is insufficient to redeem the secured debt in full, the proceeds of realising the security are divisible between income and capital in proportion to the arrears of interest on the debt and the outstanding capital amount of the debt. Otherwise, the Act now provides that any entitlement to income is an entitlement to income as it arises. The effect is that an income receipt is due to the beneficiary who is entitled to income at the time when it arises. There is no longer any requirement to apportion an income receipt where the entitlement to income has changed during the period over which it accrued. [119] Again, these new rules are subject to any contrary intention in the instrument creating the trust (or in any power under which the trust is created or arises). [120]

Footnotes

115 Trusts (Capital and Income) Act 2013 s.1(5), and the Trusts (Capital and Income) Act 2013 (Commencement No.1) Order 2013 (SI 2013/676) art.4.

116 *Howe v Earl of Dartmouth (1802) 7 Ves. 137*.

117 *Re Earl of Chesterfield's Trusts (1883) 24 Ch. D. 643*.

118 *Allhusen v Whittell (1867) L.R. 4 Eq. 295*.

119 See the Explanatory Notes to the Trusts (Income and Capital) Act 2013 at paras [24]–[31].

120 Trusts (Income and Capital) Act 2013 s.1(4).

(b) - The Classification of Certain Corporate Distributions as Capital

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Section 2. - Rules on Apportionment: Introduction

5. - The New Law on Apportionment

(b) - The Classification of Certain Corporate Distributions as Capital

On and after 1 October 2013, [121] but subject always to any contrary intention in the instrument creating the trust (or in any power under which the trust is created or arises), s.2 of the Trusts (Income and Capital) Act 2013 provides that a receipt consisting of a tax-exempt corporate distribution is to be treated for the purposes of the trust, no matter when the trust was created, as a receipt of capital, even if it would otherwise be treated for those purposes as a receipt of income. What amounts to a "tax-exempt corporate distribution" is defined in the Act, and there is a power by statutory instrument to expand the definition. [122]

The operation of s.2 of the Act could work unfairness between income and capital beneficiaries. Consequently, s.3 of the Act provides that in any case where s.2 operates, the trustees, if satisfied that it is likely that, but for the distribution, there would have been a receipt from the body corporate that would have been a receipt of income for the purposes of the trust, then they may make a payment out of the capital funds of the trust, or transfer any property of the trust, to an income beneficiary for the purpose of placing the income beneficiary (so far as practicable) in the position in which the trustees consider that the beneficiary would have been had there been the receipt of income as they had thought likely. This power is not an "all or nothing" power: the trustees must use their judgment to see both whether it should be exercised and, if so, to what extent.

Footnotes

121 The Trusts (Capital and Income) Act 2013 (Commencement No.1) Order 2013 (SI 2013/676) art.4.

122 Trusts (Income and Capital) Act 2013 s.2(3)–(5).

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1. - The Duty

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 3. - Duty to Keep Accounts and Records and Disclosure of Trust Documents

1. - The Duty

Another duty of a trustee [123] is to keep accounts and produce them to any beneficiary when required. [124] Trustees must also when required give any beneficiary all reasonable information as to the manner in which the trust estate has been dealt with and as to the investments representing it. [125] When a beneficiary comes of age they must inform him of his interest under the trust. [126]

Footnotes

123 For the position of judicial trustees as regards accounts, see para.27-020. For personal representatives, see AEA 1925 s.25, as substituted by AEA 1971 s.9.

124 See *Pearse v Green (1819) 1 Jac. & W. 135* at 140; *Armitage v Nurse [1998] Ch. 241* at 255 (per Millett LJ); *James v Newington [2004] W.T.L.R 1417* (Jersey).

125 *Re Dartnall [1895] 1 Ch. 474*.

126 *Hawkesley v May [1956] 1 Q.B. 304*. Contrast personal representatives: *Re Lewis [1904] 2 Ch. 656*; *Re Mackay [1906] 1 Ch. 25* at 32.

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2. - Disclosure of Trust Documents

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 3. - Duty to Keep Accounts and Records and Disclosure of Trust Documents

2. - Disclosure of Trust Documents

29-021 A beneficiary does not have a right (proprietary or otherwise) to disclosure of trust documents but disclosure will be ordered where appropriate as part of the court's inherent jurisdiction to supervise the administration of trusts [127] :

> "Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves and third parties. Disclosure may have to be limited and safeguards put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the material placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted relief." [128]

In *Erceg v Erceg*, [129] the New Zealand Supreme Court emphasised that the basis of the jurisdiction to order disclosure is the court's supervisory jurisdiction to administer a trust, not its jurisdiction to review the trustees' decision(s). It follows that the beneficiaries to not have to pass some threshold test to show that a decision by trustees to refuse information can be reviewed by a court. Rather, a beneficiary is asking the court to make a decision de novo to provide the information, a decision the court will make in its own discretion. This approach has been followed in England in *Lewis v Tamplin*. [130]

In *Erceg*, the New Zealand Supreme Court also set out the matters to be evaluated in relation to an application for disclosure, which include:

- the documents sought, which may need to be evaluated separately;
- the context for the request and the objective of the beneficiary in making the request;
- the nature of the interests held by the beneficiary seeking access;
- whether there are issues of personal or commercial confidentiality;
- whether the documents sought disclose the trustee's reasons for decisions; and
- the likely impact on the trustee and the other beneficiaries if disclosure is made. [131]

Some examples of application of these principles are useful. It has been held that the confidence ordinarily attached to a letter of wishes was such that, for the better discharge of their functions, trustees need not disclose it to beneficiaries merely because it is requested, unless in their view disclosure is in the interests of the administration of the trust, and the discharge of their powers and discretions. [132] In Australia, in the context of a superannuation fund, it has been held that actuarial reports would fall within the class of documents to which a beneficiary would normally be provided access. [133] In New Zealand, it has been held that the likelihood of acrimony within the family is not of itself a reason for denying beneficiaries information to which they are entitled, and indeed the denial of information may cause or exacerbate friction. [134] Furthermore, in jurisdictions outside England, and in the particular circumstances of those cases, a confidential memorandum of wishes has been held not to be disclosable [135] ; detailed financial information concerning the underlying companies of a trust has been held not to be disclosable where, if indiscriminately disclosed or used, it could have proved detrimental to those companies [136] ; documents in connection

with separate proceedings attacking the trust or the trust fund have been held not to be disclosable [137]; and trustees have been held not bound to disclose their brief to counsel and supporting documentation in a dispute with companies managing the trust fund, in circumstances where disclosure was sought by a group of beneficiaries including those companies which were also beneficiaries. [138]

29-022 In general, where trustees seek legal advice for the benefit of themselves personally (for example, in relation to their possible liability for breach of trust), or for the benefit of another trust of which they are trustees, and they pay for it themselves, or out of the funds of that other trust, but without recourse to the trust funds from which the applicant beneficiaries stand to benefit, that advice may well be privileged in favour of those trustees as against the applicant beneficiaries. But, where the advice is sought for the benefit of a trust as a whole, and the trustees pay for that advice out of funds subject to that trust, then such advice, even though it may be privileged as against third parties, is not privileged as against the beneficiaries, and is liable to be ordered to be produced, though actual production remains in the discretion of the court. [139]

In all cases, documents to be disclosed must be trust documents, and not, for example working documents belonging to professionals who worked for the trustees. [140]

It is no objection to an application by a beneficiary for disclosure of information that the application is not made by all the beneficiaries: the application can be made by any one or more of the beneficiaries, and the court will decide whether the interests of the beneficiaries as a whole speak in favour of the application or against it. [141] Equally, trustees cannot resist an application for disclosure merely replying that, in their opinion, the beneficiaries already have had sufficient information: the beneficiaries have the right to hold trustees to account for their stewardship of the trust fund and the performance of the trust obligations which they accepted. [142] Finally, though a court will be loath to order disclosure of information that reveals trustees' reasons for making a dispositive decision, the court is less reluctant to order disclosure of the reasons for an administrative decision, such as profession advice given to trustees in the course of a sale or other administrative transaction. A decision made by trustees in the exercise of a dispositive power produces, or at least may produce, different treatment for different beneficiaries. One beneficiary may receive more benefit from the trust than another. So the trustees are justified by practical considerations in withholding their reasons for that exercise. That justification does not apply to a request to trustees for information about the administration of the trust. [143]

A trustee must, however, produce to his successor documents relating to the administration of the trust [144]; and subject to the payment of costs, statute requires him to produce to any person interested any notice of any dealing with the beneficiary's interest which he has received. [145]

A trustee who fails to deliver accounts may be ordered to pay the costs of any application to the court rendered necessary by his default. [146] It is, however, no part of a trustee's duty to give legal advice to the beneficiary, [147] or, apart from the above-mentioned statutory obligation, to give to him or to any person proposing to take an assignment of his interest, information as to the way in which the beneficiary himself has dealt with that interest; for it is not his duty to assist the beneficiary in squandering or anticipating his fortune. [148]

Footnotes

127 *Schmidt v Rosewood Trust Ltd [2003] 2 W.L.R. 1442* where the Privy Council conducted a comprehensive survey of the authorities including *O'Rourke v Darbishire [1920] A.C. 581*; and *Re Londonderry's Settlement [1965] Ch. 918*. And see further *Roose v 100F Australian Trustees Ltd [2000] W.T.L.R. 111* (Australia); *Hartigan Nominees Pty Ltd v Rydge (1992) N.S.W.L.R. 405* (Australia). *Schmidt* has been accepted as representing English law in *Breakspear v Ackland [2008] W.T.L.R. 777*, where there was a survey of the relevant authorities. See also *Brovere v Mourant & Co (Trustees) Ltd [2004] W.T.L.R. 1417* (Jersey); *Re Internine Trust and Intertraders Trust (2004) 7 I.T.E.L.R. 308* (Jersey). For the position in New Zealand, see *Foreman v Kingstone [2005] W.T.L.R. 823* and *[2005] Conv. 93*. For articles see McCall, (2003) Private Client Business 358; Pollard, (2003) Trust Law International 114; Pollard and Clixby (2003) Trust Law International 170. For an illuminating discussion of the implications of Schmidt, see Lightman (2004) Private Client

Business 23. For a useful comparison with the position in Australia, see J. Campbell, "Access by Trust Beneficiaries to Trustees' Documents, Information and Reasons" (2009) 3 Journal of Equity 97; and note also *Avanes v Marshall [2007] NSWSC 191; (2007) 68 N.S.W.L.R. 595*; *McDonald v Ellis [2007] NSWSC 1068; (2007) 72 N.S.W.L.R. 605*; and *Gray v BNY Trust Company of Australia Ltd [2009] NSWSC 789* at [33].)

128 *Schmidt v Rosewood Trust Ltd [2003] 2 W.L.R. 1442* at [67], per Lord Walker; *Re Rabiotti's Settlements [2000] W.T.L.R. 953* (Jersey); *Stuart-Hutcheson v Spread Trustee Co Ltd [2002] W.T.L.R. 1213* (Guernsey); *Crane v Stevedoring Employees Retirement Fund [2003] Pens. L.R. 343*.

129 *Erceg v Erceg [2017] NZSC 28* at [14]–[19].

130 *Lewis v Tamplin [2018] EWHC 777 (Ch)*.

131 *Erceg v Erceg [2017] NZSC 28* at [56].

132 *Breakspear v Ackland [2008] W.T.L.R. 777*, where on the exceptional facts, disclosure of the letter was in fact ordered. For a note, see *[2008] C.L.J. 252* (Fox).

133 *Crowe v Stevedoring Employees Retirement Fund Pty Ltd [2005] W.T.L.R. 1271*.

134 *Foreman v Kingstone [2005] W.T.L.R. 823*.

135 *Hartigan Nominees Pty Ltd v Rydge [1992] 29 N.S.W.L.R. 405* (Australia); but contrast *Re Rabiotti's Settlements [2000] W.T.L.R. 953* (Jersey). In Guernsey the view has been taken that in a proper case the court could order disclosure of letters of wishes: *Countess Bathurst v Kleinwort Benson unreported 4 August 2004* Royal Court of Guernsey.

136 *Re Ojjeh Trust (1992–1993) C.I.L.R. 348* (Cayman Islands).

137 *Re Lemos Trust Settlement (1992–1993) C.I.L.R. 26* (Cayman Islands).

138 *Roose v 100F Australian Trustees Ltd (1999) 2 I.T.E.L.R 289* (Australia).

139 *Lewis v Tamplin [2018] EWHC 777 (Ch)* at [59], per HHJ Paul Matthews.

140 *Lewis v Tamplin [2018] EWHC 777 (Ch)* at [58].

141 *Lewis v Tamplin [2018] EWHC 777 (Ch)* at [45]–[46].

142 *Lewis v Tamplin [2018] EWHC 777 (Ch)* at [44].

143 *Lewis v Tamplin [2018] EWHC 777 (Ch)* at [47]–[52] and [78]–[86].

144 *Tiger v Barclays Bank Ltd [1952] 1 All E.R 85*.

145 LPA 1925 s.137(8).

146 *Re Skinner [1904] 1 Ch. 289*.

147 *Hawkesley v May [1956] 1 Q.B. 304*. See *A. Samuels (1970) 34 Conv (N.S.) 29*.

148 *Low v Bouverie [1891] 3 Ch. 82*; explained in *Mutual Life and Citizens' Assurance Co Ltd v Evatt [1971] A.C. 793* at 805, 813.

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3. - Audit

(a) Accountant.

29-023 Trustees may, in their absolute discretion, from time to time cause the accounts to be examined or audited by an independent accountant. [149] They may not do this, however, more often than once in every three years unless the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable. [150] The costs are to be paid out of the capital or income, or partly in one way and partly in the other, as the trustees think fit; but unless they otherwise direct in any special case, costs attributable to capital must be borne by capital, and those attributable to income by income. [151] The power to audit is subject to exercise of the statutory duty of care contained in s.1 of the Trustee Act 2000, as dealt with at para.29-003 above.

(b) Public Trustee.

29-024 Under the Public Trustee Act 1906, [152] an application can be made by any trustee or beneficiary to the Public Trustee for an investigation and audit of the trust accounts; but such an investigation and audit cannot be made more than once a year, unless the court otherwise orders. The costs must be borne by the estate unless the Public Trustee orders them to be borne by the applicant or by the trustee personally. An appeal from such an order lies to a judge of the Chancery Division [153] ; but where the funds are properly invested and all reasonable information has been given to the applicant, the judge will not set aside an order that the applicant should pay the costs of the audit. [154]

Footnotes

149 TA 1925 s.22(4).
150 TA 1925 s.22(4).
151 TA 1925 s.22(4).
152 TA 1925 s.13; and see Public Trustee Rules 1912 rr.31–37. For these rules, see para.27-003, fn.15.
153 Public Trustee Act 1906 s.10; *Re Oddy [1911] 1 Ch. 532*.
154 *Re Utley (1912) 106 L.T. 858*.

1. - Powers of Beneficiaries

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Mainwork

Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 4. - Control by Beneficiaries

1. - Powers of Beneficiaries [155]

29-025 In carrying out his duties, a trustee must be guided by the trust instrument and the rules of equity. In the exercise of any power or discretion which is confided to him, he is bound and entitled to use his own judgment, and ordinarily he is not obliged to consult the wishes or accede to the importunities of the cestuis que trust. Thus in *Re Brockbank* [156] the court refused to compel one of two trustees of a will, in whom the power of appointing new trustees resided, to concur in the appointment of a new trustee which was demanded by the other trustee and all the beneficiaries, even though the latter were all sui juris and together entitled to the whole beneficial interest. And a trustee can bring an action even if the cestui que trust to whom he will have to account directs him not to sue. [157]

Footnotes

155 See the summary in *Stephenson v Barclays Bank Trust Co Ltd [1975] 1 W.L.R. 882* at 889.

156 *Re Brockbank [1948] Ch. 206*. *Contrast Butt v Kelson [1952] Ch. 197* at 207, suggesting that trustee-shareholders can be compelled to vote as the beneficiaries direct; sed quaere: see *Re George Whichelow Ltd [1954] 1 W.L.R. 5* at 8.

157 *Morley v Moore [1936] 2 K.B. 359*.

2. - Rule in Saunders v Vautier

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Mainwork

Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 4. - Control by Beneficiaries

2. - Rule in Saunders v Vautier [158]

29-026 Although the beneficiaries cannot, in general, control the trustees while the trust remains in being, or commit them to a particular dealing with the trust property, [159] they can, if sui juris and together entitled to the whole beneficial interest, put an end to the trust and direct the trustees to hand over the trust property as they direct [160]; and this is so even if the trust deed contains express provisions for the determination of the trust. [161] This principle also applies where there is an absolute vested gift made payable on a future event, with a direction to accumulate the income in the meantime and pay it with the principal; for in *Saunders v Vautier* [162] the court declined to enforce a trust for accumulation in which no person but the beneficiary had any interest. In other words, if an accumulation is directed exclusively for the benefit of a beneficiary, the moment he is sui juris he may put an end to it and demand the property. A man who is sui juris may do what he likes with his own property. [163]

Again, where trustees are directed at their absolute discretion to pay or apply the whole or any part of the income of a fund to or for the benefit of A, and are told to pay or apply to or for the benefit of B any part of the income not applied for A's benefit, A and B, if both sui juris, can together compel the trustees to pay the whole income as they direct, for they are the sole owners of each slice of income. [164] But the rule does not apply if other persons have possible interests in the income, [165] so that A and B alone could not control the trustees' application of the income.

In principle, the rule in *Saunders v Vautier* may apply as much to trusts in a commercial setting as to traditional family trusts. [166] But it should not be applied where it would undermine the fundamental commercial purpose of the transaction in which the trust device has been used. For example, the rule would not entitle the beneficiaries of a pension trust to wind up the scheme and require the trustees to pay out the scheme assets, if that would circumvent any statutory rules regulating the winding up of the scheme and frustrate the employer's purpose in providing periodic benefits during the members' retirement. [167] But it would not necessarily prevent an entire class of bondholders from terminating the trust on which the bonds were held and requiring payment of the bonds directly to themselves. [168]

Footnotes

158 *Saunders v Vautier (1841) 4 Beav. 115; affirmed Cr. & Ph. 240*. The rule was comprehensively reviewed in Australia in *CPT Custodian Trust Pty Ltd v Commissioner of State Revenue (Victoria) [2005] HCA 53; (2005) 224 C.L.R. 98*. For an article, see *Matthews, (2006) 122 L.Q.R. 266*.

159 *Napier v Light (1974) 119 S.J. 166; 236 E.G. 273* (see esp. at 278).

160 *Anson v Potter (1879) 13 Ch. D. 141*.

161 *Re AEG Unit Trust (Managers) Ltd's Deed [1957] Ch. 415*.

162 *Saunders v Vautier (1841) 4 Beav. 115; affirmed Cr. & Ph. 240*; approved in *Gosling v Gosling (1859) Johns. 265*.

163 Secus in the USA if the continuance of the trust is necessary to carry out a material purpose of the settlor: see *Claflin v Claflin, 149 Mass. 19, 20 N.E. 454 (1889)* (cf. J. C. Gray, Restraints on Alienation 2nd edn (1895)); *A. W. Scott (1945) 59 Harv. L.R. 157 at 202*.

164 *Re Smith [1928] Ch. 915*; cf. *Re Nelson (1918) [1928] Ch. 920n*.
165 *Berry v Geen [1938] A.C. 575*.
166 *CPT Custodian Trust Pty Ltd v Commissioner of State Revenue (Victoria) [2005] HCA 53; (2005) 224 C.L.R. 98*.
167 *Rogers Communications Inc v Buschau (2006) 269 D.L.R. (4th) 1*.
168 *Law Debenture Trust Corp v Elektrim Finance NV [2006] EWHC 1305 (Ch)*.

3. - Share of Property

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Chapter 29 - The Duties and Discretions of Trustees

Section 4. - Control by Beneficiaries

3. - Share of Property

29-027 The general rule is that a person who is indefeasibly entitled to a share in divisible personalty is entitled to have his share transferred to him, [169] unless there is some good reason to the contrary, as where division in specie of trust property would give one beneficiary a disproportionate advantage. [170] The general rule applies even if the property is held on trust for sale with power to postpone sale [171] and the transfer would diminish the value of the other shares. [172] It is otherwise if it is land which is thus held. [173] Various reasons have been given for the distinction, [174] but the true basis seems to be that of easy and fair divisibility.

Footnotes

169 *Re Sandeman's Will Trusts [1937] 1 All E.R. 368*.

170 *Lloyds Bank Plc v Duker [1987] 1 W.L.R. 1324* (company shares: sale ordered).

171 *Re Marshall [1914] 1 Ch. 192*.

172 *Re Marshall [1941] 1 Ch. 192*; *Re Weiner [1956] 1 W.L.R. 579*.

173 *Re Horsnaill [1909] 1 Ch. 631*; *Re Kipping [1914] 1 Ch. 62*; *Re Marshall [1941] 1 Ch. 192*. See *Stephenson v Barclays Bank Trust Co Ltd [1975] 1 W.L.R. 882* at 889, 890.

174 See, e.g. *Re Kipping [1914] 1 Ch. 62* at 67 (effect of trust): *Re Marshall [1941] 1 Ch. 192* at 199 (detriment).

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4. - Trusts of Land

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 4. - Control by Beneficiaries

4. - Trusts of Land

29-028 As regards trusts of land, statute [175] directs the trustees, so far as practicable, to consult the persons of full age for the time being beneficially entitled to an interest in possession of the land, and so far as consistent with the general interest of the trust to give effect to the wishes of such persons, or in the case of dispute, of the majority of such persons, according to the value of their combined interests. However, this requirement applies only in the case of "positive acts" by the trustees; and a notice to quit by one co-owner which indicates to the landlord that he does not wish the tenancy to continue has been held not to be positive act. [176] This provision applies to all trusts created since 1 January 1997 unless it is excluded by the terms of the trust deed. [177] It does not apply to trusts created or arising under a will made before 1 January 1997. [178] It also does not apply to trusts created by dispositions before 1 January 1997 or thereafter by reference to a trust created before that date unless the settlor or surviving settlors make a deed stating that this provision is to apply. [179]

Footnotes

175 TLATA 1996 s.11.

176 *Crawley BC v Ure [1996] Q.B. 13*; considering LPA s.26(3) the predecessor of s.11 of the Trusts of Land and Appointment of Trustees Act 1996; and *Notting Hill Housing Trust v Brackley [2001] 35 E.G. 106*.

177 TLATA 1996 s.11(2)(a).

178 TLATA 1996 s.11(2)(b).

179 TLATA 1996 s.11(3).

End of Document

1. - Administration by the Court

29-029 A trust may be administered or executed by the Chancery Division of the High Court, or by a county court if the total value of the fund does not exceed £30,000. [180] When an order has been made for the administration of the trust by the court, the trustees cannot exercise any of their powers without the sanction of the court. [181]

Footnotes

180 See para.1-038.

181 *Minors v Battison (1876) 1 App. Cas. 428*.

2. - Supervision of Trustees

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Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 5. - Control by Court

2. - Supervision of Trustees

(a) The power.

29-030 It is not usual for trusts to be administered in court; for the court exercises a general controlling influence over all trustees, and has power to give directions and determine questions effecting the trustees and beneficiaries without making an order for administration. [182] The court's jurisdiction extends to persons potentially liable as constructive trustees. [183] In a proper case, the court may order an inquiry whether a particular investment ought to be continued, notwithstanding that the trustees claim to exercise their discretion without the interference of the court. [184] This general advisory jurisdiction is frequently invoked. Further, if a question of construction arises on the terms of a trust the Chancery Division may without hearing argument authorise the trustees to act in accordance with the opinion of a person who has had a right of audience in the High Court for 10 years. [185]

(b) Principles of interference.

