Trusts
Fall Term 2017

Lecture Notes – No. 5

CONSTITUTION OF TRUSTS

The trust is generally constituted by:

1) the settlor declaring himself or herself to be trustee in respect of property; or

2) the settlor transfers the property to the trustee directly; or

3) the settlor transfers the property to the trustee indirectly.

In general, a court will not enforce an incompletely constituted trust based on the maxims ***Equity will Not Assist a Volunteer*** and ***Equity Will Not Perfect an Imperfect Gift***. The rationale is the preservation of the proprietary interest of the settlor in the trust property; that is, the law will not disturb ownership without a compelling reason.

Sometimes a court will assist and order the trust be constituted. For example