29-031 Normally, however, if trustees have an absolute discretion as to the mode of executing the trust the court will not interfere with their discretion, provided they exercise it in good faith. [186] For instance, if a testator gives property to A, B and C to hold upon certain trusts, with power to sell it if they think fit, and A and B and some of the beneficiaries desire a sale but C, in the bona fide exercise of his discretion, refuses to sell, the court will not interfere, and the property cannot be sold. [187] The court will, however, interfere if the trustees refuse to exercise their discretion, [188] or exercise it improperly [189]; and the trustees may, if they wish, surrender their discretion to the court and ask the court to exercise it for them in particular matters [190] though not indefinitely, e.g. under discretionary trusts. [191] Where, instead of surrendering their discretion to the court the trustees seek the court's guidance and approval, the court's role is more limited and it will not without good reason substitute its views for the trustees' views. [192] The court will not compel trustees to take action, however advantageous to the beneficiaries, which will expose them to a breach of the currency regulations of a state whose law is the proper law of the trust. [193] These principles apply equally to express trusts and to statutory trusts for the sale of land. [194]

(c) Mode of interference.

29-032 Where the court has decided to interfere, it will do so in a manner best calculated to carry out the intention of the settlor. [195] An equal division of the funds between the beneficiaries [196] is a possible way of exercising a discretionary power of division, but it

is not inevitable, for other modes of carrying out the trust may be appropriate to the circumstances. Thus the court may draw up a scheme for the distribution of the funds among the potential beneficiaries, e.g. according to their needs and qualifications. [197]

(d) Statutory provision.

29-033 In the case of trusts of land s.14 of the Trusts of Land and Appointment of Trustees Act 1996 provides that any trustee or any person with an interest in property subject to the trust may apply to the court for an order relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of or to consult any person in connection with the exercise of their functions) or declaring the nature or extent of a person's interest in property subject to the trust. This provision extends also to trusts which do not include land but include the proceeds of sale of land or property representing such proceeds. [198] In determining such an application the court is to have regard to the intentions of the settlor (if any), the purposes for which the property subject to the trust is held, the welfare of any minor who occupies or might reasonably to be expected to occupy the property as his home, and the interests of any secured creditor. [199] The court is also to have regard to the wishes of the beneficiaries entitled to interests in possession of the property. [200] Authorities on the statutory predecessor of s.14 (s.30 of the Law of Property Act 1925) are to be treated with caution. [201] The court's discretion is now to be exercised on a wider basis, and it is no longer the case that the interests of the chargee are paramount. [202]

Different criteria apply where an application is made to the court by a trustee in bankruptcy for an order for the sale of land: in that case the interests of the bankrupt's creditors are to be taken into account and, where the application is made more than a year after the property vests in the trustee in bankruptcy these interests outweigh all other considerations in the absence of exceptional circumstances. [203]

In appropriate cases, the application should be made or remitted to the Family Division to allow the jurisdiction over matrimonial property to be exercised. [204] This cannot be done where the husband is bankrupt as the trustee in bankruptcy is not subject to the matrimonial jurisdiction. [205] If the court does not order an immediate sale the application should be dismissed leaving the parties to make another application if and when circumstances change. [206] In an appropriate case the court may refuse a sale and instead exercise its statutory powers so as to confine each beneficiary to occupation of separate parts of the property, and impose a condition requiring each beneficiary to contribute to the cost of adapting the property for separate occupation in this way. [207]

(e) Unanimity.

29-034 In the case of a private [208] trust, no majority of trustees can bind a minority, [209] and the court will, in general, observe this rule when asked to interfere. Thus, as has been seen, the court will not compel one trustee to exercise a power of sale at the wish of the majority. [210] But if there is a trust for sale with power to postpone conversion the trust for sale will prevail [211] unless all the trustees concur in exercising the discretionary power of postponement. Accordingly, if B and C refuse to join A in selling, the court will usually at A's request compel their concurrence. [212] But this will not be done if A is also a beneficiary who has by contract disabled himself from requiring a sale. [213]

(f) Alteration of court's jurisdiction.

29-035

The jurisdiction of the court cannot be enlarged by provisions in the trust instrument, e.g. by purporting to authorise the settlor to revoke the settlement with the consent of a Chancery judge.[214] Equally the jurisdiction of the court cannot be ousted by provisions in the trust instrument giving power to the trustees generally to decide questions, e.g. as to the identity of a beneficiary[215] or any apportionment between capital and income.[216] It is, however, a matter of degree; the jurisdiction is not ousted where specific questions are submitted to an appropriate authority, e.g. questions of Jewish blood and faith to a chief rabbi.[217]

Footnotes

182 For the procedure to be adopted when trustees or beneficiaries seek prospective costs in such proceedings see *Practice Statement (Trust Proceedings: Prospective Costs Orders) [2001] 1 W.L.R. 1082*.

183 *Bank of Scotland v A [2002] 1 W.L.R. 751*.

184 *Re D'Epinoix's Settlement [1914] 1 Ch. 890*.

185 Administration of Justice Act 1985 s.48 as amended by the Courts and Legal Services Act 1990 Sch.10 para.63; CPR Pt 50 r.50.1 and Sch.1, RSC, Ord. 93 r.21.

186 *Gisborne v Gisborne (1877) 2 App. Cas. 300*; *Re Blake (1885) 29 Ch. D. 913*; *Re Charteris [1917] 2 Ch. 379*; *Re Steed's Will Trusts [1960] Ch. 407*; *Re Hayes's Will Trusts [1971] 1 W.L.R. 758*; and see above Ch.10.

187 See *Tempest v Lord Camoys (1882) 21 Ch. D. 571*; and see *Re 90 Thornhill Road, Tolworth, Surrey [1970] Ch. 261*.

188 *Prendergast v Prendergast (1850) 3 H.L.C. 195*; *Klug v Klug [1918] 2 Ch. 67*.

189 *Tempest v Lord Camoys (1882) 21 Ch. D. 571* at 578.

190 See, e.g. *Re Ezekiel's Settlement Trusts [1942] Ch. 230*; *Marley v Mutual Security Merchant Bank and Trust Co Ltd [1991] 3 All E.R. 198*.

191 *Re Allen-Meyrick's Will Trusts [1966] 1 W.L.R. 499*; contrast a discretionary trust, discussed at para.22-004.

192 *Royal Society for the Prevention of Cruelty to Animals v Attorney General [2001] 3 All E.R. 530*; *The Public Trustee v Cooper [2001] W.T.L.R. 901*.

193 *Re Lord Cable [1977] 1 W.L.R. 7*.

194 *Re Mayo [1943] Ch. 302*.

195 See *McPhail v Doulton [1971] A.C. 424* at 451, 452, 457; and see generally *A. J. Hawkins (1967) 31 Conv (N.S.) 117*.

196 As in *Longmore v Broom (1802) 7 Ves. 124*.

197 See *Re G (Infants) [1899] 1 Ch. 719*; and see *McPhail v Doulton [1971] A.C. 424* at 451.

198 TLATA 1996 s.17(2).

199 TLATA 1996 s.15(1); and see *Oke v Rideout [1998] 10 C.L. 559*; and *W v W [2003] EWCA Civ 924; [2004] 2 F.L.R. 321*. In the latter case it was held that where there was a potential application under both the 1996 Act and the Children Act 1989 ordinarily an application should be brought under both Acts. See also *Olszanecki v Hillocks [2004] W.T.L.R. 975*.

200 TLATA 1996 s.15(3) and see s.15(2). A party may be estopped from seeking an immediate order for sale: *Holman v Howes [2007] B.P.I.R. 1085*.

201 *Mortgage Corp v Shaire [2001] Ch. 743* at 761. See further *Bank of Ireland Home Mortgages v Bell [2001] B.P.I.R. 429*. For the relevant authorities on s.30 see the 30th edition of this work at para.11-58. See generally *Pascoe [2000] Conv. 315*; *Thompson [2000] Conv. 329*. cf. *First National Bank Plc v Achampong [2003] P.C. 46* where the interests of the chargee prevailed.

202 *Mortgage Corp v Shaire [2001] Ch. 743*. See also *Edwards v Lloyds TSB Bank Plc [2004] EWHC 1745 (Ch); [2004] B.P.I.R. 1190*.

203 TLATA 1996 s.15(4) and Insolvency Act 1986 s.335A; see *Claughton v Charalambous [1998] B.P.I.R. 558* (exceptional circumstances, sale refused); *Re Bennett [2000] B.P.I.R. 630* (no exceptional circumstances, sale ordered); *Dean v Stout [2005] B.P.I.R. 1113* (no exceptional circumstances, sale ordered). In *Avis v Turner [2008] Ch. 218* it was held that a trustee in bankruptcy of a husband could seek an order for sale notwithstanding the existence of a pre-existing property adjustment order made in matrimonial proceedings. As to the exercise of the discretion under LPA s.30 which was replaced by ss.14 and 15 of TLATA 1996; see *Re Lowrie (a bankrupt) [1981] 3 All E.R. 353*; *Re Holliday (a bankrupt) [1981] Ch. 405*; *Re Citro [1991] Ch. 142*.

204 *Williams (JW) v Williams (MA) [1976] Ch. 278*; see *Brown v Pritchard [1975] 1 W.L.R. 1366*; *Bernard v Josephs [1982] Ch. 391* at 401 (homes of unmarried couples better dealt with in Family Division).

205 *Re Holliday (a bankrupt) [1981] Ch. 405*.

206 *Re Evers' Trust [1980] 1 W.L.R. 1327*.

207 *Rodway v Landy [2001] Ch.703*.

208 Contrast above para.23-063, for charitable trusts.

209 See para.28-002.

210 See para.29-040.

211 See *Barclay v Barclay [1970] 2 Q.B. 677*; but see *Irani Finance Ltd v Singh [1971] Ch. 59* at 80.

212 *Re Roth (1896) 74 L.T. 50*; *Re Hilton [1909] 2 Ch. 548*; *Re Mayo [1943] Ch. 302*. See also *Luke v South Kensington Hotel Co (1879) 11 Ch. D. 121*; *Jones v Challenger [1961] 1 Q.B. 176*; *Rawlings v Rawlings [1964] P. 398*. And see *Harris v Black (1983) 46 P. & C.R. 366* (on application for new tenancy of premises held on trust).

213 *Re Buchanan-Wollaston's Conveyance [1939] Ch. 738*. See also *Re Hyde's Conveyance (1952) 102 L.J. News 58; (1952) 16 Conv. (N.S.) 132*.

214 *Re Hooker's Settlement [1955] Ch. 55*.

215 *Re Raven [1915] 1 Ch. 673*.

216 *Re Wynn [1952] Ch. 271*. But see *Dundee General Hospitals Board of Management v Walker [1952] 1 All E.R. 896*; *Re Coxen [1948] Ch. 747*, esp. at 761, 762. cf. *Re Vaux [1939] Ch. 465*.

217 *Re Tuck's Settlement Trusts [1976] Ch. 99*, Whitford J; affirmed on other grounds, *[1978] Ch. 49 CA*, when Lord Denning MR agreed with Whitford J, Lord Russell of Killowen and Eveleigh LJ expressing no opinion.

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3. - Departure from the Terms of the Trust

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3. - Departure from the Terms of the Trust

29-036 In general, the court has no power to sanction a departure from the terms of the trust, however advantageous it might appear to the beneficiaries.[218] "I decline", said Farwell J, "to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible".[219] Nevertheless, in six cases[220] either by statute or under its inherent jurisdiction, the court may confer additional powers on trustees or vary or allow the variation of the terms of the trust.[221] These circumstances are as follows.

(a) Management and administration.

(1) Emergencies.

29-037 Prior to 1926 the court had power to sanction departures from the trust instrument where an emergency, i.e. an unforeseen situation, arose in the management or administration of the trust property,[222] or for the purposes of salvage, e.g. in effecting essential repairs to buildings.[223] This power did not permit the remoulding of the beneficial interests as distinct from rearrangements of the trust property.[224]

(2) After 1925.

29-038 Since 1925 the court has been empowered by the Trustee Act 1925 s.57, to exercise a jurisdiction of this kind even though no emergency exists.[225] The section provides that "where in the management or administration of any property vested in trustees"[226] (other than Settled Land Act trustees[227]) any transaction is expedient[228] for the trust as a whole[229] but the trustees have no power to effect it,[230] the court may confer the necessary power upon the trustees[231]:

> "The object of s.57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries and, with that object in view, to authorize specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual 'emergency' had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust."[232]

The section accordingly gives no power to vary the beneficial interests under a trust and is intended for the protection and benefit of persons who have claims under the relevant trust, not those who have claims against it. [233]

(3) Operation of section.

29-039 This is an overriding section, the provisions of which are to be read into every settlement. [234] An application under s.57 is appropriate notwithstanding that the application could arguably be made under the Variation of Trusts Act 1958. [235] The statutory power has been used to authorise the sale of chattels settled on trusts which prevent sale, [236] the sale of land where a consent requisite to sale has been refused, [237] the sale of a reversionary interest, [238] the purchase of a residence for the tenant for life, [239] the partitioning of land where there was no power to partition it, [240] the blending of two charitable funds into one, [241] and the enlarging of the range of permissible investments. [242] But where a fund is settled on A for life on protective trusts, the statutory power cannot be used to enable the trustees to release the fund from the discretionary trusts which would arise if A surrendered his life interest. [243]

(b) Settled land and trusts of land.

29-040 In the case of settled land and land held upon trusts of land [244] there is a similar though rather wider statutory provision. "Any transaction" concerning such land which is for the benefit of any of the land or of the beneficiaries and could have been effected by an absolute owner may be effected under an order of the court. [245] "Transaction" is widely defined, [246] and is not confined by any reference to "management or administration"; accordingly, in contrast with the previous head, it includes alterations of the beneficial interests. [247]

(c) Maintenance of beneficiaries.

29-041

> "Where a testator or settlor has so provided, particularly by way of a trust for accumulation, that the immediate beneficiaries have no fund for their present maintenance, the court—which has shown dislike for trusts for accumulation—will assume that the intention to provide, sensibly, for the family is so paramount that it will order maintenance in disregard of the trusts for accumulation." [248]

By providing maintenance the court has saved the beneficiary from "starving while the harvest designed for him was in the course of ripening". [249]

For instance, where a testator directed accumulation of the income of his real and personal estate for 21 years, and gave the accumulated property to his sister for life, with successive remainders to her three sons and their respective children, the court directed a present annual sum to be paid to the sister out of the income of the personal estate for the maintenance and education of her three sons. [250] But only in special circumstances will the court thus virtually set aside pro tanto the trust for accumulation; normally it will not interfere with such a trust even if it is hurtful and capricious. [251]

(d) Compromises and arrangements.

29-042 The court has power to approve, on behalf of minors and unascertained beneficiaries, compromises proposed by or between beneficiaries who are sui juris. "Compromise" here is confined to compromises of real (and not simulated[252]) differences, although they need not have reached the stage of a contested dispute.[253] Mere family arrangements whereby a beneficiary gives up his present right in return for some different right are not compromises.[254] Yet where a beneficiary had a right of residing rent-free in a certain house which was on land which it was advantageous to develop, the court approved on behalf of infants a scheme whereby the beneficiary abandoned her rights in the house in return for an annual payment of less than the estimated value of the right of residence.[255]

The provisions in the Companies Act 2006 Pt 26 cannot be used to vary trusts, even if the trustee is a "company" within the scope of the provisions.[256] They only allow the variation of the rights of creditors (broadly understood), whether or not secured.

(e) Variation of Trusts Act 1958.

29-043 The Variation of Trusts Act 1958 was passed as a result of the recommendations of the Sixth Report of the Law Reform Committee,[257] made in consequence of the decision in *Chapman v Chapman*.[258]

(1) The jurisdiction.

29-044 The Act gives the court an extensive jurisdiction to approve variations of trusts (including beneficial interests thereunder) on behalf of infants, unborn persons and others; and the jurisdiction is additional to other statutory powers.[259] Under the Act, the court[260] may, if it thinks fit,[261] approve on behalf of certain persons "any arrangement varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts".[262] "Arrangement" has been construed very widely, and is not confined to an agreement between two or more persons.[263] Anyone, even though not a beneficiary,[264] may propose an arrangement, and it matters not whether "there is any other person beneficially interested who is capable of assenting thereto".[265] "Varying" is also construed very widely, and includes the complete replacement of one set of trusts by another,[266] at all events if the substratum of the original trusts remains.[267]

The trusts may affect both real and personal property, and may arise under any will, settlement or other disposition[268] and in suitable cases[269] the jurisdiction may be exercised over trusts which have a foreign proper law.[270] But the Act does not apply to property settled by Act of Parliament,[271] nor in respect of contingencies which cannot happen, e.g. a variation in favour of issue to be born to a woman over 70 years old.[272] In general, it is desirable that the application should be made by one or more beneficiaries and not by the trustees, unless no beneficiary is willing to make it and the trustees are satisfied that it is beneficial; for their proper function is that of watch-dog for the unborn and unascertained.[273]

(2) Persons within the jurisdiction.

29-045 There are four classes of person on whose behalf the court may approve an arrangement.[274]

(i)Incapacity: "any person having, directly or indirectly", a vested or contingent interest "who by reason of infancy or other incapacity is incapable of assenting".

(ii)Contingency:

> "any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons."

The words "may become entitled" do not cover a person who has an actual interest under a settlement, albeit a very remote one.[275] Further, this head expressly excludes any person who would satisfy the description or be a member of the class if the date had arrived or the event had happened when the application was made to the court. Thus if there is a gift to the next-of-kin of X, who is alive, the court has no jurisdiction on behalf of those who would be X's next-of-kin if he were then dead, and so their consent must be obtained.[276]

(iii)Unborn: "any person unborn".

(iv)Protective trusts: "any person" (whether or not unborn or unascertained[277]) "in respect of any discretionary interest of his" under the statutory[278] or similar[279] protective trusts[280] "where the interest of the principal beneficiary has not failed or determined."

(3) Benefit.

29-046 The court cannot approve an arrangement on behalf of any person "unless the carrying out thereof would be for the benefit of that person",[281] i.e. in all reasonable circumstances, though not necessarily in every remote contingency.[282] The court may "have to take a broad view, but not a galloping, gambling view".[283] This, however, does not apply to those mentioned in para.(iv) above, so that the court has a discretionary power[284] to approve an arrangement that is not for their benefit[285]; and they need not be joined as parties.[286]

"Benefit" is not confined to financial benefit,[287] e.g. where the beneficiary is an irresponsible minor.[288] Thus a provision forfeiting benefits on "practising Roman Catholicism" has been removed.[289] It may also be a benefit to a mentally incapable person to give away his property where the gift is one which he would have made if of sound mind.[290] But it is not for A's benefit to take from him property mistakenly given to him and give it to B, even if B is a member of the same family.[291]

(4) Extent of jurisdiction.

29-047 The Act does no more than empower the court to approve arrangements on behalf of certain persons; if any other beneficiary refuses his consent, the arrangement will not bind him.[292] Thus if one or more adult beneficiaries will not concur, some other jurisdiction to make the change must be invoked. While it is the duty of a guardian ad litem for a minor beneficiary to consider the arrangement and inform the court of the course which he thinks should be taken, the court has jurisdiction to approve the arrangement even if this is not done.[293] Thus, with the adult beneficiaries consenting, the jurisdiction is very wide, and has been exercised for a great variety of purposes. These include the revision of administrative provisions, such as the alteration of investment clauses[294] or the termination of an accumulation,[295] but the most widespread use has been the variation of beneficial interests,[296] principally to mitigate potential tax burdens.[297]

In a proper case the court may accordingly approve the replacement of fixed beneficial interests by discretionary trusts in a larger sum,[298] the addition of a power of advancement,[299] and the substitution of a foreign trust for an English trust[300] where the beneficiaries are genuinely and permanently settled abroad.[301] But before the Act the court had no power to direct a settlement of a minor's property,[302] and so it has refused to construe the Act as conferring such a jurisdiction.[303] Thus if an irresponsible infant is prospectively entitled to an absolute interest at majority, the court cannot approve a resettlement of her interest on protective trusts for her life with remainder to her issue, though it can approve the postponement of the age at which her absolute interest will vest and the creation of interim protective trusts.[304] Also the court will not approve an arrangement involving an appointment under a special power which is or may fairly be suspected of being a fraud on the power.[305] But jurisdiction is not excluded merely because the proposed arrangement will discourage the marriage of beneficiaries who are unlikely to marry[306]; and a purely future variation may be permitted.[307] The settlor's wishes or intentions have little, if any, relevance as to whether the court approves the arrangement.[308]

(5) Effect of order.

29-048 The Act merely empowers the court to give a binding consent to the arrangement on behalf of those unable to give it themselves, so that the variation is effected not by the court but by the consent of all parties.[309] New trusts replace the old,[310] and thus the perpetuity period begins to run anew.[311] The variation takes effect as soon as the order of the court is made, without any further instrument,[312] and the order may be liable to stamp duty.[313] As the court is solely concerned to give its consent to the arrangement, and not to try any specific issue, no estoppel per rem judicatam arises.[314]

(f) Variation by Divorce Court.

29-049 A further statutory power of modifying settlements has since 1857 been exercisable, at first by the Divorce Court and later by the Divorce Division of the High Court, now the Family Division. After pronouncing a decree of divorce or of nullity of marriage, the court may vary before-nuptial and after-nuptial settlements under which property was settled for the benefit of parties to or children of the marriage.[315] The manner in which this jurisdiction is exercised is outside the scope of this book.

Footnotes

218 *Chapman v Chapman [1954] A.C. 429*; *Re Heyworth's Contingent Reversionary Interest [1956] Ch. 364*; and see *Re Earl of Strafford [1980] Ch. 28*, and para.29-051 below.
219 *Re Walker [1901] 1 Ch. 879* at 885; cited with approval in *Chapman v Chapman [1954] A.C. 429* at 445, 456.
220 See generally *O. R. Marshall (1954) 17 M.L.R. 420*.
221 *Re Downshire SE [1953] Ch. 218*.
222 *Re New [1901] 2 Ch. 534*; *Re Tollemache [1903] 1 Ch. 955*.
223 *Re Jackson (1882) 21 Ch. D. 786*; contrast *Re Montagu [1897] 2 Ch. 8*.
224 *Chapman v Chapman [1954] A.C. 429* at 454, 455.
225 For previous "benevolent" orders, see *Re Morrison [1901] 1 Ch. 701* at 704.
226 See *Re Downshire [1953] Ch. 218* at 247.
227 TA 1925 s.57(4).
228 See *Riddle v Riddle (1952) 85 C.L.R. 202*.

229 *Re Craven's Estate (No.2) [1937] Ch. 431*; and see *Re Earl of Strafford [1980] Ch. 28* at 32, 33.

230 See *Re Pratt's Will Trusts [1943] Ch. 326*; *Municipal and General Securities Co Ltd v Lloyds Bank Ltd [1950] Ch. 212*.

231 And see Settled Land and Trustee Acts (Court's General Powers) Act 1943 s.1, for an extension of these powers in the case of trusts of land. (The original limit of time for the exercise of the extended powers was removed by the Emergency Laws (Miscellaneous Provisions) Act 1953 s.9 (repealed by Statute Law (Repeals) Act 1974 Sch. Pt X and again by Statute Law (Repeals) Act 1976 Sch.1 Pt XX)).

232 *Re Downshire SE [1953] Ch. 218* at 248, per Evershed MR and Romer LJ.

233 *Rennie & Rennie v Proma Ltd & Byng (1990) 22 H.L.R.129* at 142.

234 *Re Mair [1935] Ch. 562*. For Canadian alarm, see *(1943) 59 L.Q.R. 111*.

235 *Anker-Petersen v Anker-Petersen [2000] W.T.L.R. 581*.

236 *Re Hope's Will Trusts [1929] 2 Ch. 136*; para.28-006.

237 *Re Beale's Settlement Trusts [1932] 2 Ch. 15*.

238 *Re Cockerell's Settlement Trusts [1956] Ch. 372*. Contrast *Re Heyworth's Contingent Reversionary Interest [1956] Ch. 364*.

239 *Re Power [1947] Ch. 572*.

240 *Re Thomas, Thomas v Thompson [1930] 1 Ch. 194*.

241 *Re Harvey, Westminster Bank Ltd v Askwith [1941] 3 All E.R. 284*; *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] Ch. 220*; not following dicta in *Re Royal Society's Charitable Trusts [1956] Ch. 87* at 91.

242 *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] Ch. 220*; *Re Brassey's Settlement [1955] 1 W.L.R. 192* at 196; *Mason v Farbrother [1983] 2 All E.R. 1078* at 1086, 1087; and *Anker-Petersen v Anker-Petersen [2000] W.T.L.R. 581* (but see *British Museum (Trustees of the) v Attorney General [1984] 1 W.L.R. 418* at 425, 426).

243 *Re Blackwell's Settlement Trusts [1953] Ch. 218*. And see *Re Basden's Settlement Trusts [1943] 2 All E.R. 11*; *Municipal and General Securities Co Ltd v Lloyds Bank Ltd [1950] Ch. 212*.

244 *Re Simmons [1956] Ch. 125*.

245 SLA 1925 s.64(1); and see the extension of these powers by Settled Land and Trustee Acts (Court's General Powers) Act 1943 s.1, as amended by Emergency Laws (Miscellaneous Provisions) Act 1953 s.9; para.29-042, fn.231.

246 SLA 1925 s.64(2), as amended by Settled Land and Trustee Acts (Court's General Powers) Act 1943 s.2, and Statute Law (Repeals) Act 1969 Sch. Pt III. See *Raikes v Lygon [1988] 1 W.L.R. 281*; *Hambro v Duke of Marlborough [1994] Ch. 158*.

247 *Re Simmons [1956] Ch. 125*; *Hambro v Duke of Marlborough [1994] Ch. 158*.

248 *Re Downshire SE [1953] Ch. 218* at 238, per Evershed MR and Romer LJ. This head was recognised and discussed in *Chapman v Chapman [1954] A.C. 429* at 445, 455–457, 469, 471; and see above para.28-053. The statutory powers of maintenance and advancement are now usually available: see below paras 28-039 to 28-052.

249 *Chapman v Chapman [1954] A.C. 429* at 469, per Lord Asquith of Bishopstone.

250 *Re Collins (1886) 32 Ch. D. 229*; and see *Re Allan (1881) 17 Ch. D. 807*; *Re Walker [1901] 1 Ch. 879*; *Re Spurrell (1967) 64 D.L.R. (2d) 64* (car for children aged 18 and 13 to go to school).

251 *Re Alford (1886) 32 Ch. D. 383*.

252 See *Re Powell Cotton's Resettlement [1956] 1 W.L.R. 23*.

253 *Mason v Farbrother [1983] 2 All E.R. 1078*.

254 *Chapman v Chapman [1954] A.C. 429*; see *(1954) 70 L.Q.R. 473*. Contrast *Re Earl of Strafford [1980] Ch. 28*, para.28-026.

255 *Re Trenchard [1902] 1 Ch. 378*, a case carrying "compromise" to its limit: see *Chapman v Chapman [1954] A.C. 429* at 441, 463. For another example, see *Re Lord Hylton's Settlement [1954] 1 W.L.R. 1055*; and see *Re Wells [1903] 1 Ch. 848*; *Re Cockerell's Settlement Trusts [1956] Ch. 372*.

256 *Re Lehman Brothers International (Europe) (In Administration) [2009] EWCA Civ 1161*.

257 Sixth Report of the Law Reform Committee Cmnd. 310 (1957).

258 *Chapman v Chapman [1954] A.C. 429*; see para.29-044. For a full survey of the first decade of the Act's operation, see *J. W. Harris (1969) 33 Conv. (N.S.) 113, at 183*.

259 Variation of Trusts Act 1958 s.1(6).

260 Variation of Trusts Act 1958 s.1(2), (3).

261 See *Re Steed's Will Trusts [1959] Ch. 354 at 362; [1960] Ch. 407*; *Re Van Gruisen's Will Trusts [1964] 1 W.L.R. 449*.

262 Variation of Trusts Act 1958 s.1(1).

263 *Re Steed's Will Trusts [1960] Ch. 407* at 419.

264 See *Re T's Settlement Trusts [1964] Ch. 158* (mother of beneficiary).
265 Variation of Trusts Act 1958 s.1(1).
266 *Re Holt's Settlement [1969] 1 Ch. 100*.
267 *Re Ball's Settlement Trusts [1968] 1 W.L.R. 899*; but see *(1968) 84 L.Q.R. 458 at 459, 460*.
268 Variation of Trusts Act 1958 s.1(1).
269 *Re Paget's Settlement [1965] 1 W.L.R. 1046* (New York).
270 *Re Ker's Settlement Trusts [1963] Ch. 553* (Northern Ireland).
271 Variation of Trusts Act 1958 s.1(6).
272 *Re Pettifor's Will Trusts [1966] Ch. 257*; the court made an order in its administrative jurisdiction: see above para.29-033 and *Re White, White v Edmond [1901] 1 Ch. 570*.
273 *Re Druce's Settlement Trusts [1962] 1 W.L.R. 363*.
274 Variation of Trusts Act 1958 s.1(1).
275 *Knocker v Youle [1986] 1 W.L.R. 934* at 937.
276 *Re Suffert's Settlement [1961] Ch. 1*; and see *Knocker v Youle [1986] 1 W.L.R. 934*.
277 *Re Turner's Will Trusts [1960] Ch. 122*.
278 i.e. under TA 1925 s.33; see above para.22-006.
279 See *Re Bristol's Settled Estates [1965] 1 W.L.R. 469*; *Re Wallace's Settlements [1968] 1 W.L.R. 711*.
280 Variation of Trusts Act 1958 s.1(2).
281 Variation of Trusts Act 1958 s.1(1), proviso; see *Re Tinker's Settlement [1960] 1 W.L.R. 1011*; *Re Cohen's Settlement Trusts [1965] 1 W.L.R. 1229*.
282 *Re Cohen's Will Trusts [1959] 1 W.L.R. 865* (but see *(1960) 76 L.Q.R. 22*); *Re Holt's Settlement [1969] 1 Ch. 100*.
283 *Re Robinson's Settlement Trusts [1976] 1 W.L.R. 806* at 810 per Templeman J.
284 See *Re Poole's Settlement Trusts [1959] 1 W.L.R. 651*; *Re Steed's Will Trusts [1960] Ch. 407*; *Re Burney's Settlement Trusts [1961] 1 W.L.R. 545*.
285 Variation of Trusts Act 1958 s.1(1), proviso.
286 *Re Munro's Settlement Trusts [1963] 1 W.L.R. 145*.
287 *Re Weston's Settlements [1969] 1 Ch. 223* at 245; *Re Holt's Settlement [1969] 1 Ch. 100* at 121.
288 See *Re T's Settlement Trusts [1964] Ch. 158*.
289 *Re Remnant's Settlement Trusts [1970] Ch. 560*.
290 *Re CL [1969] 1 Ch. 587*.
291 *Re Tinker's Settlement [1960] 1 W.L.R. 1011*.
292 *Re Suffert's Settlement [1961] Ch. 1* (potential next-of-kin); *Knocker v Youle [1986] 1 W.L.R. 934* (numerous issue with very remote interest).
293 *Re Whittall [1973] 1 W.L.R. 1027*.
294 *Re Coates' Trusts [1959] 1 W.L.R. 375*; *Re Clarke's Will Trusts [1961] 1 W.L.R. 1471* (bringing an express clause into line with the Trustee Investments Act 1961).
295 *Re Tinker's Settlement [1960] 1 W.L.R. 1011*.
296 *Re Poole's Settlement Trusts [1959] 1 W.L.R. 651*; *Re Turner's Will Trusts [1960] Ch. 122*; and see the examples below.
297 *Re Clitheroe's Settlement Trusts [1959] 1 W.L.R. 1159* (surtax); *Re Sainsbury's Settlement [1967] 1 W.L.R. 476* (capital gains tax); and see *Re Drewe's Settlement [1966] 1 W.L.R. 1518* (court's insistence on provision that power to appoint be exercised with consent of trustees after advice of counsel as to estate duty). But see *Re Weston's Settlements [1969] 1 Ch. 223; (1969) 85 L.Q.R. 15*.
298 *Re Druce's Settlement Trusts [1962] 1 W.L.R. 363*.
299 *Re Lister's Will Trusts [1962] 1 W.L.R. 1441*.
300 *Re Seale's Marriage Settlement [1961] Ch. 574*; *Re Windeatt's Will Trusts [1969] 1 W.L.R. 692*.
301 See *Re Weston's Settlement [1969] 1 Ch. 223*.
302 *Re Leigh (1888) 40 Ch. D. 290*.
303 *Re T's Settlement Trusts [1964] Ch. 158*; *Allen v Distillers Co (Biochemicals) Ltd [1974] Q.B. 384*; distinguished in *CD v O [2004] EWHC 1036 (Ch); [2004] W.T.L.R. 751; [2004] 3 All E.R. 780*.
304 *Re T's Settlement Trusts [1964] Ch. 158*.

305 See *Re Robertson's Will Trusts [1960] 1 W.L.R. 1050* and *Re Wallace's Settlements [1968] 1 W.L.R. 711* (arrangements approved); *Re Brook's Settlement [1968] 1 W.L.R. 1661* (approval withheld); *S. M. Cretney (1969) 32 M.L.R. 317*. For fraud on a power, see paras 10-020 and 11-010.

306 *Re Michelham's Will Trusts [1964] Ch. 550* (males aged 59 and 62).

307 *Re Joseph's Will Trusts [1959] 1 W.L.R. 1019*.

308 *Goulding v James [1997] 3 All E.R. 239*.

309 *Re Holt's Settlement [1969] 1 Ch. 100*; *IRC v Holmden [1968] A.C. 685* at 701, 702, 710, 713; and see *Spens v IRC [1970] 1 W.L.R. 1173* at 1183, 1184.

310 See *IRC v Holmden [1968] A.C. 685* at 701, 702, 713; but see at 705, 710.

311 *Re Holt's Settlement [1969] 1 Ch. 100*.

312 *Re Hambleden's Will Trusts [1960] 1 W.L.R. 82*; *Re Holt's Settlement [1969] 1 Ch. 100*.

313 See *Practice Note [1966] 1 W.L.R. 345*.

314 *Spens v IRC [1970] 1 W.L.R. 1173*.

315 Matrimonial Causes Act 1973 s.24(1)(a) replacing earlier legislation. See Rayden and Jackson on Divorce and Family Matters, 17th edn, Ch.18 s.12.

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Section 6. - Trustee Profiting from Trust

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Mainwork

Part 5 - Trusts

Chapter 29 - The Duties and Discretions of Trustees

Section 6. - Trustee Profiting from Trust

29-050 This is dealt with in Ch.7, paras 7-041 to 7-050.

End of Document

Section 7. - Indemnification of Trustee

29-051 This is dealt with in Ch.7, paras 7-030 to 7-035.

1. - Breach and Absence of Equitable Authority

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Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 1. - Nature of Breach of Trust

1. - Breach and Absence of Equitable Authority

30-001 A trustee is guilty of a breach of trust if he fails to do what his duty requires, or if he does what he is not entitled to do. Breaches of trust are almost infinitely various. They range from the fraudulent conversion of trust funds to purely technical failures of duty which harm nobody, and transactions (such as investments in unauthorised securities) which may even result in a substantial profit for the trust. Their common feature is that the trustee wrongfully exceeds the equitable authority conferred upon him by the trust instrument or by the general law, in circumstances which may lead to a liability to make good any losses which may result.

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2. - Personal and Proprietary Remedies

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Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 1. - Nature of Breach of Trust

2. - Personal and Proprietary Remedies

30-002 A trustee may be liable to personal or proprietary remedies for his breach of trust. Personal remedies are traditionally enforced by requiring the trustee to account for his stewardship of the trust fund. [1] On taking the account, it may be found that the trustee is liable to pay a sum of money that will restore the trust to the position it would have been in if the breach had not occurred. [2] The trustee may also be liable to a proprietary remedy. The beneficiary of the trust has an equitable interest in the assets held in the trust fund so if the trustee misapplies them, the beneficiary may recover the original trust assets or their traceable proceeds from the trustee. [3] He may also enforce a proprietary remedy if the trustee has transferred the assets to a third party and his equitable interest in them has not been extinguished.

Footnotes

1 See Ch.20 above.
2 See para.30-013 below.
3 See para.30-050 below.

End of Document

3. - Third Parties Involved in the Breach of Trust

30-003 The trust claimant may also have an action against third parties who have become involved in the primary breach of trust committed by the trustee.[4] They may have received money or other assets that were misapplied by the trustee, or they may have wrongly implicated themselves in the trustee's breach by lending him assistance. The trust claimant is likely to sue a third party when the trustee is insolvent and is unable to satisfy the full amount of a personal claim against him. The trust claimant may not recover his loss twice over. Any money that he recovers on the claims against the third parties must be deducted from the amount of his claim against the trustee for the losses resulting from his breach.

Footnotes

4 See para.30-067 below.

1. - Liability of Trustee for his Own Defaults

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Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 2. - Establishing a Breach of Trust

1. - Liability of Trustee for his Own Defaults

30-004 The liability of a trustee is essentially for his own acts and defaults and not for those of others. This is true both in relation to his co-trustees and agents to whom he delegates his functions as trustee. [5]

(a) Liability personal and not vicarious.

30-005 A trustee is not liable for breaches committed by fellow trustees unless the trustee is at fault. If A and B are trustees, and A makes away with trust funds, B is not liable for A's acts merely because they are co-trustees; one trustee is not vicariously liable for another. But B may be liable for his own default, e.g. in improperly allowing A to receive the funds or have sole control over them; and similarly if a trustee improperly allows trust property to remain in the control of an agent. [6]

The old case of *Townley v Sherborne* [7] illustrates the rule. A trustee who had joined with his co-trustees in signing receipts was liable, though he had received nothing, because the liability of the non-receiving trustee arose, not from his mere signing of the receipts, but from his subsequently leaving in the hands of his co-trustees the money that had been received. This was said to be an "evil-dealing" or, as we would now say, a breach of trust.

(b) Independent liability for act of co-trustee.

30-006 Though the trustee is not vicariously liable for the default of his co-trustee, he may nonetheless incur liability for losses caused directly by the breach of his co-trustee. This is particularly relevant where one trustee is active in the administration of the trust and the other passive. So, for example, where one trustee applied trust money in an unauthorised investment, the co-trustee who took no part in the investment decision was nonetheless held accountable for the losses which resulted. She, in her own right, owed a duty to ensure that trust fund was property invested. [8]

A trustee may also be said to be liable for losses resulting from a breach by his co-trustee which he might reasonably have anticipated. It is a question of how far the trustee is expected to be vigilant over the co-trustee. In one case it was held that a trustee was not liable for losses resulting from the fraudulent misappropriation of some proceeds of sale of trust property by her co-trustee, a solicitor. She knew him to be a dilatory and incompetent muddler but did not know he was dishonest. [9] On the other hand, a trustee may be liable if he conceals a breach which his fellow trustees have committed, [10] or if he stands by, knowing that his fellow trustees are committing [11] or even meditating [12] a breach of trust, or if he leaves trust matters in their hands without inquiry. [13] In so doing he is neglecting his duty to watch over his fellow trustees. [14] In all such cases the burden would be on the beneficiary to prove that the loss resulting from the default of the co-trustee could be said to be caused by the independent breach of duty of the trustee whom he sues. [15]

(c) Breaches by former trustees.

30-007 A new trustee is not liable for breaches of trust committed by his predecessors; unless he has reason to believe otherwise, he is entitled to assume that he has performed his duties and got in all the trust property. [16] If, however, he discovers that breaches of trust have been committed, he must obtain satisfaction for them from the old trustees, just in the same way as an original trustee must get in any part of the trust estate which is outstanding. [17] The only excuse for not doing so is that it would be useless to take proceedings against the old trustees. [18]

(d) Breaches by subsequent trustees.

30-008 A trustee who has retired is prima facie not liable for breaches of trust committed by his successors. But he may be liable if he retired in order to enable the breach to be committed; for in so doing he may not only make the new trustees his agents for the purpose, but also be guilty of a breach of his own duty to protect the trust property. [19] However, he is not liable merely because by retiring he facilitated the commission of some breach, or because he knew that some breach was likely: it must be shown that he retired in contemplation of the particular breach committed. [20] Even an analogous breach is not enough. [21]

(e) Executors.

30-009 In general, an executor is answerable for his own acts only, and not for the acts of his co-executors. Each executor has a full and absolute control over the pure personalty of the testator and is competent to give a valid discharge for it by his own separate act, independently of the others. If, therefore, an executor joins with his co-executor in signing a receipt, this is stronger evidence of his having actually received the money than in the case of trustees; and even if he can show that he did not in fact receive it, he will be liable if he allowed the money unnecessarily to get into the hands of his co-executor, or remain there. [22]

Footnotes

5 Trustee Act 2000 s.23(1).
6 TA 2000 s.23(1).
7 *Townley v Sherborne (1634) Bridg. J. 35* at 37, 38; and see *Brice v Stokes (1805) 11 Ves. 319*.
8 *Bahin v Hughes (1886) 31 Ch. D. 390*.
9 *Re Munton [1927] 1 Ch. 262*.
10 *Boardman v Mosman (1779) 1 Bro. C.C. 68*.
11 *Booth v Booth (1838) 1 Beav. 125*.
12 *Wilkins v Hogg (1861) 5 L.T. 467* at 470.
13 *Lord Shipbrook v Lord Hinchinbrook (1810) 16 Ves. 477*; *Wynne v Tempest (1897) 13 T.L.R. 360*; contrast *Shepherd v Harris [1905] 2 Ch. 310*.
14 *Styles v Guy (1849) 1 Mac. & G. 422* at 433 (executors).
15 *Re Brier (1884) 26 Ch. D. 238*.

16 *Re Strahan (1856) 8 De G.M. & G. 291*.

17 See *Forest of Dean Coal Mining Co (1878) 10 Ch. D. 450* at 451, 452.

18 *Hobday v Peters (1860) 28 Beav. 603*.

19 *Head v Gould [1898] 2 Ch. 250* at 268. This rule probably applies to directors of companies: *Curtis's Furnishing Stores Ltd v Freedman [1966] 1 W.L.R. 1219* at 1224.

20 *Webster v Le Hunt (1861) 4 L.T. 723*; *Head v Gould [1898] 2 Ch. 250*.

21 *Clark v Hoskins (1868) 19 L.T. 331*.

22 *Clough v Bond (1838) 3 My. & Cr. 490* at 496; *Joy v Campbell (1804) 1 Sch. & Lef. 328 at 341; affirmed 2 Sch. & Lef. 740*; *Re Gasquoine [1894] 1 Ch. 470*.

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1. - Anticipated Breach

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Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 3. - Personal Remedies Against the Trustee in Breach

1. - Anticipated Breach

30-010 If a beneficiary has reason to suppose that the trustee is about to do an act not authorised by the trust, he need not wait until a breach has been committed, but may obtain an injunction to restrain the trustee.[23] The courts have thus restrained the election by the trustees of a church of an unqualified person as minister[24]; an improvident sale of trust property[25]; and the grant of an unauthorised mortgage.[26] Injunctions have also been granted to secure the due conduct of the trust business, e.g. to prevent a minority of trustees of a charity from disturbing the management of the trust by the majority.[27]

Footnotes

23 *Balls v Strutt (1841) 1 Hare 146*; and see above Ch.18.
24 *Milligan v Mitchell (1833) 1 My. & K. 446*.
25 *Dance v Goldingham (1873) 8 Ch. App. 902*; *Wheelwright v Walker (No.2) (1883) 31 W.R. 912*.
26 *Rigall v Foster (1853) 18 Jur. 39*.
27 *Perry v Shipway (1859) 4 De G. & J. 353*. For the power of a majority to act, see above para.23-063.

2. - Personal Remedies after Breach

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Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 3. - Personal Remedies Against the Trustee in Breach

2. - Personal Remedies after Breach

(a) General.

30-011

> "The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument … and the general law." [28]

If the trustee commits a breach which causes loss to the trust, then the beneficiary may require the trustee to restore the trust fund to the position it would have been in if the breach had not occurred. This point was once summed up by saying that the "obligation of a defaulting trustee is essentially that of effecting restitution to the trust estate". [29] But to describe the trustee's liability in this way may cause confusion. It may imply that the trustee's liability depends on principles of unjust enrichment rather than restoration of the trust estate and compensation for loss. It also obscures important differences in the kind of breach committed by the trustee. In some cases, the trustee's breach may be that he has misapplied assets from the trust fund in breach of his duties of custodial stewardship. In others, the trustee may be in breach of his duties of management stewardship. The nature of the loss resulting from each kind of breach is different. To avoid any confusion with unjust enrichment, the general expression "restoration" will be used in this chapter to refer to loss-based remedies that arise out of a breach of trust. [30]

The proper approach to restoring the trust depends on the following points:

(i)the nature of the trustee's breach, either as a breach of a duty of custodianship or a breach of a duty of management;

(ii)whether the trustee can specifically restore any misapplied assets to the trust or whether he should pay a sum of money to restore the trust to an equivalent financial position;

(iii)where a sum of money is awarded, whether it should be paid into the trust fund or directly to the beneficiary; and

(iv)the date for assessing the trustee's liability.

(b) Breach of custodianship duty or breach of management duty.

30-012 Two main kinds of breach of trust need to be distinguished when considering the trustee's liability make restoration to the trust fund: a misapplication of trust assets in breach of his duty to preserve the custody of the trust assets, and a breach of his duty to manage the assets. [31]

A trustee misapplies trust assets if he disposes of them in breach of his general duty to preserve them according to the terms of the trust. A misapplication may occur where the trustee invests trust money in an unauthorised security [32]; where he pays trust

money to an unauthorised agent [33]; or where a trustee releases trust money in breach of the authority conferred upon him by his beneficiary. [34] The loss to the trust consists in a direct transfer of an asset out of the fund.

A trustee commits a different kind of breach when he fails to manage the trust fund according to his equitable duties. [35] He may, for example, cause loss to the trust by failing to exercise reasonable care and skill in selecting an investment, or in selecting an agent to whom he pays trust money. [36] Here the loss suffered by the trust is not caused by a wrongful disposal of assets from the fund. In the two examples given, the trustee's actions were authorised but they were performed negligently, in breach of his equitable duty of care. [37] The loss consists in a fall in the value of the trust fund compared with its value if due care had been exercised.

The difference between these two kinds of breach and loss can be seen in the traditional accounting procedures for determining a trustee's liability for breach. [38] When the trustee misapplies property from the trust fund, the beneficiary is entitled to "falsify" the entry in the account that records the unauthorised disposition. The effect is to make the trustee liable to restore the property or its value that was wrongfully transferred out of the trust fund.

But where the trustee causes loss by breaching a managerial duty, there is no unauthorised disposition of property that the beneficiary can falsify. The beneficiary instead seeks an account on the basis of "wilful default". The trustee is required to restore the financial position of the trust fund to what it would have been if the trustee had not been guilty of wilful default. [39] The effect is that the trustee must pay fresh money into the account. The trustee's liability is essentially to compensate the trust for consequential losses that follow from the trustee's breach.

(c) Specific or monetary restoration.

(1) Misapplication.

30-013 Where the breach consists in a misapplication of trust assets, the first question is whether the trustee should specifically restore the assets to the trust or restore their value by making a money payment. If the trustee still has the original assets, he may make restoration in specie by transferring them back to the trust fund. [40] If the original assets are no longer available, then the beneficiary may elect to assert a proprietary remedy over any traceable proceeds in the hands of the trustee or a third party. [41] To the extent that this is possible, it will be treated as the specific restoration of the trust assets.

If the trust assets or their proceeds cannot be restored in specie, then the trustee must pay a sum of money sufficient to restore the trust fund to the position it would have been in if the trust assets had not been misapplied. The money payment is a substitute for restoration in specie. [42]

In assessing the amount of money payable by the trustee, the court does not make any allowance for the remoteness or foreseeability of losses resulting from the original misapplication. [43] The money claim is a liquidated debt even though the court may need to assess its precise amount. [44] Where, for example, the trust suffers a loss because the trustee has invested trust money in an unauthorised security, the trustee must reinstate the full amount of the money even if the loss on the investment was unforeseeable. [45] The approach is different from the assessment of damages for breach of a contractual or tortious duty at common law. [46] The trustee's breach relates to his distinctive equitable duty to preserve the trust fund and to apply it solely in accordance with his limited equitable powers. Causation is only relevant to determining the equivalent position to which the trust fund should be restored. The award of money must restore the fund to the position it would have been in if the trustee had not made the unauthorised disposition of trust assets. [47] This requires the court to consider events between the dates of breach and judgment. [48]

(2) Breach of management duty.

30-014 Where the trustee has breached a management duty, then it may be unnecessary or impossible for the trustee to restore any specific assets to the trust fund. The assets may still be held in the trust fund, although at a diminished value. The trustee can only be liable to pay monetary compensation for the losses caused by his breach of duty. [49] The analogy with the breach of a contractual or tortious duty arising at common law is strong. [50] The trustee is liable to restore the trust fund to the financial position it would have been in but for his breach of duty. But common law rules of forseeability and remoteness to not apply to limit the claimant's loss in the way that they would for the breach of a common law duty. [51] This marks an important difference between equitable compensation and common law damages.

(d) Restoration of trust fund or payment to beneficiary.

30-015 Where the terms of the trust require continuing duties of custodianship over the fund, then the trustee must restore the trust assets or pay compensation into the trust fund itself. [52] An example is a traditional family trust where the beneficiaries have successive interests, or are the objects of a discretionary power. Under such a trust, no individual beneficiary has an absolute interest in the trust fund that would entitle him to direct the trustee to pay the fund to him. [53] His only right is to have the trust properly administered according to its terms. When a breach occurs, the beneficiary cannot require the trustee to transfer the trust assets or pay compensation to him directly. To do so would give him a greater right after the breach of the trust than he would have had when the trust was being properly administered.

Where the beneficiary is the object of a bare trust, however, then the court may order the trustee to pay equitable compensation directly to the beneficiary. [54] Under the bare trust the beneficiary would have been absolutely entitled to the trust fund and could have required it to be paid over to him. Payment of equitable compensation directly to the beneficiary gives him no greater right than he would have had under the original trust. The court might only require the trustee to reconstitute the original bare trust if the underlying transaction for which the trust was established still had to be carried out according to its terms. [55]

(e) Date for assessing liability.

30-016 The court assesses the trustee's liability for loss at the date of judgment rather than the date of breach. It does not "stop the clock" and assess the amount of the loss to the trust at some intermediate stage. [56] The selection of this date follows from the trustee's duty to account for his stewardship of the trust assets: the account must be taken down to the date on which it is rendered. [57]

So where the trustee is in breach of his duty of care and skill in administering the trust, the court takes into account matters after the date of breach to determine the full extent of the loss for which the trustee must pay compensation. [58] Where assets are misapplied from a continuing trust, then the monetary remedy paid by the trustee is a substitute for the specific restoration of the trust assets. The trustee must therefore pay their value at the judgment date. [59] The judgment date is also used to assess the remedy where the trustee misapplies assets held on a bare trust and is liable to pay equitable compensation directly to the beneficiary. [60] The court acts with the benefit of hindsight. It considers what the beneficiary's position would have been if the trustee had properly performed his duty. It may therefore determine whether the transaction would have proceeded in any event even if the disbursement of money by the trustee had been properly authorised. Thus, a beneficiary may not be entitled to full restoration of the entire sum paid if the transaction would have gone ahead despite the trustee's breach and the same

loss would have happened in any event.[61] But if the transaction would not have happened at all, the beneficiary may have a right to restoration of the entire sum paid.[62]

(f) Quantification of loss: examples.

(1) Misapplication.

30-017 Many of the cases involve unauthorised investments or disbursement of trust monies in conveyancing transactions. The starting point in cases of unauthorised investment is that the trustee is liable to reinstate the money applied in making the investment. He is entitled to a credit for the money raised on realising it so he remains liable for difference between this and the purchase price,[63] even if the fall in value was unforeseeable.[64] If the trustee sells an authorised security to make an unauthorised investment, then the whole transaction is regarded as one, and he is liable to restore the original security at its value on judgment date. If the authorised security has increased in value, then the trustee is liable for difference.[65] If he wrongfully retains an unauthorised investment, he is liable for the difference between the price for which it is sold and the price that would have been obtained on a sale at the correct time.[66] The trustee bears the risk of any currency fluctuations between the dates of breach and judgment.[67] In the cases where a solicitor makes an unauthorised disbursement of trust monies in a conveyancing transaction, the starting point is that the beneficiary is entitled to full restoration of the money paid if the transaction is never in fact completed.[68] So where a fraudulent third party caused the solicitor to disburse the money in breach of his authority, the court would not inquire whether the fraudster might have caused a similar loss in a different way.[69] But where the unauthorised transaction would have proceeded despite the solicitor's technical lack of authority, the court will compare the actual position with that which the beneficiary would have been in had there been no breach.[70]

(2) Breach of management duty.

30-018 Where the trustee breaches a management duty, then the quantification of his liability may be more difficult since it does not involve the outright misapplication of money. The court must assess the current value of the trust fund against the value it would have had if the breach had not occurred. The trustee may be liable for capital and income losses that can be proved to follow from his breach.[71] Exceptionally, where the breach relates to more than one transaction and stems from the same policy, the court may allow the trustee to set off a loss made in one transaction against a profit made in another.[72] But where the trust claimant cannot prove what the trustees would have done if they had not committed the breach, then they may fail to prove any loss resulting from the trustee's breach. So where trustees failed in their duty to diversify the trust investments, the trust claimants could not prove any loss resulting from the breach unless they could point to actual investment returns that would have been made if the fund had been properly diversified.[73]

The trustee, unlike a contract breaker and tortfeasor, is not entitled to any allowance for the tax which the beneficiaries would have incurred if they had received the full amount of capital and income to which they were entitled. The trustee's liability is calculated as if they were restoring the trust fund rather than paying damages directly to the beneficiary. The tax liability of individual beneficiaries arises not at the point where the trust estate is restored but where capital or income is distributed from it.[74]

(3) Set off.

30-019

Where assets are misapplied, a profit made in one unauthorised transaction cannot be set off against a loss incurred in another unauthorised transaction. [75] If the trustee's net liability were reduced in this way, they would effectively be allowed to keep part of the unauthorised profit for himself. Yet profits and losses that stem from same transaction [76] or from the same wrongful policy in administering the trust can be set off against each other to reduce the trustee's net liability. [77]

(g) Interest and liability for lost income. [78]

30-020 The trustee may be liable to pay interest to compensate the trust for the loss of income resulting from his breach. [79] Where the trustee applies the trust money for his own use, he may also have to account for his unauthorised profit made with the trust money. In principle, the rules for awarding interest should compensate the beneficiary fully for his lost income or make the trustee disgorge his full profit. [80] But this does not always happen. The exercise of calculating the actual loss to the trust or gain to the trustee is often difficult: it may involve speculative inquiries into the possible income returns on the original capital sum, or the degree to which the trustee's profit was attributable to his use of the trust money. The general approach is that the beneficiary should be allowed interest which reflects the cost of being kept out of the money which the trustee should have been reinstated to the trust fund. [81]

The traditional approach has been to award interest at defined rates. Historically, the standard trustee rate was set at 4 per cent. [82] A higher rate of 5 per cent was only awarded in special cases. Interest was not generally compounded. [83] Since the 1970s, this regime was replaced with two fluctuating rates pegged to recognised scales. For private trusts, standard awards of interest are now set at the rate allowed from time the time on money deposited in court on the special account. [84] The new higher rate is 1 per cent above bank base rate. [85] It is awarded where the party is a commercial organisation, or where the special circumstances of a private trust warrant it. [86]

The special cases where the higher rate may be awarded in a private trust claim are:

(i)Where the trustee is guilty of fraud or serious misconduct. The higher rate would also be compounded [87] with yearly [88] or even half-yearly rests. [89]

(ii)Where the trustee has traded with the trust money for his own use. Here he is presumed to have earned more than the standard rate. Interest at the higher commercial rate is available where the beneficiary cannot prove and recover the profits actually made by the trustee with the trust money. [90] Normally compound interest is awarded [91] unless the trading has been for the benefit or partly for the benefit of the beneficiary. [92] Likewise, simple interest would be awarded if the money, while employed in a business or profession, was not used in the normal course of trading. [93]

Alternatively, the court may order an inquiry into the income actually lost by the beneficiary owing to the trustee's breach, or the actual rate of return in fact made by the trustee with the trust money:

(i)thus where the trust claimant can establish what proportion of the trustee's profits was made by trading with the trust money, he must account for that profit rather than pay interest on trust money [94] ;

(ii)where a trustee who applied trust money for his own benefit invested it at a rate above the standard trustee rate, they must account for the interest he actually received. [95]

In periods when there is a wide difference between commercial borrowing rates and investment rates, the court may vary from the usual higher rate of one per cent above bank base rate. It may take into account the purpose for which the claimant placed the money on trust with the defendant, and the standard rates of borrowing or investment return that a hypothetical person in the position of the claimant might have expected to pay or receive. [96]

(h) Costs.

30-021 A trustee against whom an action for breach of trust succeeds will be ordered to pay costs on the standard basis. Cost on the higher indemnity basis will only be awarded in exceptional circumstances. [97] Interests on costs runs from the date of judgment even though it is not until taxation that the trustee knows what he has to pay. [98]

(i) Imprisonment.

30-022 In addition to ordinary methods of execution, a trustee may be imprisoned for not more than a year if he fails to pay any sum in his possession or under his control as ordered by a court of equity. [99] This rule applies to others in a fiduciary capacity, e.g. executors [100] and auctioneers. [101]

Footnotes

28 *Target Holdings Ltd v Redferns [1996] A.C. 421* at 434; *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503* at [64].

29 *Re Dawson (Deceased) [1966] 2 N.S.W.R. 211* at 214, per Street J; *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515* at 543 per Brightman J.

30 This is the general expression used in leading case *Target Holdings Ltd v Redferns [1996] A.C. 421*.

31 For the distinction, see *Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15; (2003) 212 C.L.R. 484* at 499–500; and *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503* at [51]–[60]. The distinction is sharply drawn in *S.B. Elliott and C. Mitchell (2004) 67 M.L.R. 16 at 24–31*; and *S.B. Elliott and J. Edelman (2004) 18 Tru. L.I. 116 at 116–122* between monetary awards amounting to "substitutive compensation" for misapplication of trust funds and "reparative compensation" for losses resulting from wrongful administration of the trust.

32 *Knott v Cottee (1852) 16 Beav. 77*.

33 *Re Dawson (Deceased) [1996] 2 N.S.W.R. 211*; *Clough v Bond (1838) 3 My. & Cr. 490*.

34 *Target Holdings Ltd v Redferns [1996] A.C. 421*; *Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15; (2003) 212 C.L.R. 484*. It is a matter of construction to determine which terms of a solicitor's contractual retainer limit his authority to disburse monies which he holds on trust: *Lloyds Bank TSB Plc v Markandan & Uddin [2012] EWCA Civ 65; [2012] 2 All E.R. 884*; *Nationwide Building Society v Davisons Solicitors [2012] EWCA Civ 1626; [2013] P.N.L.R. 12*; *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503*.

35 See Ch.29 above.

36 TA 2000 s.1, Sch.1.

37 *Re Chapman [1896] 2 Ch. 763*; TA 2000 s.24.

38 See Ch.20 above; and generally *P. Millett (1998) 114 L.Q.R. 214 at 225–227*; R. Chambers, Ch.1 in Birks and Pretto (eds) Breach of Trust (Hart Publishing, 2002).

39 *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503* at [54].

40 *Target Holdings Ltd v Redferns [1996] A.C. 421* at 434C–D.

41 See para.30-050 below.

42 *Target Holdings Ltd v Redferns [1996] A.C. 421* at 434D–G; *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503* at [90], [107].

43 *Re Dawson (Deceased) [1996] 2 N.S.W.R. 211*; *Re Duckwari Plc (No.2) [1999] Ch. 268* at 272.

44 *Creggy v Barnett [2016] EWCA Civ 1004; [2017] Ch. 273* at [35], [44]–[45], [47]–[55].

45 *Re Duckwari Plc (No.2) [1999] Ch. 268* at 272.

46 See *The Heron II [1969] 1 A.C. 350*; *The Wagonmound (No.1) [1961] A.C. 388*.

47 *Target Holdings Ltd v Redferns [1996] A.C. 421* at 434; *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503* at [93].

48 See para.30-016 below.

49 *Bartlett v Barclays Bank Trust Co Ltd [1990] 1 Ch. 515* at 545.

50 See *Bristol and West Building Society v Mothew [1998] Ch. 1* at 17; *P. Millett (1998) 114 L.Q.R. 214 at 226*.

51 For criticism see *S.B. Elliott (2002) 65 M.L.R. 588*; S.B. Elliott and C. Mitchell (2004) 67 M.L.R. 16; S.B. Elliott and J. Edelman (2004) 18 Tru. L.I. 116.

52 *Partridge v Equity Trustees Executors and Agency Co Ltd (1947) 75 C.L.R. 149* at 167; *Target Holdings Ltd v Redferns [1996] A.C. 421* at 434; *AIB Group (UK) Ltd v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503* at [100].

53 See para.22-005 above.

54 *Target Holdings Ltd v Redferns [1996] A.C. 421* at 434G–D; *AIB Group (UK) Ltd v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503* at [106].

55 *Contrast Target Holdings Ltd v Redferns [1996] A.C. 421* with *Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15; (2003) 212 C.L.R. 484*.

56 *Target Holdings Ltd v Redferns [1996] A.C. 421* at 437, 440.

57 *P. Millett (1998) 114 L.Q.R. 214 at 225*.

58 *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*; *Nestle v National Westminster Bank Plc [1993] 1 W.L.R. 1260*.

59 *Re Dawson (Deceased) [1966] 2 N.S.W.R. 211*; *Phillipson v Gatty (1846) 6 Hare 26; affirmed (1850) Hare 516*.

60 *Target Holdings Ltd v Redferns [1996] A.C. 421*; *Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15; (2003) 212 C.L.R. 484*.

61 *Target Holdings Ltd v Redferns [1996] A.C. 421*; *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503* at [73], [90], [134]–[135].

62 *Lloyds Bank TSB Plc v Markandan & Uddin [2012] EWCA Civ 65; [2012] 2 All E.R. 884*; *Nationwide Building Society v Davisons Solicitors [2012] EWCA Civ 1626; [2013] P.N.L.R. 12*; *Ikbal v Sterling Law [2013] EWHC 3291 (Ch); [2014] P.N.L.R. 9*. The trustee may however have a defence under the Trustee Act 1925 s.61.

63 *Knott v Cottee (1852) 16 Beav. 77*.

64 *Re Duckwari Plc [1999] Ch. 253 at 272; (1837) 3 My. & Cr. 490*.

65 *Phillipson v Gatty (1848) 7 Hare 516; affirmed (1850) 2 H. & Tw. 459*; applied in *Re Massingberd's Settlement (1890) 63 L.T. 296*. If the investment was in fact resold by those to whom it was improperly sold, the resale price is the measure of the trustee's liability, because this would in fact have been the cost of replacement: *Re Bell's Indenture [1980] 1 W.L.R. 1217*.

66 *Fry v Fry (1859) 27 Beav. 144*. And see *Robinson v Robinson (1851) 1 De G.M. & G. 247*.

67 *Re Dawson (Deceased) [1966] 2 N.S.W.R. 211*.

68 *Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15; (2003) 212 C.L.R. 484*; *Lloyds Bank TSB Plc v Markandan & Uddin [2012] EWCA Civ 65; [2012] 2 All E.R. 884*; *Nationwide Building Society v Davisons Solicitors [2012] EWCA Civ 1626; [2013] P.N.L.R. 12*; *Ikbal v Sterling Law [2013] EWHC 3291 (Ch); [2014] P.N.L.R. 9*.

69 *Lloyds Bank TSB Plc v Markandan & Uddin [2012] EWCA Civ 65; [2012] 2 All E.R. 884*; *Ikbal v Sterling Law [2013] EWHC 3291 (Ch); [2014] P.N.L.R. 9*.

70 *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2014] 3 W.L.R. 1367* at [105], [107], [134].

71 *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*.

72 *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*.

73 *Nestle v National Westminster Bank (No.2) [1993] 1 W.L.R. 1260*.

74 *Re Bell's Indenture [1980] 1 W.L.R. 1217*; *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*; distinguishing *British Transport Commission v Gourley [1956] A.C. 185*.

75 *Dimes v Scott (1827) 4 Russ. 195*; *Wiles v Gresham (1854) 2 Drew. 258; affirmed 5 De G.M. & G. 770*.

76 *Fletcher v Green (1864) 33 Beav. 426*.

77 *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*.

78 See generally *S.B. Elliott [2001] Conv. 313*.

79 e.g. *Stafford v Fiddon (1857) 23 Beav. 386*; *Re Jones (1883) 49 L.T. 91*; *Re Waterman's WT [1952] 2 All E.R. 1054* (trustee liable for interest representing lost income owing to undue delay in investing trust funds).

80 S.B. Elliott [2001] Conv. 313 at 319–321.

81 The principles are summarised in *Challinor v Juliet Bellis & Co [2013] EWHC 620 (Ch)*; reversed on other grounds in *[2015] EWCA Civ 59; [2016] W.T.L.R. 43*.

82 *Re Davy [1908] 1 Ch. 61*.

83 *Burdick v Garrick (1870) L.R. 5 Ch.App. 233* at 241–242; *Wallsteiner v Moir [1975] Q.B. 373*.

84 *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*. See Court Funds Rules 1987 r.26 for the special account. The rate of interest is prescribed from time to time by a direction made by the Lord Chancellor with the concurrence of the Treasury: above rr.27. This approximates to the return on National Investment Instruments and assumes that the private trust funds would have been invested in secure investments offering a relatively low rate of return. The special account was formerly known as the "short-term investment" account.

85 *Wallsteiner v Moir [1975] Q.B. 373*.

86 *Re Duckwari Plc (No.2) [1999] Ch. 268*.

87 See *Westdeutsche Bank v Islington LBC [1996] A.C. 669*.

88 See *Re Barclay [1899] 1 Ch. 674*.

89 *Re Emmet's Estate (1881) 17 Ch. D. 142*. Half-yearly rests are rarely directed: *Burdick v Garrick (1870) 5 Ch. App. 233*.

90 *Vyse v Foster (1872) 8 Ch.App. 309 at 329 (affirmed L.R. 7 H.L. 318)*; *Re Davis, Davis v Davis [1902] 2 Ch. 314*; *Gordon v Gonda [1955] 1 W.L.R. 885*. The beneficiary may not claim the profits of a trader to whom the money has been improperly lent, even though the borrower knew that the money belonged to the trust: *Stroud v Gwyer (1860) 28 Beav. 130*.

91 *Jones v Foxall (1852) 15 Beav. 388*; *Williams v Powell (1852) 15 Beav. 461*; *Wallersteiner v Moir (No.2) [1975] Q.B. 373*; and see *Westdeutsche Bank v Islington LBC [1996] A.C. 669*.

92 *O'Sullivan v Management Agency and Music Ltd [1985] Q.B. 428*.

93 *Burdick v Garrick (1870) 5 Ch. App. 233*.

94 *Docker v Somes (1834) 2 My. & K. 655*.

95 *Re Emmet's Estate (1881) 17 Ch. D. 142*.

96 *Challinor v Juliet Bellis & Co [2013] EWHC 620 (Ch)*; reversed on other grounds in *[2015] EWCA Civ 59; [2016] W.T.L.R. 43*.

97 *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*; *Bowen-Jones v Bowen-Jones [1986] 3 All E.R. 163*.

98 *Hunt v RM Douglas (Roofing) Ltd [1990] A.C. 398*; overruling *K v K [1977] Fam. 39*; applied in *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*.

99 Debtors Act 1869 s.4; *Re Lord Berwick (1900) 81 L.T. 797*.

100 *Re Bourne [1906] 1 Ch. 697*.

101 *Crowther v Elgood (1887) 34 Ch. D. 691*.

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3. - Impoundment of Trustee's Beneficial Interest

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 3. - Personal Remedies Against the Trustee in Breach

3. - Impoundment of Trustee's Beneficial Interest

30-023 If a trustee who has been guilty of a breach of trust has a beneficial interest under the trust instrument, he will not be allowed to receive any part of the trust fund in which he is equitably interested until he has made good the breach of trust. [102] The principle is that to the extent that he is in default [103] he is regarded as having already received his share. [104] The rule applies not only to beneficial interests given to him directly by the trust instrument, but also to interests acquired derivatively, e.g. by purchase from another beneficiary or as his next-of-kin. [105] The beneficial interest which he claims under the instrument imposing the trust is treated as being subject to an implied condition of the proper performance of his duty as trustee. [106] His assignee is accordingly in no better position than he would be, even where the default was committed by the trustee after assigning his beneficial interest. [107] But there can be no impounding if the assignor does not become a trustee until after the assignment [108]; and if the trustee holds two distinct funds on distinct trusts, and has a beneficial interest in the first but not in the second, the court has no power to impound his beneficial interest in the first to make good his default in the second. [109]

Footnotes

102 *Re Dacre [1916] 1 Ch. 344*. Contrast impounding orders under TA 1925 s.62.

103 For adjustments to be made in respect of costs, see *Selangor United Rubber Estates Ltd v Cradock (No.4) [1969] 1 W.L.R. 1773*.

104 *Re Dacre [1916] 1 Ch. 344*. The principle is also applied as between shareholder directors and companies in liquidation: see *Selangor United Rubber Estates Ltd v Cradock (No.4) [1969] 1 W.L.R. 1773*; discussing *Re VGM Holdings Ltd [1942] Ch. 235*.

105 *Jacubs v Rylance (1874) L.R. 17 Eq. 341*; *Doering v Doering (1889) 42 Ch. D. 203*; *Re Dacre [1916] 1 Ch. 344*.

106 *Morris v Livie (1842) 1 Y. & C.C.C. 380*; *Re Pain [1919] 1 Ch. 38* at 47.

107 *Doering v Doering (1889) 42 Ch. D. 203*.

108 *Irby v Irby (No.3) (1858) 25 Beav. 632*; *Re Pain [1919] 1 Ch. 38* at 47.

109 *Re Towndrow [1911] 1 Ch. 662*.

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1. - Exemption Clauses and Express Modification of Duty

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 4. - Defences and Adjustments to Trustee's Liability

1. - Exemption Clauses and Express Modification of Duty [110]

30-024 The trust instrument is the primary source of the trustee's powers and duties. A settlor is generally free to alter any duties or limitations on powers that a trustee would owe under the general law. A trust instrument commonly contains clauses that negative or modify the duties to which the trustee would otherwise be subject, [111] or which exempt him from liability for a breach of duty. [112] It may prove therefore that the trustee has not committed any actionable breach or, at least, not one for which he can be held liable.

(a) Construction.

30-025 The duty or liability of a trustee under the general law can only be excluded by clear and unambiguous words. The court construes the exemption clause restrictively. Anything not clearly within it is treated as falling outside it. [113] The clause is construed contra proferentem only in a limited sense. The party relying on the clause bears the burden of showing that its words refer to the conduct that has been called into question. The court has no inherent reason to construe the clause in favour of the trust beneficiary since the beneficiary is not generally a party to the trust instrument. [114]

(b) Limits on permitted exclusion.

30-026 Even a clearly worded clause may not be applied according to its terms if it exceeds the permitted range of exclusion. A trustee owes an irreducible core of duties that cannot be excluded if the transaction between himself and the settlor is to be recognised as a trust. So a settlor cannot exclude liability for loss or damage resulting from the trustee's actual fraud. [115] In this context, fraud is understood to mean dishonesty, in the sense of conduct falling below the objective standard of an ordinary honest trustee. [116] A person who is at liberty to deal with property that belongs to him at law in dishonest disregard of his alleged beneficiaries' interests and without being held accountable to him is in substance a beneficial owner rather than a trustee.

The settlor is generally free to exclude any lesser degree of fault, such as negligence, and the trustee may rely on the clause as it stands. [117] The current understanding of English law is that the settlor may also exclude liability even for the trustee's gross negligence. [118] Some doubts have been expressed, however, as to whether the earlier authorities in fact provided clear support for this view: in principle, a settlor might not be free to modify or exclude certain other core duties of a trustee, such as the duty to obey the terms of the trust; to keep the trust property separate from his own property; and exercise his discretion in good faith and for a proper purpose. [119] Statute may also prohibit the exclusion of certain general law duties. [120]

A clause that is too broad in its purported range of exemption may nonetheless be valid. But it is read down in its effect to the permitted range of exclusion. [121] In extreme cases, an excessively broad exemption clause may indicate that a purported trust is a sham if there is other evidence, outside the terms of the instrument, that also supports this inference. [122]

(c) Rule of practice.

30-027 The Law Commission's review of trustee exemption clauses concluded that the use of trustee exemption clauses was best regulated by rules of professional practice. It recommended that any paid trustee who caused a settlor to include a clause in a trust instrument that had the effect of excluding or limiting liability for negligence had to take reasonable steps to ensure that the settlor was aware of the meaning and effect of the clause. [123] If the trustee did not do so, then the clause would remain fully enforceable but the trustee would be liable to be censured by the professional or regulatory organisation that they belonged to. The aim of the rule was to ensure that the settlor gave a properly informed consent to the inclusion of the clause. The Society of Trusts and Estate Practitioners has now adopted this practice. [124]

Footnotes

110 See generally Law Commission, Trustee Exemption Clauses (C.P. No. 171); and Trustee Exemption Clauses (Law Com. No.301).

111 *Wilkins v Hogg (1861) 5 L.T. 467*; *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*.

112 *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515* at 536, 537; and Law Com. No.301 paras 5.46–5.102.

113 For example *Knox v MacKinnon (1888) 13 App. Cas. 753 (HL Sc)*; *Lutea Trustees Ltd v Orbis Trustees Guernsey Ltd 1998 S.L.T. 471*; *Barnsley v Noble [2016] EWCA Civ 799; [2016] W.T.L.R. 1027*.

114 *Bogg v Raper unreported 8 April 1998 Court of Appeal*. It may however take a somewhat stricter approach to construction against a professional trustee: *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd [1996] P.L.R. 179* at [133] Jersey CA.

115 *Armitage v Nurse [1998] Ch. 241*.

116 *Walker v Stones [2000] 4 All E.R. 412*; following *Royal Brunei Airlines Sdn Bhd v Tan [1995] A.C. 378*. See para.30-079 below. An intentional breach of trust that was justifiably committed in the interests of the beneficiaries would not necessarily be dishonest in this sense. "The main duty of a trustee is to commit *judicious* breaches of trust": *Perrins v Bellamy [1889] 1 Ch. 797, 798* in arg. A trustee who believes her acts are morally justified, or that her actions have not fallen below acceptable standards, may nonetheless be held to have acted dishonestly if an ordinary, honest trustee would not have acted as she did: *Wong v Burt [2004] NZCA 174; [2005] W.T.L.R. 29*; *Barnes v Tomlinson [2006] EWHC 3115; [2007] W.T.L.R. 377*.

117 *Armitage v Nurse [1998] Ch. 241*.

118 *Spread Trustee Co Ltd v Hutcheson [2011] UKPC 13; [2012] 2 A.C. 194*.

119 D. Hayton, in A.J. Oakley (ed.), Contemporary Trends in Trust Law (OUP, 1996), Ch.3.

120 For example Pensions Act 1995 s.33(1) (duty of care and skill by trustees or fund managers in performance of investment functions); Financial Services and Markets Act 2000 s.253 (duty of care and skill of trustees of a unit trust scheme). The Unfair Contract Terms Act 1977 does not apply to trusts: *Baker v JE Clark & Co (Transport) Ltd [2006] EWCA Civ 464; [2006] Pens. L.R. 131*.

121 *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd [1996] Pens. L.R. 179* at [146]–[147].

122 See para.22-067 above.

123 Law Com. No.301, Pt 6.

124 See STEP, Guidance Notes: Practice Rule to Trustee Exemption Clauses.

End of Document

2. - Prior Consent or Acquiescence by Beneficiary

30-028 Two consequences may follow from a beneficiary's acquiescence in a breach of trust or prior consent to it.

(a) Beneficiary's action barred.

30-029 A beneficiary who has consented to the trustee's breach or acquiesced in it may not proceed against the trustee. [125] The rule applies whether or not the beneficiary derived any benefit from the breach. [126] The reason is that a beneficiary cannot be heard to complain of acts which he has himself knowingly authorised. [127] The beneficiary must have had full knowledge of the facts, and possibly also their legal consequences if his concurrence is to bar his claim. [128]

The bar on the beneficiary's claim only applies if he has full capacity to concur in the breach. Unless the beneficiary is himself guilty of fraud, [129] his consent is only effective if he has attained the age of majority [130] or is not subject to his parents' undue influence and they are profiting from the breach. [131]

The beneficiary's consent or acquiescence only bars his own claim against the trustee. The trustee remains liable to the other beneficiaries who have not consented. [132] Thus if trustees made an unauthorised investment, and all the beneficiaries being sui juris elected to adopt it as part of the trust fund, then the trustee would be absolved from liability. [133] They must, however, positively adopt it: it is not sufficient merely that a beneficiary has become absolutely entitled to a share in the trust fund. [134]

(b) Trustee's indemnity from consenting beneficiary.

30-030 If the trustee remains liable to another beneficiary who did not consent to the breach, then they may have some recourse against the consenting beneficiary. Equity has always had jurisdiction to order the trustee to be indemnified out of the interest of the beneficiary who instigated [135] the breach of trust to the extent that the beneficiary benefited by the breach. [136] This jurisdiction was considerably enlarged by statute. [137] It is provided that where a trustee commits a breach of trust at the instigation or request of a beneficiary (whether oral or written), [138] or with his consent in writing:

> "the court may, if it thinks fit, make such order as to the court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming though him."

The court has a full discretion under this section. It will not grant an impounding order unless the beneficiary clearly knew the facts which constituted the breach of trust, although it need not be shown that they knew that these facts amounted to a breach of trust. [139] If the order is made, it takes priority over the right of an assignee of the beneficiary's interest under an assignment made after the breach of trust was committed. [140] Moreover, neither the equitable nor the statutory right depends upon possession of the trust fund, so that the order can be made in favour of a former trustee. [141]

Footnotes

125 *Fletcher v Collis [1905] 2 Ch. 24*; *Life Association of Scotland v Siddal (1861) 3 De G.F. & J. 58*. See generally *Re Pauling's ST (No.1) [1964] Ch. 303*; *Knight v Frost [1999] 1 B.C.L.C. 364*.

126 *Fletcher v Collis [1905] 2 Ch. 24*.

127 *Brice v Stokes (1805) 11 Ves. 319*; *Re Deane (1888) 42 Ch. D. 9*.

128 *Cockerell v Cholmeley (1830) 1 Russ. & M. 418*; *Re Howlett [1949] Ch. 767* at 775; contrast *Stafford v Stafford (1857) 1 De G. & J. 193* at 202; *Holder v Holder [1968] Ch. 353*; approving *Re Pauling's ST (No.1) [1962] 1 W.L.R. 86 at 108 (affirmed: [1964] Ch. 303)*.

129 *Overton v Bannister (1844) 3 Hare 503*.

130 *Wilkinson v Parry (1828) 4 Russ. 272* at 276.

131 *Re Pauling's ST (No.1) [1964] Ch. 303*; for undue influence, see above para.8-008.

132 *Brice v Stokes (1805) 11 Ves. 319*; *Ghost v Waller (1846) 9 Beav. 497*.

133 *Re Jenkins and HE Randall & Co.'s Contract [1903] 2 Ch. 362*; *Wright v Morgan [1926] A.C. 788* at 799. And see above para.29-030.

134 *Consider Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515* at 543.

135 See *Sawyer v Sawyer (1885) 28 Ch. D. 595* at 598. In so far as this case appears to apply the rule more favourably towards a married woman beneficiary (even where she was not restrained from anticipation), it would probably not now be followed.

136 *Raby v Ridehalgh (1855) 7 De G.M. & G. 104*; and see *Re Balfour's Settlement [1938] Ch. 928*.

137 Trustee Act 1925 s.62. Contrast the automatic impounding of the interest of a trustee-beneficiary; above para.30-023.

138 *Griffith v Hughes [1892] 3 Ch. 105*; *Re Somerset [1894] 1 Ch. 231* at 266.

139 *Re Somerset [1894] 1 Ch. 231* at 270, 274.

140 *Bolton v Curre [1895] 1 Ch. 544*.

141 *Re Pauling's ST (No.2) [1963] Ch. 576*.

3. - Subsequent Release or Confirmation by Beneficiary

30-031 On the same principle, a beneficiary may, by subsequent confirmation or release, prevent himself from taking proceedings against his trustee for breach of trust. The beneficiary must be of full capacity and know all the relevant facts. [142]

It is not clearly settled whether a trustee or executor is entitled to demand a release when he completes his duties. It seems that an executor is entitled to a release on handing over the residue to the residuary legatee. In general, a trustee remains liable for breaches of trust even after he has retired from his trusteeship. He cannot require a deed of release from the incoming trustee [143] or the beneficiaries. Often, however, he will be given a release if he asks for it. [144] Moreover, the trustee is entitled to have his accounts examined and settled, and beneficiaries who are sui juris ought not to keep the risk of proceedings for breach hanging indefinitely over him. A claim by the beneficiary may be barred by lapse of time. [145]

Footnotes

142 *Burrows v Walls (1855) 5 De G.M. & G. 233*; *Walker v Symonds (1818) 3 Swans. 1*.

143 *Tiger v Barclays Bank Ltd [1951] 2 K.B. 556 (affirmed on other grounds, [1952] 1 All E.R. 85)*.

144 *King v Mullins (1852) 1 Drew. 308*; *Re Cater's Trusts (No.2) (1858) 25 Beav. 366*; but see *Re Wright's Trusts (1857) 3 K. & J. 419* at 421, 422.

145 See para.30-035 below.

4. - Relief by Court

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Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 4. - Defences and Adjustments to Trustee's Liability

4. - Relief by Court

(a) The jurisdiction.

30-032 By the Trustee Act 1925 s.61, [146] the court may relieve a trustee either wholly or partly from personal liability for a breach of trust if he "acted honestly and reasonably, and ought fairly [147] to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach". The power to grant relief extends to executors as well as trustees. [148]

(b) Grant of relief.

30-033 There are two stages to the applying the test. The burden lies on the trustee to establish that he acted honestly and reasonably, and that the discretion to grant relief should be exercised in his favour. [149] The conduct relied upon by the defendant must have had some relevant connection to the beneficiary's loss, at least in the sense that it raised the risk of the loss happening. But it need not be the "but for" cause of the loss in a strict sense, since in many transactions where the defence is raised, the loss might have occurred in any event owing to the involvement of a fraudulent third party. [150] Conduct outside this range of relevance may not be taken into account. [151] The defendant need only have acted reasonably, which is does not imply that he must have complied with best practice in every respect. [152] The defendant may rely on the defence even though he has failed to seek the directions of the court, particularly where the sum involved was small. [153]

(c) Paid or professional trustees.

30-034

> "A paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee." [154]

Thus the court may expect a higher standard of care of a paid or professional trustee before allowing him the benefit of the defence. Since the effect of granting the defence is to leave the loss with the beneficiary, the court may be reluctant allow it to a trustee who carried liability insurance. [155]

Footnotes

146 Replacing Judicial Trustees Act 1896 s.3. For the events leading to the enactment of the Judicial Trustees Act 1896 s.3, see *D. R. Paling (1973) 37 Conv.(N.S.) 48 at 53, n.22*. Companies Act 2006 s.1157 confers a similar power to relieve a director, officer, or auditor. But the tests for relief are not interchangeable. Unlike TA 1925 s.61, Companies Act s.1157 contemplates that the defendant may still be found to have acted reasonably even if he has breached his duty of care: *Santander UK v RA Legal Solicitors [2014] EWCA Civ 183; [2014] P.N.L.R. 20* at [31]. For examples, see *Re Allsop [1914] 1 Ch. 1*; *Holland v German Property Administrator [1937] 2 All E.R. 807*; *Re Wightwick's WT [1950] Ch. 260* (transfer of trust property to wrong person). For recent applications of s.61, see *P.S. Davies [2015] Conv. 379*; and *J. Lowry and R. Edmunds (2017) 133 L.Q.R. 223*.

147 See *Marsden v Regan [1954] 1 W.L.R. 423* at 434, 435; *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515* at 537, 538.

148 Trustee Act 1925 s.68(17); and see *Re Kay [1897] 2 Ch. 518*.

149 *Santander UK v RA Legal Solicitors [2014] EWCA Civ 183; [2014] P.N.L.R. 20*.

150 e.g. *Purrunsing v A'Court & Co (a firm) [2016] EWHC Ch 789; [2016] 4 W.L.R. 81*.

151 *Davisons (Solicitors) v Nationwide Building Society [2012] EWCA Civ 1626; [2013] P.N.L.R. 20*; *Santander UK v RA Legal Solicitors [2014] EWCA Civ 183; [2014] P.N.L.R. 20* at [24].

152 *Davisons (Solicitors) v Nationwide Building Society [2012] EWCA Civ 1626*.

153 *Re Grindey*; contrast *Re Gee* at 297; *Partridge v Equity Trustees Executors and Agency Co Ltd (1947) 75 C.L.R. 149* at 165.

154 *Re Waterman's WT, Lloyds Bank Ltd v Sutton [1952] 2 All E.R. 1054* at 1055 per Harman J.

155 See *National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd [1905] A.C. 373*; *Re Windsor Steam Coal Co (1901) Ltd [1929] 1 Ch. 151*; *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*; *P & P Property Ltd v Owen, White and Catlin LLP [2018] EWCA Civ 1082 at [110]; [2018] 3 W.L.R. 1244*.

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5. - Lapse of Time and Limitation

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Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 4. - Defences and Adjustments to Trustee's Liability

5. - Lapse of Time and Limitation

(a) General.

30-035 There were originally no limitation statutes applying to equitable claims arising out of a breach of trust. Instead, equity relied on the defence of laches to bar old suits. [156] A claimant who had been guilty of an inexcusable delay might be barred from bringing his suit if it would cause substantial prejudice to the defendant. Laches may still bar a claim arising out of breach of trust where statute does not provide a relevant limitation period. [157]

The present law is laid down by the Limitation Act 1980. [158] The general rule is now that an action by a beneficiary to recover trust property or in respect of any breach of trust may not be brought after six years from the date that the right of action accrued. [159] There are some exceptions to this general rule, where the trustee's liability is indefinite. It is therefore necessary to consider:

(i)who is a "trustee" for the purposes of the Limitation Act 1980; and

(ii)the exceptions where the six-year limitation period does not apply.

(b) Meaning of "trustee".

30-036 For the purposes of the Limitation Act 1980 and these exceptions, a "trustee" is a person who has lawfully assumed fiduciary obligations in relation to trust property, with or without any formal appointment to his office. [160] The term obviously includes an express trustee. It also extends to people who are in a sense "constructive trustees" because they have assumed trustee-like duties to their principals. These include a personal representative, [161] a director of a company (since for some purposes a director is treated as a trustee of the company's funds under his control) [162]; and a mortgagee with respect to any balance of the proceeds of sale of the mortgaged property. [163] The expression also applies to one who, although not expressly appointed as a trustee, takes upon himself the office of trusteeship. [164] The main instance is a trustee de son tort since he assumes trustee duties to a beneficiary even if he is not expressly appointed as a trustee. [165] But it does include not a trustee in bankruptcy, [166] nor, apparently, the liquidator of a company in a voluntary liquidation. [167]

Significantly, the term does not apply to a person who is called a "constructive trustee" merely because he is liable to account to the claimant for some breach of equitable duty. [168] The common instances are where the defendant's liability is merely ancillary to that of the primary trustee, such as for knowing receipt of misapplied trust property or dishonest assistance in a breach of trust. [169] To call a person a constructive trustee in those cases is only a formula indicating that he is liable to an equitable claim. [170] The liability of such a person remains subject to the general six-year limitation period. [171]

(c) Exceptions to six-year rule.

30-037 Where these exceptions apply, the trustee is exposed to an indefinite liability. [172] Delay will not bar the action unless the defendant can rely on laches. The exceptions are as follows:

(2) Fraud or fraudulent breach of trust.

30-038 The Limitation Act 1980 provides that no period of limitation applies in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy. [173] "Fraud" means dishonesty. [174]

(3) Recovery of trust property from trustee.

30-039 The Limitation Act 1980 also provides that no period of limitation applies to a suit to recover from the trustee trust property or its proceeds in the possession of the trustee, [175] or previously received by the trustee and converted to his use. [176] The trust property may be capital or income. [177] The trustee's liability is indefinite since he is treated as having possession of the property on the beneficiary's behalf both before and after he commits the breach of trust. [178] The effect is to leave the trustee open indefinitely to a proprietary claim for restitution of the original trust property or its traceable proceeds. But the trustee does not "convert" the property to his use when it is properly paid to him in his capacity as a beneficiary. [179] Nor is it "converted" because it is properly lent on mortgage to enable the mortgagor to repay a debt owed to a firm in which a trustee is a partner. [180] In such cases, time runs in the usual way.

(1) Charitable trusts.

30-040 No period of limitation applies to an action by the Attorney General [181] to enforce charitable trusts; such an action does not involve allegations of breach of trust nor is there any beneficiary in whom the cause of action is vested, as the Limitation Act requires. [182]

(d) Accrual of cause of action.

30-041 In general, time begins to run under the Limitation Act from when the breach of trust was committed, whether the beneficiary knew of it or not. [183]

The Limitation Act provides for certain refinements to this general rule. Where the beneficiary is under disability (i.e. while a minor or of unsound mind) [184] time runs only once his disability ceases. [185] Time is also postponed if the action is based on the trustee's fraud, [186] or the defendant has fraudulently concealed the right of action. [187] A trustee who is unaware that he is acting in breach of trust does not conceal the right of action by fraud. [188]

Where the beneficiary has a future interest, time begins to run only when his interest falls into possession. [189] The reason is that the beneficiary cannot be expected to risk litigation about damage to a future interest which he may never live to enjoy. [190] The possibility of a beneficiary having property appointed to him under a simple discretionary trust does not postpone the running of time until he in fact receives the property. [191]

(e) Effect of limitation.

30-042 A beneficiary whose action is barred cannot benefit from proceedings brought by one whose action is not barred. [192] The point is relevant to beneficiaries with successive interests in the trust. The example is of a trustee who commits a non-fraudulent breach of trust by advancing too much on a mortgage. After the tenant for life's right of action has been barred, the remainderman may nonetheless sue the trustee to replace the lost capital. The interest on the money until the death of the tenant for life belongs to the trustee himself. [193]

(f) Trustee also beneficiary.

30-043 Where a trustee who is also a beneficiary receives or retains trust property as his share in a distribution, his liability in an action to recover trust property after the period of limitation is limited to the excess over his proper share. [194] Thus if the property is divided between three including the trustee, and a further beneficiary claims, so that the property is divisible in quarters, the trustee is liable only for the difference between one-third and one-quarter, and not for a whole quarter. This relief is only available if the trustee acted honestly and reasonably in making the distribution. [195]

Footnotes

156 *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355* at [12], [44].

157 Limitation Act 1980 s.36(2).

158 LA 1980 s.21, replacing LA 1939 s.19, which replaced TA 1888 s.8, on which see *How v Earl Winterton [1896] 2 Ch. 626* at 639.

159 LA 1980 s.21(3); as to settled land and land held on trust, see s.18.

160 *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355*, at [9]. It is immaterial whether the trustee in this sense has any beneficial interest in the property: LA 1980 s.38(1), TA 1925 s.68(17).

161 LA 1980 s.38 and TA 1925 s.68(17).

162 *JJ Harrison (Properties) Ltd v Harrison [2002] 1 B.C.L.C. 162*; *Burnden Holdings (UK) Ltd v Fielding [2018] UKSC 14; [2018] A.C. 857*. As to the circumstances in which a claim against a director for an account is within LA 1980 s.21, see *DEG-Deutsche Investitions v Koshy [2002] 1 B.C.L.C. 478*.

163 *Thorne v Heard [1895] A.C. 495*; and Law of Property Act 1925 s.105.

164 See para.26-005 above.

165 *Mara v Brown [1896] 1 Ch. 196*; *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355*.

166 *Re Cornish [1896] 1 Q.B. 99*.

167 *Re Windsor Steam Coal Co (1901) Ltd [1928] Ch. 609; affirmed on a different ground [1929] 1 Ch. 151*.

168 *Paragon Finance v DB Thakerar & Co [1999] 1 All E.R. 400*; *UCB Home Loans v Carr [2000] Lloyd's Rep. PN 754* at 767–769; *JJ Harrison (Properties) Ltd v Harrison [2002] 1 B.C.L.C. 162*; *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355*.

169 *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355*. See para.30-087 below.

170 *Selangor United Rubber Estates Ltd v Cradock [1968] 1 W.L.R. 1555* at 1582, per Ungoed-Thomas J; *Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48; [2003] 2 A.C. 366* at [141]–[143], per Lord Millett who criticises the description of the defendant as "accountable as a constructive trustee", it being more accurate simply to describe the defendant "as accountable in equity".

171 See para.30-085 below.

172 LA 1980 s.21(1). See, e.g. *Mills v Drewitt (1855) 20 Beav. 632* (33 years); *Re Ashwell's Will (1859) Johns. 112* (37 years). Compare *McDonnel v White (1865) 11 H.L.C. 570*.

173 LA 1980 s.21(1)(a). See *Thorne v Heard [1895] A.C. 495*. The fraud must be related to the breach of trust rather than coincidental to it: *UCB Home Loans v Carr [2000] Lloyd's Rep. P.N. 754* at 757.

174 *Armitage v Nurse [1998] Ch. 241* at 260. For dishonesty, see para.30-078 below.

175 See *Thorne v Heard [1895] A.C. 495*; *Re Page [1893] 1 Ch. 304*.

176 LA 1980 s.21(1)(b).

177 *Re Howlett [1949] Ch. 767*; and see *A.K.R. Kiralfy (1949) 13 Conv.(N.S.) 276*.

178 *Paragon Finance v DB Thakerer & Co Ltd [1999] 1 All E.R. 400*; *Halton International Holdings SARL v Guernoy Ltd [2006] EWCA Civ 801*.

179 *Re Timmis [1902] 1 Ch. 176*. *Contrast Re Landi [1939] Ch. 828*; and see *Re Milking Pail Farm Trusts [1940] Ch. 996; criticised (1941) 57 L.Q.R. 26*.

180 *Re Gurney [1893] 1 Ch. 590*.

181 For this function of the Attorney General, see above para.23-065.

182 *Attorney General v Cocke [1988] Ch. 414*; and LA 1980 s.21(1), (3).

183 *Re Somerset [1894] 1 Ch. 231*.

184 LA 1980 s.38(2).

185 LA 1980 s.28.

186 This should mean actual rather than constructive fraud: W. Swadling, Ch.11 in P. Birks and A. Pretto, Breach of Trust (Hart Publishing, 2002).

187 LA 1980 s.32.

188 *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515*.

189 LA 1980 s.21(3). Sums do not fall into possession merely because, under a power of advancement, they are advanced out of a future interest: *Re Pauling's ST (No.1) [1964] Ch. 303 at 353; affirming [1962] 1 W.L.R. 86* at 115; *Armitage v Nurse [1998] Ch. 241* at 261.

190 *Cattley v Pollard [2006] EWHC 3130 (Ch); [2007] 2 All E.R. 1086*.

191 *Johns v Johns [2004] NZCA 42; [2005] W.T.L.R. 529*.

192 LA 1980 s.21(4).

193 See *Re Somerset [1894] 1 Ch. 231*; *Re Fountaine [1909] 2 Ch. 382*; *Bartlett v Barclays Bank Trust Co Ltd [1980] Ch. 515* at 537.

194 LA 1980 s.21(2), a new provision introduced by the Limitation Amendment Act 1980.

195 LA 1980.

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6. - Bankruptcy

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Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 4. - Defences and Adjustments to Trustee's Liability

6. - Bankruptcy

30-044 A trustee will be freed from further liability for a breach of trust by becoming bankrupt and obtaining his discharge, unless the breach was fraudulent and he was a party to the fraud. [196] "Fraud" in this context connotes actual fraud or dishonesty. A finding of undue influence or "wilful default" is not enough. [197]

Footnotes

196 Insolvency Act 1986 s.281, replacing Insolvency Act 1985 s.128, which itself replaced Bankruptcy Act 1914 s.28.

197 *Mander v Evans [2001] 1 W.L.R. 2378*; *Woodland-Ferrari v UCL Group Retirement Benefits Scheme [2002] 3 All E.R. 670*.

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7. - Contribution and Indemnity

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Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 4. - Defences and Adjustments to Trustee's Liability

7. - Contribution and Indemnity

(a) Joint and several liability.

30-045 The starting point is that a trustee is only liable for the losses resulting from his own breach of trust. [198] But where two or more trustees are liable, each of them may be sued for the whole amount of the loss resulting from their breach. If they are all sued, the judgment may be executed against any one of them singly. When the judgment against two co-trustees is partly satisfied by one of them and the other goes bankrupt, the judgment creditor may prove in the bankruptcy for the whole original judgment debt and not merely for the balance of it which remains unsatisfied. [199]

(b) Contribution.

30-046 The general rule in equity was that, as between themselves, the trustees liable to make good a breach of trust had to bear the liability equally: if one paid more than his share he could claim contribution from the others. [200]

In exceptional cases, [201] the rule of equal contribution was replaced by a right of one trustee to obtain an indemnity from the others, but there was no intermediate position between these extremes. These rules have now been superseded by statute. [202] The court may now award in favour of one trustee against another a contribution that is just and equitable having regard to the extent of the contributing trustee's responsibility for the loss. [203] This enables the loss to be apportioned between the trustees according to their different degrees of fault and responsibility.

A contribution may also be sought from third parties who are liable for receiving the proceeds of the breach. They also may claim contribution from other defendants who are liable for the same damage. For the purposes of contribution proceedings under the statutory rule, the restitutionary claim against the recipient is treated as one to recover compensation for damage sustained through the trustee's breach. [204]

(c) Indemnity.

30-047 In proceedings in which contribution is claimed, the court has power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity. [205] The statutory power to order one co-trustee to indemnify another is likely to be exercised in the same instances where under the former law a right of indemnity replaced the rule of equal contribution. These were:

(i)Where one trustee received and misappropriated the trust money, or was otherwise alone morally guilty. [206]

(ii)Where one of the trustees acted as solicitor to the trust, and the breach of trust was committed on his advice, [207] and not independently of it [208]

(iii)Where one of the trustees was a beneficiary, to the extent of his beneficial interest rather than the extent of the benefit he received from the breach. The breach of trust was made good as far as possible out of the beneficial interest before applying the normal rule that the loss is borne equally between them. [209]

(d) Limitation.

30-048 Special rules govern contribution and indemnity claims both in the date on which the right to claim contribution accrues and to the period of limitation. [210] If a beneficiary obtains judgment against a trustee for breach of trust, the trustee's right to claim contribution accrues on the date of the judgment [211] : while, if the trustee compromises the beneficiary's claim (whether or not he admits liability), his right of action for contribution accrues on the date on which he and the beneficiary reach agreement as to the amount to be paid by him. [212] The right of action for contribution becomes statute-barred two years after it has accrued. [213]

(e) Adjustment of payments due to beneficiaries. [214]

30-049 A trustee who overpays one beneficiary can adjust accounts by retaining the overpayments out of other interests of the beneficiary, e.g. future income. [215] Thus payments out of capital for legacy duty which should have been made out of income, [216] or the amount of tax on payments made gross but which should have suffered deduction of tax, [217] have been recouped in this way. [218] Where, however, the trustee being also a beneficiary underpays himself while overpaying the other beneficiaries, equity will not allow him to adjust accounts in his own favour if this would cause inconvenience and hardship to the beneficiaries. [219]

Footnotes

198 See para.30-004 above.
199 *Edwards v Hood-Barrs [1905] 1 Ch. 20*.
200 *Lingard v Bromley (1812) 1 V. & B. 114*; *Bahin v Hughes (1886) 31 Ch. D. 390*; *Jackson v Dickinson [1903] 1 Ch. 947*.
201 See para.30-047.
202 Civil Liability (Contribution) Act 1978 ss.1(1), 6(1), 7(3); *Friends Provident v Hillier Parker [1997] Q.B. 85* at 107.
203 Civil Liability (Contribution) Act 1978 ss.1(10), 2(1).
204 *Charter Plc v City Index Ltd [2007] EWCA Civ 1382; [2008] Ch. 313*, applying Civil Liability (Contribution) Act 1978 s.6(1); noted *G. Virgo [2008] C.L.J. 254*.
205 Civil Liability (Contribution) Act 1978 s.2(2).
206 *Bahin v Hughes (1886) 31 Ch. D. 390* at 395.
207 *Lockhart v Reilly (1856) 25 L.J.Ch. 697*; *Re Partington (1887) 57 L.T. 654*; *Re Turner, Barker v Ivimey [1897] 1 Ch. 536*; *Re Linsley [1904] 2 Ch. 785*.
208 *Head v Gould [1898] 2 Ch. 250*.
209 *Chillingworth v Chambers [1896] 1 Ch. 685*. Consider also the court's powers of impounding: above para.30-023.

210 Contrast the position with regard to contribution claims between sureties: below para.45-023.
211 Limitation Act 1980 s.10(3).
212 LA 1980 s.10(4).
213 LA 1980 s.10(1).
214 C. Harpum, Ch.1 in P. Birks (ed.) The Frontiers of Liability, Vol.1. (OUP, 1994) at 21–22.
215 *Livesey v Livesey (1827) 3 Russ. 287*; and see *Re Robinson [1911] 1 Ch. 502* at 508.
216 *Re Ainsworth [1915] 2 Ch. 96*.
217 *Re Musgrave [1916] 2 Ch. 417*.
218 See also *Re Reading [1916] W.N. 262*.
219 *Re Horne [1905] 1 Ch. 76*; as explained in *Re Ainsworth [1915] 2 Ch. 96*.

1. - General

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Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 5. - Proprietary Remedies Against Proceeds of Breach of Trust

1. - General [220]

30-050 The beneficiary may also enforce proprietary claims to the proceeds of the misapplied trust property which he identifies by the rules of following and tracing. Against the defaulting trustee, a proprietary claim may be enforced by an equitable lien or beneficial interest under a constructive trust. [221] A third party to whom the beneficiary follows the misapplied property may be liable on a personal claim for receiving the property. [222] A third party into whose hands the proceeds of the misapplied property are followed or traced will hold it subject to an equitable lien or constructive trust, depending on whether that person took the property with notice of the breach of trust. [223] The value of any property recovered on a proprietary claim against the trustee or from a third party must be taken into account in determining the amount of the trustee's personal liability to account for losses which the trust has incurred.

(a) Following and tracing.

30-051 The rules of following and tracing are artificial rules of evidence which allow a claimant to identify misapplied property or its proceeds. [224] Following is the process of identifying the same property as it is transferred from one person to another. Tracing is the process of identifying a new asset as the substitute for an original asset which was misappropriated from the claimant. Where one asset is exchanged for another, the claimant may elect to treat the substituted asset as representing the value contained in the original asset. He is said to trace the value represented in the original asset into the substitute.

In the strict sense, the processes of following and tracing are not claims or remedies. They merely lay the evidential foundation necessary to prove some claim against the defendant which the claimant then forces by a remedy. [225] The remedy may be personal or proprietary. So, for example, the claimant may follow money which the trustee paid in breach of trust to a third party. The claimant's motive may be to establish the personal liability of the third party in a claim for knowing receipt. [226] In such a case, the process of following merely proves the identity of the money received by the third party with that misapplied from the trust. It is common, however, that a claimant relies on the rules of following and tracing to prove his entitlement to a proprietary remedy against the defendant, and tracing and following are considered in this section for this reason. For example, the claimant may trace misapplied property from the trust into the trustee's personal bank account with a view to asserting an equitable lien over the account. This will ensure the priority of his claim in the insolvency of the trustee.

(b) Law and equity.

30-052 For historical reasons, different rules of following and tracing have evolved at common law and in equity. The distinction has been much criticised. [227] The main difference is that the common law rules of identification do not allow money to be followed through a mixed fund, whereas the equitable rules do. The rules cannot be applied interchangeably so a claimant cannot

necessarily rely on the equitable rules of identification to follow money through a mixture when his attempts to follow the money at law have failed. [228] However, the distinction between the two sets of rules has diminished in its importance. The rules which determine whether the claimant has a sufficient equitable title to trace in equity have been expanded. In many situations where the claimant might once have needed to trace his property at law, he is now treated as having a sufficient equitable title to rely on the more sophisticated rules of identification in equity because the very circumstances of the misapplication generate in him a distinct equitable title to the money. [229]

The common law and equitable rules of identification will be discussed separately.

(c) Following and tracing at common law. [230]

30-053 A claimant with a legal interest in the original asset is generally required to rely on the common law rules of following and tracing, and then to enforce any claim they may have by a common law remedy. The common law treated money as identifiable so long as it had not become mixed with other money. Accordingly, if the defendant paid the claimant's money into a bank account which already contained money belonging to the defendant, the claimant could not trace his money into any withdrawal from the account. [231] This would prevent the claimant from following his money at law through a clearing payment system. [232]

But if the defendant withdrew money from the claimant's account then the claimant could trace into the withdrawal. There would be no mixture involved in the substitution of the money proceeds for the original chose in action representing the credit balance in the bank account. [233] Having proved his title to the money in this way, the claimant might have an action in money had and received against a third person to whom the defendant paid the money, provided that the money remained unmixed until the point of receipt. [234] This has been explained as a restitutionary action for the enforcement of the claimant's proprietary title to the money. [235] If the fund of money remained identifiable, he would be entitled to a declaration of his legal title to it. He could thus recover it specifically even in the insolvency of the person who had it in his control. [236] But if the claimant's money were mixed with that of another person and applied in the purchase of another asset, he could have no claim to the substituted asset. In contrast to the common law claims arising from the mixture of granular or fluid fungibles, the common law appears not to recognise a co-ownership interest in a mixture of money. [237]

Footnotes

220 See L. Smith, The Law of Tracing (Oxford, Clarendon Press, 1997).

221 *Foskett v McKeown [2001] 1 A.C. 102*.

222 See para.30-071 below.

223 See para.30-055 below.

224 *Boscawan v Bajwa [1996] 1 W.L.R. 328* at 334; *Foskett v McKeown [2001] 1 A.C. 102 at 127–128*, per Lord Millett.

225 *Foskett v McKeown [2001] 1 A.C. 102* at 128, per Lord Millett.

226 See para.30-071 below.

227 *Trustee of the Property of FC Jones & Sons v Jones [1997] Ch. 159* at 169, per Millett LJ; *Foskett v McKeown [2001] 1 A.C. 102* at 128, per Lord Millett.

228 See para.30-054 below.

229 See further para.30-054 below.

230 See generally *R.M. Goode (1976) 92 L.Q.R. 360*; *S. Khurshid & P. Matthews (1979) 95 L.Q.R. 78*; *D. Fox [1999] Restitution L. Rev. 55*.

231 *Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 A.C. 548* at 572, per Lord Goff; *Trustee of the Property of FC Jones & Sons v Jones [1997] Ch. 159* at 169, per Millett LJ.

232 *Agip (Africa) Ltd v Jackson [1991] Ch. 547*; *El Ajou v Dollar Land Holdings Plc [1993] 3 All E.R. 717 at 733; reversed on other grounds [1994] 2 All E.R. 685*.

233 *Lipkin Gorman v Karpnale Ltd [1991] 2 A.C. 548*.

234 *Lipkin Gorman v Karpnale Ltd [1991] 2 A.C. 548*.

235 *Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch); [2013] Ch. 156*.

236 *Trustee of the Property of FC Jones and Sons v Jones [1997] Ch. 159*.

237 *Spence v Union Maritime Insurance Co (1868) L.R. 3 C.P. 427*; *Indian Oil Corp v Greenstone Shipping SA [1988] 1 Q.B. 345*.

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2. - Title to Follow or Trace in Equity

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 5. - Proprietary Remedies Against Proceeds of Breach of Trust

2. - Title to Follow or Trace in Equity

(a) Fiduciary relationship or distinct equitable title.

30-054 To rely on the equitable rules of identification the claimant must have some distinct equitable title to the original asset.[238] It need not be a beneficial interest: it would be enough, for example, that he had an equitable charge over the original asset.[239] On the orthodox view, therefore, it is not enough that the claimant has a legal and beneficial title to the original asset. In this situation, the claimant has no distinct equitable title to the asset[240] and must instead rely on the common law rules of identification to found his claim.

The requirement that the claimant have a distinct equitable title is commonly satisfied by the original asset having been held subject to a fiduciary relationship before it was misapplied. In other cases, where the claimant was not the principal in such a relationship, the circumstances in which claimant was separated from the original asset may generate a distinct equitable title sufficient to allow him to follow or trace it. So, for example, a person who is induced to pay money by a fraudulent misrepresentation has a sufficient equitable title even before he elects to rescind the payment transaction to follow or trace the money.[241] It has been said that a thief holds the stolen property on trust for his victim and the victim thereby has a sufficient title to rely on the equitable rules of identification.[242] On one view, the payment of money under a simple mistake generates a sufficient equitable title in the claimant to allow him to trace it. This, however, has been doubted at least in cases where the conscience of the recipient is unaffected by knowledge of the mistake.[243]

The requirement that the claimant have a distinct equitable title to follow or trace property has been criticised. It confuses the requirements of the process of identifying the claimant's original asset or its proceeds, with the appropriate conditions for the assertion of a proprietary remedy against the property so identified, thereby conferring priority on the claimant over the defendants' unsecured creditors.[244]

(b) Identification and assertion of proprietary claim.

30-055 Where the trustee has misapplied the claimant's original asset and transferred it to a third person, the claimant has a choice to make. He may either follow the original asset and enforce his equitable title to it, or trace into the substituted asset in the hands of the trustee and enforce a proprietary remedy against it.[245] In cases where the original asset can no longer be identified as still existing, or where the claimant's equitable title to it has been extinguished (as where the third party took the legal interest in it as a bona fide purchaser for value without notice),[246] the claimant's only option will be to trace into the substituted asset in the hands of the defendant.

Against an asset in the hands of the trustee, the claimant has an election between two proprietary remedies. He may enforce an equitable lien against it for the value of the original asset which was applied to acquire it. The lien is for this fixed amount, and does not change in value even if the substituted asset rises or falls in value. Alternatively, he may claim the entire beneficial ownership of the substituted asset under a constructive trust. The value of this proprietary security will vary as the value of the substituted asset fluctuates. The claimant has an unrestricted election between whichever of the remedies is more advantageous to him. [247]

Footnotes

238 *Re Diplock [1948] Ch. 465* at 520 per curiam.

239 *Dick v Harper [2006] B.P.I.R. 20*.

240 *Vandervell v IRC [1967] 2 A.C. 291* at 311, per Lord Upjohn; 317 per Lord Donovan; *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at 706, per Lord Browne-Wilkinson.

241 *El Ajou v DLH Plc [1993] 3 All E.R. 717* at 734, per Millett J; *Twinsectra Ltd v Yardley [1999] Lloyd's Rep. Bank. 438*; reversed on other grounds *[2002] 2 A.C. 164; [2002] UKHL 12*. See further para.2-007 above.

242 *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at 715–716, per Lord Browne-Wilkinson; applied in *Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch); [2013] Ch. 156* at [274]–[275].

243 *Chase Manhattan NA Ltd v Israel British Bank (London) Ltd [1981] Ch. 105*; cf. *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at 714–715.

244 See, e.g. *Bristol & West BS v Mothew [1998] Ch. 1* at 23, per Millett LJ; *Foskett v McKeown [2001] 1 A.C. 102* at 128, per Lord Millett.

245 *Re Hallett's Estate (1879) 13 Ch. D. 696* at 709–711, per Sir George Jessel MR; *Foskett v McKeown [2001] 1 A.C. 102* at 129–133, per Lord Millett.

246 See para.4-017 above.

247 *Foskett v McKeown [2001] 1 A.C. 102*.

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3. - Identification and Mixed Funds

Snell's Equity 34th Ed.

Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 5. - Proprietary Remedies Against Proceeds of Breach of Trust

3. - Identification and Mixed Funds

(a) General.

30-056 It often happens that the proceeds of the claimant's original asset are mixed in a bank account. Money is then withdrawn from the account which is used to acquire a substituted asset. Before the claimant can assert any claim to the substituted asset, he must establish whether the money used to acquire it was specifically attributable to him or to the other contributor to the bank account. Formalised rules of identification are used resolve the evidential uncertainty. They differ depending on whether the other contributor to the mixture is—like the claimant—innocent of any fault, or whether he is a wrongdoer. In this context, a wrongdoer means the defaulting trustee or a person who has received the money with notice of the breach of trust. Money belonging to two innocent contributors may be mixed where a trustee mixes the funds of two separate trusts,[248] or gives trust money to a volunteer who mixes it with his own.[249]

(b) Other contributor at fault.

30-057 Punitive presumptions of identification apply where the other contributor to the bank account is a wrongdoer. They aim to preserve the value contributed by the claimant to the mixed fund in the bank account at the expense of the value contributed by the wrongdoer. A reversed burden of proof operates. The mixed money in the bank account is presumed to belong to the innocent trust claimant to the extent that the wrongdoer cannot prove that it is attributable to his own contributions to the account.[250]

> "If a trustee mixes trust assets with his own, the onus is on the trustee to distinguish the separate assets, and to the extent that he fails to do so, they belong to the trust."[251]

The wrongdoing trustee cannot defeat the trust claimant's proprietary claim by so fundamentally mixing the trust money with his own that he creates an evidential "black hole". The onus is on the trustee to show the very part of the mixed fund which is his own property.[252] It follows that when money is withdrawn from the account and dissipated, then it is presumed to have been drawn from the wrongdoer's share of the mixed fund.[253] The presumption is made with the benefit of hindsight. Depending on the outcome of events, it may turn out that the trust claimant's share of the mixture remained unspent in the account or that it was withdrawn and used to acquire another asset which still survives. So in one case where the money which the trustee withdrew from the account was dissipated, it was presumed that the residue was attributable to the claimant. She was entitled to an equitable lien over the account for the money thus identified. In other case, where the money which the trustee withdrew from the account was successfully invested in stock and the residue in the account was dissipated, it was presumed that the claimant's money could be traced into the stock.[254] There is no rule that money first withdrawn from the account must be treated as the trustee's,[255] unless it turns out that that money was dissipated.

Where, however, the trustee deposits money into the account after he has been proved by the rules above to have drawn against the claimant's money, there is no presumption that he intends the deposit to replace the claimant's money. [256] The claimant is therefore limited to asserting a claim against the account for the lowest balance that his money has fallen to between the date of the deposit of his money and the subsequent deposit of the trustee's own money. This result is consistent with the general presumptions operating in cases of mixture. Since the subsequent deposit of the trustee's money does not originate in the mixed fund, the trustee can easily displace the evidential presumption that it is attributable to the claimant. [257] The claimant might only be able to trace into the later deposit if the defendant controlled the funds in the account as part of a coordinated scheme for laundering funds and obscuring their movement through the account. [258]

(c) Other contributor innocent.

30-058 Where neither of the two contributors to the mixed fund in the bank account is a wrongdoer towards the other, there is no reason to favour the interests of one over the other. Different presumptions of identification apply between them.

(1) Rule in Clayton's Case.

30-059 The traditional approach has been to apply the rule in *Clayton's Case* to allocate the mixture in the bank account between them. Specific credits in the account are matched against specific debits. It is presumed that the money first withdrawn from the account is drawn against the contribution of the party whose money was first deposited. Once that contribution has been exhausted, later withdrawals are treated as made against the contribution of the party whose money was next deposited. In attributing withdrawals to one party or the other, the court does not take into account—as it would with a wrongdoer—whether the money withdrawn is dissipated or preserved.

The results of applying *Clayton's Case* may be arbitrary. Its effect may be to prejudice or favour the contributor whose money was first paid into the account depending on whether the money withdrawn happened to be dissipated or preserved in some other asset. The rule can also be expensive to apply where the money in a mixture derived from many different contributors, and where there have been many deposits and withdrawals in the account all of which need to be specifically matched with each other. [259] Moreover, the analytical justification for applying *Clayton's Case* in tracing cases has been questioned. The rule developed to determine the state of the running account between the bank and its customer. But it has been extended to apportion the value in the account between parties who have equitable claims to the benefit of the customer's chose in action against the bank. [260]

(2) Different rules for allocation.

30-060 Recent cases have recognised reasons to displace the rule in *Clayton's Case*. Although it remains the default rule, it may be displaced with relative ease in favour of a solution that produces a fairer result. [261] It would not apply where it was contrary to the actual presumed intentions of the contributors, [262] or was unjust or impractical in its operation. [263] The court may instead treat the mixed fund as subject to a "rolling charge" in favour of each innocent contributor. [264] Debits from the account are borne proportionately by each contributor according to the amount of their money in the account immediately before each withdrawal. But this approach may become unnecessarily complex where the mixed fund derives from the deposits of many different contributors made over a long period. The simpler solution is to treat all withdrawals from the account as borne rateably by all the contributors but to make no adjustment for sequence of deposits and withdrawals from the account. [265] The effect may be to allow a contributor to trace into a withdrawal from the account even though the withdrawal was made before his money had been deposited in the account.

(d) Payment systems.

30-061 Special difficulties may arise where the trustee misapplies the claimant's money and passes it through a series of bank accounts, each linked by a network of payment systems. The problem may be to identify the funds misapplied at the outset with the funds of similar value deposited in the defendant's account at the end of the tracing process. The claimant may succeed even without exact proof of each transactional link between himself and the defendant. The inference that the sum in the defendant's account represents the proceeds of the claimant's money would be stronger if the trustee has coordinated the sequence of payments or if they are part of a systemic scheme for laundering funds.[266] The inference may even stand where the sum was paid to the defendant before it was reimbursed by the misapplication from the claimant's account. But in that case the credit to the defendant's account and the depletion of the claimant's funds must be part of a coordinated scheme. Without such coordination, the credit and the debit cannot be treated as attributable to each other.[267] Where defendant is a wrongdoer, he cannot defeat the possibility of tracing against him by creating an evidential "black hole" designed to frustrate the claimant's action against him.[268]

(e) Tracing beyond mixture in bank account.

30-062 Where money drawn from the account by the trust is entirely attributable to the claimant, then the claimant may assert a lien or right of beneficial ownership over the asset bought with it. The choice of remedy will make no difference to him unless the asset increases in value.[269] But where it is proved that the withdrawal was partly attributable to the claimant and partly to the trustee, it would be inequitable to award to claimant the entire beneficial ownership of the mixed substituted asset. This would, in effect, operate as a forfeiture of the trustee's interest.[270] Accordingly, the claimant is entitled to enforce his interest in the mixed asset either by a lien for the amount of his money which can be proved to have been applied purchasing it, or a proportionate beneficial interest. The election is wholly unrestricted.[271] The claimant may assert whichever remedy is more favourable to him. Should the asset fall in value, the claimant is better to assert a lien since the risk of depreciation is then borne by the trustee. Should it rise in value, he is better to assert a proportionate interest so that he may capture a share of that increase for his own benefit.

Where the substituted asset is bought with money attributable to two innocent contributors, then the claims enforceable against the asset are different. Since the equities between the two contributors are equal, there is no reason to favour one contributor over the other. They each share the beneficial ownership of the asset in proportion to their contributions. Both then bear equally the risk of depreciation in the asset or the benefits of any increase in value.[272]

(f) Subrogation to secured charge.

30-063 If the claimant's money is paid to discharge a debt, the creditor will typically take free of his interest since he will generally be bona fide purchaser for value of the legal interest in the money. The claimant may nonetheless be entitled to enforce a proprietary remedy if the debt was secured by a charge over property. He may elect to be subrogated to the creditor's charge over the debtor's property to the extent that his money was applied towards repaying it.[273] It is unnecessary for the claimant to show that he intended to keep the charge alive for his own benefit,[274] since the remedy of subrogation depends on a principle of preventing unjust enrichment at the claimant's expense.[275] Indeed, it may not even be necessary for the claimant to prove by the formal rules of tracing that money in which he had a proprietary interest was used to repay the charge. It is enough that there is a sufficiently clear transfer of value between the claimant and the creditor whose change was repaid to establish that the defendant was enriched at his expense. Since the claimant's rights are in the charge, the value of their interest does not fall or

rise as the value of the underlying asset fluctuates. The substitute acquired when the claimant's money is applied towards the secured debt is a discharge of the charge rather than an equity share in the underlying asset. The original purchase of the asset and the discharge of the charge are often analytically distinct transactions. [276]

Footnotes

248 *Hancock v Smith (1889) 41 Ch. D. 456*; *Re Stenning [1895] 2 Ch. 433*.

249 *Re Diplock [1948] Ch. 465* at 552–554.

250 *El Ajou v DLH Plc [1993] 3 All E.R. 717* at 735–736, per Millett J.

251 *Re Tilley's WT [1967] 1 Ch. 1179* at 1183 per Ungoed-Thomas J.

252 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Group [2011] EWCA Civ 347; [2012] Ch. 453* at [138].

253 *Re Hallett's Estate (1879) 13 Ch. D. 696* at 726–729 per Jessel MR.

254 *Re Oatway [1903] 2 Ch. 356*.

255 *Re Tilley [1967] Ch. 1179* at 1185, per Ungoed-Thomas J.

256 *Roscoe v Winder [1915] 1 Ch. 62*; *Bishopsgate Investment v Homan [1995] 1 All E.R. 347*.

257 For example *El Ajou v DLH Plc [1993] 3 All E.R. 717* at 735–736, per Millett J.

258 *Federal Republic of Brazil v Durant International Ltd [2015] UKPC 35; [2016] A.C. 297*. See further para.30-061 below.

259 For example *Barlow Clowes International Ltd (In Liquidation) v Vaughan [1992] 4 All E.R. 22*.

260 *D.A. McConville (1963) 79 L.Q.R. 388*; *Re French Caledonia Travel (2004) 22 A.C.L.C. 498*.

261 *Charity Commission for England and Wales v Framjee [2014] EWHC 2507 (Ch); (2014) 17 I.T.E.L.R. 271* at [49].

262 *Barlow Clowes International Ltd (In Liquidation) v Vaughan [1992] 4 All E.R. 22*; *Russell-Cooke Trust Co v Prentis [2002] EWHC 2227 (Ch); [2003] All E.R. 478*.

263 *Commerzbank AG v IMB Morgan Plc [2004] EWHC 2771 (Ch); [2005] 2 All E.R. (Comm) 564*.

264 See *Ontario Securities Commission and Greymac Credit Corp (1985) 55 O.R. (2d) 673*; discussed in *Barlow Clowes International Ltd (In Liquidation) v Vaughan [1992] 4 All E.R. 22* at 27, 44.

265 *Barlow Clowes International Ltd (In Liquidation) v Vaughan [1992] 4 All E.R. 22*.

266 *El-Ajou v Dollar Land Holdings Plc [1993] 3 All E.R. 717 at 733; reversed on other grounds [1994] 2 All E.R. 685*; *Federal Republic of Brazil v Durant International Ltd [2015] UKPC 35; [2016] A.C. 297* at [34], [38]; *Relfo Ltd (In Liquidation) v Varsani [2014] EWCA Civ 360; [2015] 1 B.C.L.C. 14*.

267 *Agip (Africa) Ltd v Jackson [1990] Ch. 265*; *Relfo Ltd (In Liquidation) v Varsani [2014] EWCA Civ 360; [2015] 1 B.C.L.C. 14*.; *Federal Republic of Brazil v Durant International Ltd [2015] UKPC 35; [2015] 3 W.L.R. 599* at [40]–[41].

268 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2011] EWCA Civ 347; [2012] Ch. 453* at [135]–[139].

269 See para.30-055 above.

270 See *Indian Oil Corp v Greenstone Shipping SA [1988] 1 Q.B. 345*.

271 *Foskett v McKeown [2001] 1 A.C. 102*; which in this respect did not follow dicta *Re Hallett's Estate (1879) 13 Ch. D. 696* at 709, per Sir George Jessel MR.

272 *Re Diplock [1948] Ch. 465* at 539 per curiam; *Lord Provost of Edinburgh v The Lord Advocate (1879) 4 App. Cas. 823 (HL (Sc))*.

273 *Boscawen v Bajwa [1996] 1 W.L.R. 328*; explaining *Re Diplock [1948] Ch. 465* at 549–550; *Banque Financière de la Cité v Parc (Battersea) Ltd [1999] A.C. 221*; *Cheltenham & Gloucester Plc v Appleyard [2004] EWCA 291; [2004] 13 E.G. 127 (CS)*.

274 *Boscawen v Bajwa [1996] 1 W.L.R. at 338–339*; explaining *Butler v Rice [1910] 2 Ch. 277*; and *Ghana Commercial Bank v Chandiram [1960] A.C. 732*.

275 *Banque Financière de la Cité v Parc (Battersea) Ltd [1999] A.C. 221* at 234; *Lehman Commercial Conduit v Gatedale Ltd [2012] EWHC 848 (Ch)*.

276 *Calverley v Green [1984] HCA 81; (1984) 155 C.L.R. 242* at [7] per Mason and Brennan JJ.

4. - Loss of Proprietary Claim; Defences to Proprietary Remedies

(a) Failure of identification and dissipation of proceeds.

30-064 If it is established by the rules of following and tracing that the specific proceeds of the claimants' property have been dissipated, then there will be no foundation for a proprietary remedy against the assets of the trustee. In the absence of such specific identification, the claimant may not assert a general lien over the trustee's assets to reflect the extent to which they might have been swollen by the contribution of the claimant's money.[277] Accordingly the effect of the trustee's paying the claimant's money into an overdrawn bank account is generally to render the money untraceable.[278] The claimant may however assert a lien over the account to the extent that his money reduces an authorised overdraft since the authorised overdraft is a chose in action equivalent to a credit balance in the account.

(b) Extinction of the claimant's proprietary interest.

30-065 Regardless of whether the claimant's property remains specifically identifiable, the claimant will be barred from recovering it if his proprietary interest has been extinguished. Accordingly the claimant may not recover money or personal property which is received by a bona fide purchaser for value of the legal interest. In relation to registered land, the claimant's interest would be extinguished if the land were the subject of a registered disposition for value and the claimant had not protected the priority of his interest.[279]

(c) Change of position and inequitability.

30-066 Change of position has been recognised as a defence to restitutionary claims founded upon unjust enrichment.[280] Its place in claims arising from a breach of trust and depending on following or tracing remains uncertain.

The rationale of the defence is that the liability of a person should be reduced or extinguished if his position has been so changed by the receipt of the claimant's money that it would be inequitable for him to make restitution of all or part of the money received.[281] The defence is not available to a wrongdoer. This includes a person who changes his position knowing the facts of the claimant's cause of action against him. Accordingly, the defence is unlikely to be available to a claim for knowing receipt. The pre-condition to liability in that action is the defendant's knowledge of the facts making his receipt of the money unconscionable.[282]

The authorities are divided on whether change of position should be available as defence to a claim to a proprietary remedy founded on tracing or following. In general, the enforcement of a proprietary right against a third party does not depend on questions of inequitability to the third party, and the enforcement of a property right against a substituted asset is said not to depend on questions of unjust enrichment.[283] In an earlier case, however, it was held that an innocent volunteer who used the claimant's money to improve buildings on his land or to repay a loan secured by a charge should not be liable to a proprietary remedy enforceable against the land since enforcement of the remedy would be "inequitable".[284] These instances may nowadays be analysed as instances of the change of position defence.[285]

Footnotes

277 *Re Goldcorp Exchange Ltd (In Receivership) [1995] 1 A.C. 74* at 110; *Bishopsgate Investment v Homan [1995] 1 All E.R. 347*; not following dicta in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd [1986] 1 W.L.R. 1072* at 1074.

278 *Bishopsgate Investment v Homan [1995] 1 All E.R. 347*; see *Smith (1994) 8 T.L.I. 102*.

279 See paras 4-017, 4-006 above.

280 *Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 A.C. 548*.

281 *Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 A.C. 548*; *Scottish Equitable Plc v Derby [2001] EWCA Civ 369*; *Jones v Commerzbank AG [2003] EWCA Civ 1663*.

282 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele [2001] Ch. 437* at 456.

283 *Foskett v McKeown [2001] 1 A.C. 102* at 129, 132.

284 *Re Diplock [1948] Ch. 465* at 544–550.

285 *Boscawen v Bajwa [1995] 4 All E.R. 769* at 783; cf. *Foskett v McKeown [2001] 1 A.C. 102* at 129.

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Section 6. - Personal Liability of Third Parties Involved in Breach of Trust

30-067 The claimant in a breach of trust may have claims against third parties involved in the breach. The third party may have received or dealt with the misapplied trust property or he may have wrongfully assisted the trustee in committing it. A common feature of all these forms of liability is that the claimant enforces a personal remedy against the defendant. Even in cases where the defendant is made liable because he has received the misapplied trust property, he is not required to restore the specific fund he received. His liability is only to restore an equivalent amount of money. A second feature is that the defendant in such cases is commonly described as a "constructive trustee". This formula merely indicates that the defendant is held liable to account for the relevant gain to himself or the loss to the trust as if he were a trustee to the claimant. In imposing the liability on the defendant, it is not supposed that he owes the full range of primary and fiduciary duties commonly owed by an express trustee, or even that he has ever held property which belonged in equity to the claimant. [286] A third common feature is that these forms of liability depend on proving that the defendant was at fault. The degree of fault required may vary with each kind of liability, and from transaction to transaction.

Each of these claims brought against third parties has the effect of reducing the amount of the beneficiary's loss resulting from the primary breach of trust. Any sum which the beneficiary recovers would therefore be counted towards reducing the amount of the trustee's primary liability for losses resulting from the breach.

Footnotes

286 See para.26-005 above. For criticism of the expression and the risks of applying too closely the analogy with express trusteeship, see *Paragon Finance v DB Thakerar & Co [1999] 1 All E.R. 400* at 408–409; *Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48; [2003] 2 A.C. 366* at [141]–[143]; Lord Nicholls, Ch.15 in W.R. Cornish (eds), Restitution: Past, Present and Future (Hart Publishing, 1998) pp.243–244; C. Mitchell, Ch.6 in P. Birks and A. Pretto (eds), Breach of Trust (Hart Publishing, 2002) pp.146–150.

1. - Receipt of or Dealing with Trust Property

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Section 6. - Personal Liability of Third Parties Involved in Breach of Trust

1. - Receipt of or Dealing with Trust Property

30-068 Before considering liability for knowing receipt and inconsistent dealing, it is necessary to say something about the distinction between beneficial and ministerial receipt of property, and about the kinds of property for which the claims may lie.

(a) Nature of receipt.

30-069 A person may receive or deal with misapplied trust property in different capacities. He may receive it for his own benefit, in which case his liability is for "knowing receipt" of the property. His liability is restitutionary, since he must restore the benefit he has received. If he deals with it ministerially, as an agent for another person, then his liability is based on the wrong of dealing with the property "inconsistently" with the beneficiary's equitable rights to it. Each kind of liability has a different standard of fault, which reflects the difference in their rationale. [287]

The distinction between beneficial and ministerial receipt is important when a bank receives a deposit of trust money for crediting to its customer's account. [288] The relevant meaning of benefit in this context is easily misunderstood. The question does not depend on the beneficial ownership of the funds that gave rise to the credit in the customer's account but on the existence of agency duties owed by the bank to the customer in respect of the credit in the account. In proprietary terms, a bank nearly always becomes the legal and beneficial owner of the funds received through the payment clearing system. It is a debtor to the customer for the amount of the deposit. The customer's debt is analytically separate from the funds received by the bank. [289] When the bank makes a payment out of the account on the customer's behalf, it acts as the customer's agent. Its dealings with the credit balance in the account are therefore undertaken in a purely ministerial capacity. [290] It is the customer who is treated as having received the money beneficially unless, for separate reasons, the customer happens to hold it ministerially for another. [291] Sometimes, however, the bank may receive the trust money for its own benefit. This would happen if it applied the deposit in the account towards clearing the customer's overdraft, or as payment for special banking services it provided to the customer. [292] Here the bank might be liable for knowing receipt rather than inconsistent dealing.

(b) Property received.

30-070 The defendant must have received or dealt with property in which the trust claimant has an equitable interest. Any kind of asset that is recognised as property could found the claim. Most commonly, it is the original trust money or its traceable proceeds. But it could also be trust chattels [293] and possibly even the benefit of a contractual obligation owed by the trustee to the defendant, provided that it was secured on other trust property. [294] But the right to enforce a purely personal contractual obligation against

the trustee would not be treated as the receipt of property. [295] Nor generally would the receipt of confidential information, even if it was of some financial benefit to the recipient. [296]

Footnotes

287 This passage was cited with approval in *Uzinterimpex JSC v Standard Bank Plc [2008] EWCA Civ 819*.

288 *M. Bryan (1998) 26 Australian Business Law Review 93*; D. Fox, Property Rights in Money (2008) paras 9.53–9.62.

289 *Foley v Hill (1848) H.L.C. 28*; *Lipkin Gorman v Karpnale (a firm) [1991] 2 A.C. 548* at 573–574.

290 *Jeremy D. Stone Consultants Ltd v National Westminster Bank Plc [2013] EWHC 208 (Ch)* at [242]–[244].

291 For example *Law Society v Habitable Concepts Ltd [2010] EWHC 1449 (Ch)*.

292 For example *Westpac Banking Corp v Savin [1985] 2 N.Z.L.R. 41*; *Gray v Johnston (1868) L.R. 3 H.L. 1*; *Stephens Travel Service International Pty Ltd v Qantas Airway Ltd (1988) 13 N.S.W.L.R. 331*; *Agip (Africa) Ltd v Jackson [1990] Ch. 265* at 292, per Millett J; *Lankshear v ANZ Banking Group (New Zealand) Ltd [1993] 1 N.Z.L.R. 481*; *Citadel General Assurance Co v Lloyds Bank Canada (1997) 152 D.L.R. (4th) 411* (all involving clearing of overdraft); and *Polly Peck International Plc v Nadir (No.2) [1992] 4 All E.R. 769* at 777, per Scott LJ; *Nimmo v Westpac Banking Corp [1993] 3 N.Z.L.R. 218*; *Uzinterimpex JSC v Standard Bank Plc [2008] EWCA Civ 819* (all involving payment of fees or provision of special banking services).

293 *Re Montague's ST [1987] Ch. 264*.

294 *Gold v Primary Developments Ltd (1997) 152 D.L.R. (4th) 385* at [54], [88].

295 *Gold v Primary Developments Ltd (1997) 152 D.L.R. (4th) 385* at [54], [88].

296 *Farah Constructions v Say-Dee Pty Ltd (2007) 81 A.L.J.R. 1107* at [120]–[121].

2. - Knowing Receipt

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Section 6. - Personal Liability of Third Parties Involved in Breach of Trust

2. - Knowing Receipt

(a) Beneficial receipt.

30-071 Where the defendant receives the property beneficially he may be liable to give restitution of its value in an action for knowing receipt. The basis of the defendant's liability is that he received property in which the claimant had a subsisting equitable interest,[297] so the claim could not arise if he received it as a bona fide purchaser for value.[298] The claimant may need to prove by the formal rules of following or tracing that the money received by the defendant was specifically attributable to him.[299] It would not be enough for him to prove in a more general way that the sum received by the defendant was the same as the sum misapplied from the trust.

Since the defendant's liability is restitutionary, it is fixed at the value of the property when he first received it. He remains liable even if the defendant dissipated the original property, or if it can no longer be specifically identified in the defendant's remaining assets. This is an important practical distinction between it and the proprietary claim founded on following or tracing.

(b) Fault.

30-072 The defendant must be at fault when he receives the trust property. This justifies his continuing liability to restore its value to the claimant even after he may no longer have the original property to restore by a proprietary claim.[300] Fault means that the defendant must know enough of the facts surrounding the misapplication of trust property to make it unconscionable for him to retain the benefit of his receipt.[301] The degree of knowledge which might make the defendant's conduct unconscionable varies with the context. This allows the court to set a standard that is appropriate to exigencies of the transaction in question.[302] An example of the application of this test arose when a bank received money from a fraudulently operated company in discharge of secured loans owed to it. The company then became insolvent. The test was whether a responsible large bank with the benefit of experienced insolvency practitioners as its receivers should have realised that a proprietary claim probably existed or should have made inquiries that would have revealed the probable existence of a claim.[303]

The degree of awareness which might fix the defendant with liability varies on a sliding scale between two extremes. At one end, the defendant may actually know the possibility that the money is paid to him in breach of trust or without proper authority. This would clearly be unconscionable. A defendant's wilful decision to overlook a possible breach of trust or to his deliberate failure to make reasonable inquiries as to that possibility would be treated in the same way. At the other end of the scale, a mere negligent failure to appreciate that transfer to him was possibly improper would not be unconscionable.[304] But the defendant's failure to appreciate a probable breach which would have been obvious to a reasonable person in his situation may be enough to make his receipt unconscionable, at least in situations where there is an established practice of making inquiries into title. But where there is no such practice and where transactions need to be concluded promptly, the defendant may need to be subjectively aware that he is receiving tainted property before his receipt could be stigmatised as unconscionable.[305] His knowledge of the

facts may shade into dishonesty, as that term is now defined.[306] But in gratuitous transactions, where the defendant has no reasonable justification to rely unquestioningly on the trustee's authority to transfer the property to him, it may be reasonable to impose a duty of inquiry on him. The recipient's knowledge of facts that would put a reasonable person on inquiry might amount to unconscionable knowledge.[307]

(c) Strict liability.

(1) Argument from analogy.

30-073 It has been argued that equity should recognise an alternative ground of liability where the defendant receives misapplied trust property. It would not depend on proving that the recipient was at fault, but on the principle of reversing unjust enrichment.[308] The defendant's liability would be strict but subject to a defence of change of position. The burden would be on the defendant to prove that he did not know of the wrongful or unauthorised origin of the trust property when he changed his position. The current fault-based kind of liability would continue to exist but would be analysed differently. It would be treated as an equitable accessory liability where they defendant was made liable to yield up the gains that accrued from his wrongful participation in the trustee's breach of duty. It would merge with the analogous claim for dishonest assistance in breach of trust.

The argument depends on drawing an analogy with two other kinds of strict liability claim against a recipient of misapplied money. These are: the claim of an unpaid creditor of a deceased estate to sue an overpaid legatee of a will[309]; and the common law restitutionary claim against a person to receive misapplied money to which the claimant has a subsisting legal title.[310]

(2) Rejection of argument.

30-074 The argument for the strict liability claim in restitution has not been accepted in the authorities. The cases hold that the defendant's fault is an essential condition to any restitutionary liability to restore misapplied trust property.[311] As to principle, the two analogies drawn to support the argument are not wholly in point. First, the strict liability claim against an overpaid legatee is the product of a peculiar procedural history. Historically, the legatee of a will was made strictly liable to an unpaid creditor of the estate as the price for no longer having to give security to the executor when he received his legacy for any unpaid debts due from the estate. It is not a sound basis for holding that equitable liability for misapplied money should generally be strict.[312] The analogy with title-based liability at common law overlooks the different incidents of legal and equitable titles to property. Equitable titles are more vulnerable to extinction than legal titles. Interference with an equitable title might only be actionable if the defendant's conscience was affected by knowledge or notice that he had received property that derived from a breach of trust.[313]

Footnotes

297 C. Harpum (1986) above at 267–269; Lord Nicholls, Ch.15 in W.R. Cornish (eds), Restitution: Past, Present and Future (Hart Publishing, 1998) at 235–236.

298 See para.4-017 above.

299 See para.30-051 above.

300 An innocent volunteer who received misapplied trust property would be liable to restore its traceable proceeds in a proprietary claim. But would not be liable to a personal claim in knowing receipt: *Re Diplock [1948] Ch. 465*.

301 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele [2001] Ch. 437*.

302 See generally D. Fox, Property Rights in Money (2008) paras 8.55–8.72.

303 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Group [2011] EWCA Civ 347; [2012] Ch. 453* at [109] (proof of notice so as defeat a bona fide purchase defence).

304 *Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch); [2013] Ch. 156* at [131]–[132]; adapting the gradations of fault in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA Note [1993] 1 W.L.R. 509* at 575–576. The test for unconscionabilty is similar to the standard of notice used in commercial transactions. It is less exacting than the standards of constructive notice used in dealings with unregistered land where there are formalised procedures which purchasers are expected to adhere to in conveyancing transactions: *MacMillan Inc v Bishopgate Investment Trust Plc [1995] 1 W.L.R. 978* at 1000.

305 *Eagle Trust Plc v SBC Securities Ltd [1992] 4 All E.R. 488* at 509, per Vinelott J; *Cowan de Groot Properties v Eagle Star Trust Plc [1992] 4 All E.R. 700* at 759–761 per Knox J; *Polly Peck International Plc v Nadir (No.2) [1992] 4 All E.R. 769*.

306 *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378*. See para.30-077 below.

307 *MacMillan Inc v Bishopgate Investment Trust Plc [1995] 1 W.L.R. 978* at 1000.

308 See C. Harpum, Ch.1 in P. Birks (ed.), The Frontiers of Liability, Vol.1. (OUP, 1994) pp.24–25; Lord Nicholls, Ch.15 in W.R. Cornish (eds), Restitution: Past, Present and Future (1998); P. Birks, Ch.7 in P. Birks and A. Pretto (eds), Breach of Trust (2002). For judicial endorsement, see *Criterion Properties Plc v Stratford UK Properties LLC [2004] UKHL 28; [2004] 1 W.L.R. 1846* at [4].

309 *Re Diplock [1948] Ch. 465*; affirmed. sub nom. *Ministry of Health v Simpson [1951] A.C. 251*. See para.34-021 below.

310 For example *Lipkin Gorman (a firm) v Karpnale [1991] 1 A.C. 548*.

311 *Farah Constructions v Say-Dee Pty Ltd (2007) 81 A.L.J.R. 1107* at [120]–[121] (HCA) (noted M. Conaglen and R. Nolan [2007] C.L.J. 19; [2007] C.L.J. 515; *J. Edelman (2006) 122 L.Q.R. 174*; *P. Ridge and J. Dietrich (2008) 124 L.Q.R. 26*). In *Citadel General Assurance Co v Lloyds Bank Canada (1997) 152 D.L.R. (4th) 411* at [51]–[52] (noted *L. Smith (1998) 114 L.Q.R. 394*) the Supreme Court of Canada accepted the unjust enrichment explanation but affirmed that the recipient must be at fault. The recipient's enrichment would not be unjust unless he knew or had notice that the property derived from a breach of trust.

312 See C. Harpum, (1994) above at 21–24, and *L. Smith (2000) 116 L.Q.R. 412 at 437–444*, following *S. J. Whittaker (1983) 4 J.L.H. 3*.

313 See L. Smith (2000) above.

End of Document

3. - Inconsistent Dealing

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Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 6. - Personal Liability of Third Parties Involved in Breach of Trust

3. - Inconsistent Dealing

(a) Ministerial receipt.

30-075 When the defendant receives or deals with money that still belongs to the trust then he may be liable to restore its value to the trust claimant. His liability is explained by his wrongful participation in the trustee's breach of duty. It is not strictly restitutionary in character since the defendant does not receive and deal with the money as a beneficial owner of it. [314] The defendant is traditionally described as a constructive trustee to the trust claimant. As with the other related kinds of liability for participation in a breach of trust, this is merely a formula that expresses the defendant's accountability for the losses that the claimant suffers from the defendant's dealing with the money. [315]

The common situations where a person is liable for inconsistent dealing are where he deals with trust property as an agent, bailee or debtor for the trustee. [316] In principle, a bank might be liable for making payments of trust money from its customer's account since it acts as an agent for the customer in carrying out his payment instructions. [317] This situation must be distinguished from that where the bank applies a deposit of trust money for its own benefit, as where it uses it to clear the customer's overdraft. [318] Here the bank's liability should be for knowing receipt since it has received the funds beneficially.

(b) Fault.

30-076 A higher degree of fault is required to justify the liability of a person who merely handles money in a ministerial capacity than would be sufficient to justify liability for knowing receipt in the same circumstances. Where the defendant acts as an agent, his primary duty is to comply with his principal's instructions. [319] He should be entitled to follow them unless he realises that he would be acting in breach of a third person's equitable rights. [320] A merely negligent failure to realise this should not be enough to implicate him. [321] In principle, constructive notice of the breach should not be enough either. This may be tantamount to requiring the defendant's dealing with the money to be dishonest. This is the standard of fault now required where a person is held liable for assisting in a breach of fiduciary duty. Many instances of ministerial receipt could also be characterised as dishonest assistance in the breach of trust, and the reason for requiring a higher standard of fault in each kind of liability is the same. [322]

Footnotes

314 *Uzinterimpex JSC v Standard Bank Plc [2008] EWCA Civ 819* at [39]; C. Harpum, Ch.1 in P. Birks (ed.), The Frontiers of Liability, Vol.1. (OUP, 1994) at 16.

315 Since the defendant receives the money in a ministerial capacity, he generally does not make any personal gain that could be establish a gain-based liability to account. In principle, however, the defendant might be liable to account for any secondary profits that accrue to him from handling the money. Compare the position for dishonest assistance at para.30-081 below.

316 *Agip (Africa) Ltd v Jackson [1990] Ch. 265* at 291–293. e.g. *Lee v Sankey (1873) L.R. 15 Eq. 204* (solicitor retained by trustees misapplies proceeds of sale of trust property); *Ashman v Price and Williams (1881) 17 Ch. D. 437* (solicitor to trust makes disbursements of trust income on behalf of trustees).

317 As was argued unsuccessfully in *Uzinterimpex JSC v Standard Bank Plc [2008] EWCA Civ 819*.

318 For example *Gray v Johnston (1868) L.R. 3 H.L. 1*; *Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567*; *Westpac Banking Corp v Savin [1985] 2 N.Z.L.R. 41*.

319 *Lee v Sankey (1872) L.R. 15 Eq. 204* at 211; *C. Harpum (1986) 102 L.Q.R. 114 at 131*.

320 *Lee v Sankey (1872) L.R. 15 Eq. 204*.

321 *Ashman v Price and Williams (1881) 17 Ch. D. 437*.

322 See para.30-079 below.

4. - Dishonest Assistance

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Mainwork

Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 6. - Personal Liability of Third Parties Involved in Breach of Trust

4. - Dishonest Assistance [323]

(a) Accessory liability.

30-077 Dishonest assistance in a breach of trust is a kind of accessory liability. It depends on the defendant's wrongful participation in a primary breach committed by the trustee. It is unnecessary for the primary breach to be dishonest or fraudulent. [324] Unlike knowing receipt, the defendant's liability is not restitutionary since it does not depend on the defendant receiving the trust property. [325]

The modern formulation of dishonest assistance covers conduct that would once have been analysed as the separate wrong of knowingly inducing or procuring a breach of trust. [326] It too was a kind of accessory liability, the gist of which was that the defendant wrongfully implicated himself in the trustee's primary breach. The distinction between the ways of characterising the accessory's conduct was once significant: for dishonest assistance, the rule used to be that the primary breach of trust needed to be dishonest and fraudulent. It seemed that this was not necessary where the defendant induced or procured the breach. Now that a defendant can be liable for dishonestly assisting a breach of trust that is merely negligent or even innocent, it has been possible to bring these two kinds of liability into line with each other.

(b) The primary breach of duty.

30-078 The defendant must have lent assistance to the commission of a primary breach of trust, or in some other breach of duty by a person in a fiduciary relationship with the claimant. Beyond trusts, the principle has been applied to partners in a fiduciary joint venture, [327] or to the director of a company. [328] The duty breached by the primary wrongdoer need not be one that is distinctively fiduciary in type. [329] What matters is the fiduciary status of the primary wrongdoer rather than the fiduciary character of his breach. So the unauthorised mixing of money by a trustee or the misapplication of it in breach of the terms of an undertaking could both found a claim for dishonest assistance. [330]

(c) Dishonesty.

30-079 The defendant's assistance in the breach of trust must have been given dishonestly. [331] This is an objective standard which implies a more serious degree of fault than ordinary negligence. [332] One reason for setting the standard of fault above negligence is to differentiate the defendant's duties to the trust claimant from those that they may often owe to the trustee himself. It often

happens that the people who lend assistance to what proves to be a breach of duty by a trustee have been hired as agents or advisers to the trust. Their primary duty, which arises in contract, is to the trustee. If they are to be liable directly to the trust beneficiary in equity, then their misconduct should be more serious than the simple negligence that might make them liable for breach of contract to the trustee. [333]

When the test of dishonesty is applied, the defendant is not free to be judged according to his own standards. He is judged according the standards of an ordinary honest person, who would have the same knowledge of the circumstances as he does, and sharing some of his personal characteristics, such as his age and experience. [334] His conduct need not be dishonest by the standards of all people, since not all people may appreciate the kinds of specialised wrongdoing involved in certain kinds of commercial transaction. [335] In the past the authorities were uncertain whether the trustee also needed to realise that his conduct would be regarded as dishonest by the standard of an ordinary honest person. The better view, which now appears to be accepted in England, is that the defendant need not take a view on the propriety of his own conduct. [336] A finding that the defendant was dishonest only involves an assessment of his participation in the impugned transaction, judged in the light of his motives and his knowledge of the facts. Reckless participation in the impugned transaction is not the same as dishonesty unless the defendant's motive for acting was itself dishonest. [337]

The finding of dishonesty depends on how precisely he knew the facts which amounted to the breach of trust, and the extent to which his assistance in the transaction involved a commercially unacceptable risk of knowingly implicating himself in the trustee's breach. For this purpose, knowledge and a deliberate choice by the defendant not to confirm his suspicions are treated alike. [338] A negligent or incompetent failure to realise that the transaction was unlawful is not enough. [339]

The defendant need not appreciate the precise legal significance of the transaction as amounting to a breach of trust. It is enough that he realises that the person whom he assists is misappropriating money over which he does not have a right of free disposal. [340] But he must have some suspicions about the particular transactions to which he gives his assistance. A general suspicion, for example, that the transaction is of a kind consistent with possible money laundering is not direct enough to support a finding of dishonesty. [341] But a deliberate removal of assets from an insolvent company to defeat the claims of a certain creditor would be commercially dishonest behaviour. [342]

(d) Amount of liability.

30-080 If the defendant is proved liable, then he may be required to compensate the trust for losses following from his assistance, [343] or to account for profits which accrue to him as a result of his assistance. [344] These two kinds of liability follow from the premise that the defendant is held liable to account as if he were truly a trustee to the claimant. [345]

(1) Losses.

30-081 As to losses, once it is proved that the defendant provided relevant assistance to the breach of duty, he is liable for the losses resulting from the trustee's breach. [346] Since the defendant's fault is serious, he cannot put the claimant to proof of the specific causal connection between the assistance he gave and the loss that ensued; nor is it open to the defendant to exculpate himself by arguing that the losses resulted directly from the voluntary act of the trustee. [347] But his assistance must have had some causative impact in facilitating the trustee's breach of duty if he is to be held accountable for them. [348] The measure of the defendant's liability is not reduced to reflect the claimant's contributory negligence. [349]

(2) Profits.

30-082 The defendant is only liable to account personally for a profit accruing to him from his own assistance. He should not be required to hold the profit on a constructive trust, enforceable by a proprietary remedy, unless perhaps it accrued to him through use of the claimant's own property. [350] The claimant must prove a sufficiently direct causal connection between the defendant's assistance and the alleged profit accruing to him. The profit for which the defendant is held accountable must not be disproportionate to his conduct. [351] This may require the defendant's assistance to the real or effective cause of the profit. Proof of a simple "but for" causal connection may not suffice, nor that the defendant's assistance merely provided the opportunity for his profit to be made for other reasons. But where the defendant is a corporate vehicle controlled by the defaulting trustee, then it may be liable for its full profit just as if the trustee himself had made the profit personally. [352]

Footnotes

323 See generally C. Mitchell, Ch.6 in P. Birks and A. Pretto (eds), Breach of Trust (2002); *S.B. Elliott and C. Mitchell (2004) 67 M.L.R. 16*; *P. Ridge (2008) 124 L.Q.R. 445*.

324 *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378*; not following *Barnes v Addy (1874) 9 Ch. App. 244* at 252–252. Compare the approach in *Australia: Farah Constructions v Say-Dee Pty Ltd (2007) 81 A.L.J.R. 1107*.

325 The defendant's dealing with the trust property as an agent for the trustee may sometimes amount to dishonest assistance for the trustee's breach, as where he facilitates the breach by hiding or laundering the proceeds of it.

326 See *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378* at 383. For inducement of a breach of trust, see *Alleyne v Darcy (1854) 4 Ir. Ch. Rep. 199*; and *Eaves v Hickson (1861) 30 Beav. 136*; and generally *C. Harpum (1986) 102 L.Q.R. 115 at 141–144*. In *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378* at 385 the Privy Council treated *Eaves v Hickson* as an example dishonest assistance.

327 *Abou-Rahmah v Abacha [2005] EWHC 2662 (QB); [2006] Lloyd's Rep. 484* at [38].

328 *Baden v Société Generale [1993] 1 W.L.R. 509* at 573; but see *Brown v Bennett [1999] B.C.C. 525*; *Goose v Wilson Sandford & Co [2001] Lloyd's Rep. PN 189*; and *Gencor ACP Ltd v Dalby [2002] 2 B.C.L.C. 734* at 757 where the point was left open.

329 See Ch.7 above.

330 *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378*; *Twinsectra Ltd v Yardley [2002] 2 A.C. 164; [2002] UKHL 165*.

331 *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378*.

332 *Clydesdale Bank v Workman [2016] EWCA Civ 73; [2016] P.N.L.R. 18*.

333 *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378* at 391.

334 *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378*.

335 *Starglade Properties Ltd v Nash [2010] EWCA Civ 314*.

336 Compare *Twinsectra Ltd v Yardley [2002] UKHL 165; [2002] 2 A.C. 164* at [32]–[35]; with *Barlow Clowes v Eurotrust International Ltd [2005] UKPC 37; [2006] 1 All E.R. 333* at [15]–[16]. In *Abou-Rahmah v Abacha [2006] EWCA Civ 1492; [2007] W.T.L.R. 1*; and *Starglade Properties Ltd v Nash [2010] EWCA Civ 314* held that the later decision of the Privy Council in the *Barlow Clowes* case represented the correct interpretation of English law.

337 *Clydesdale Bank v Workman [2016] EWCA Civ 73; [2016] P.N.L.R. 18* at [51].

338 *Attorney General of Zambia v Meer Care & Desai (a firm) [2008] EWCA Civ 1007* at [21].

339 *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378* at 391–392.

340 *Twinsectra Ltd v Yardley [2002] UKHL 165; [2002] 2 A.C. 164* at [137]; *Barlow Clowes v Eurotrust International Ltd [2005] UKPC 37; [2006] 1 All E.R. 333* at [28], per Lord Hoffmann.

341 *Abou-Rahmah v Abacha [2006] EWCA Civ 1492* at [72], per Arden LJ, [98] per Pill LJ.

342 *Starglade Properties Ltd v Nash [2010] EWCA Civ 314*.

343 *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378*.

344 *Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835*; *Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908; [2015] Q.B. 499*.

345 *Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908; [2015] Q.B. 499* at [75], relying on this passage.

346 For the extent of the losses and the possible relevance of the kind of primary breach of trust, see S.B. Elliott and C. Mitchell (2004) 67 M.L.R. 16 at 38–39.

347 *Grupo Torras SA v Al Sabah [1999] C.L.C. 1, 469* (reversed in part on appeal without comment on this point: [2001] C.L.C. 221). cf. *Edgington v Fitzmaurice (1885) L.R. 29 Ch. D. 459*; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] A.C. 191* (causation of loss resulting from fraudulent mispresentation). See further S.B. Elliott and C. Mitchell (2004) 67 M.L.R. 16 at 17–20.

348 *Brown v Bennet [1999] B.C.C. 525*.

349 *Corp del Cobre de Chile v Sogemin Ltd [1997] 1 W.L.R. 1396*; *Standard Chartered Bank v Pakistan National Insurance Corp (Nos 2 and 4) [2002] UKHL 43; [2003] 1 A.C. 959*.

350 *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd [2007] EWHC 915 (Ch); [2007] 2 All E.R. (Comm) 993*. See further P. Ridge, (2008) 124 L.Q.R. 445 at 460–467.

351 *Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908; [2015] Q.B. 419* at [107]–[120], relying on this passage.

352 *Akita Holdings Ltd v Attorney General of the Turks and Caicos Islands [2017] UKPC 7; [2017] A.C. 590*.

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5. - Limitation

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Part 5 - Trusts

Chapter 30 - Breach of Trust

Section 6. - Personal Liability of Third Parties Involved in Breach of Trust

5. - Limitation

30-083 The rules governing the limitation of actions against third parties involved in a breach of trust have special complexities of their own that warrant a separate treatment. The general limitation rules governing breach of trust have already been explained. [353]

(a) General.

30-084 As a general rule, s.21(3) of the Limitation Act 1980 bars any action arising out of a breach of trust six years after the cause of action against the defendant accrued. This rule applies to trustees and to third parties who, without being trustees themselves, are liable in equity because they have become involved in a breach of trust committed by another person who is in fact a trustee.

This general rule is subject to two statutory exceptions where no limitation period applies. They are:

(i)an action against a person in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy [354] ;

(ii)an action to recover from the trustee trust property or its proceeds in the possession of the trustee, [355] or previously received by the trustee and converted to his use. [356]

In these exceptional cases, the defendant's liability is indefinite, subject to the defence of laches.

30-085 In applying these two exceptions to third parties who become involved in a breach of trust, a distinction is drawn between two categories of person. The first includes people who are true trustees in the sense that they have lawfully assumed fiduciary duties in relation to trust property, whether or not they have been formally appointed to the trust. The two exceptions to the general six-year limitation rule apply to such persons. The second category refers to persons who have never assumed or intended to assume the status of trustees, whether formally or informally, but who have become liable to equitable remedies through their unlawful participation in the misapplication of trust assets by another person. These persons are ancillary to a breach of trust committed by another. The two exceptions do not apply to such persons. They are therefore subject to the general rule and their liability is barred six years after the cause of action accrued against them. [357]

(b) True trustees.

30-086 The two exceptions that allow indefinite liability should only apply to persons who have been expressly appointed as trustees, or who are de facto trustees in the sense that they intended to act as such, if only as a matter of objective construction of their acts. [358] So express trustees, personal representatives, trustees de son tort, [359] and persons who become constructive trustees

owing to the informality of an express transaction may be indefinitely liable in the two situations specified above. [360] A common feature of all these situations is that the defendant already held office as a trustee before the events that gave rise to the claimant's action. [361] Trustees de son tort and trustees of informally created trusts are "constructive trustees" for these purposes, only in the sense that they were not expressly appointed.

(c) Knowing receipt, inconsistent dealing and dishonest assistance.

30-087 Conversely, where the defendant has become liable in equity only by reason of the events that founded the claimant's action against him, then the usual six-year limitation period applies. [362] In these circumstances, the description of the defendant as a "constructive trustee" is merely a formula for his equitable accountability to the trust claimant rather than anything indicating that he assumed the duties of trusteeship. [363] Consequently, a claim in knowing receipt would generally be barred six years after the defendant received the misapplied trust property. [364]

But if the person receiving the trust property was already a trustee to the claimant or if he owed fiduciary duties to the claimant in his own right, then his liability would be indefinite even if he no longer held the traceable proceeds of the breach of trust. This a situation to which exception (ii) above applies. The defendant would be a "trustee" to the claimant for the purposes of the Limitation Act 1980, and the trust property would have been received by him and converted to his own use. [365]

30-088 For the same reasons as apply to claims for knowing receipt, the liability of a person who is a constructive trustee for inconsistent dealing or dishonest assistance in a breach of trust is barred six years after the relevant act of dealing or assistance. [366] It makes no difference whether the primary breach of trust was fraudulent or not, since the defendant in the dealing or assistance action is not the "trustee" referred to in exception (i) above. That "trustee" is the true trustee who committed the primary breach.

(e) Cause of action against defendant based on fraud.

30-089 The running of time in the cause of action against the third party may be postponed if the "the action is based upon the fraud of the defendant". The limitation period does not begin to run until the claimant has discovered the fraud or could with reasonable diligence have discovered it. [367]

The term "fraudulent" has been interpreted as meaning "dishonest" in the analogous context of a fraudulent breach of trust committed by an express trustee. [368] In some cases of knowing receipt, inconsistent dealing or dishonest assistance the claimant may be able to invoke this exception to postpone the commencement of the six years. [369] It has been argued that the running of time in a dishonest assistance action might routinely be postponed until the claimant had discovered the defendant's dishonesty. [370] The defendant's dishonesty is an integral part of the claimant's cause of action against him and not merely incidental to it. [371]

Footnotes

353 See para.30-035 above.

354 LA 1980 s.21(1)(a). See *Thorne v Heard [1895] A.C. 495*.

355 See *Thorne v Heard [1895] A.C. 495*; *Re Page [1893] 1 Ch. 304*.

356 LA 1980 s.21(1)(b).

357 *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355* at [9]; following *Selangor United Rubber Estates Ltd v Cradock (No.3) [1968] 1 W.L.R. 1555*; *Paragon Finance v DB Thakerar & Co [1999] 1 All E.R. 400* at 408–409; *Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48; [2003] 2 A.C. 366* at [141]–[143].

358 *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355* at [9].

359 *Mara v Brown [1896] 1 Ch. 196*; *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355* at [9].

360 These would include secret trustees and constructive trustees under the rules in *Pallant v Morgan [1953] Ch. 43*; and *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432*: *Paragon Finance v DB Thakerar & Co [1999] 1 All E.R. 400* at 408–409.

361 *Taylor v Davies [1920] A.C. 636* at 653. See too *Clarkson v Davies [1923] A.C. 100* at 110–111; *Paragon Finance v DB Thakerer & Co Ltd [1999] 1 All E.R. 400*; *Halton International Holdings SARL v Guernoy Ltd [2006] EWCA Civ 801*.

362 *Paragon Finance v DB Thakerar & Co [1999] 1 All E.R. 400*; *UCB Home Loans v Carr [2000] Lloyd's Rep. P.N. 754* at 767–769; *JJ Harrison (Properties) Ltd v Harrison [2001] EWCA Civ 1467; [2002] B.C.L.C. 162*; *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355* at [9].

363 *Selangor United Rubber Estates Ltd v Cradock [1968] 1 W.L.R. 1555* at 1582, per Ungoed-Thomas J; *Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48; [2003] 2 A.C. 366* at [141]–[143], per Lord Millett who criticises the description of the defendant as "accountable as a constructive trustee", it being more accurate simply to describe the defendant "as accountable in equity".

364 *Taylor v Davies [1920] A.C. 636*; *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355*.

365 *JJ Harrison (Properties) Ltd v Harrison [2001] EWCA Civ 1467; [2002] B.C.L.C. 162* at [27]–[29].

366 *Cattley v Pollard [2006] EWHC 3130 (Ch); [2007] 2 All E.R. 1086* (dishonest assistance); *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355*; not following *Statek Corp v Alford [2008] EWHC 32 (Ch); [2008] B.C.C. 266*.

367 LA 1980 s.32(1)(b).

368 *Armitage v Nurse [1998] Ch. 241* at 260 interpreting LA 1980 s.21(1)(a).

369 *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] 2 W.L.R. 355* at [119].

370 See *C. Mitchell [2008] Conv. 236–237*.

371 *Beaman v ARTS Ltd [1949] 1 K.B. 550*.

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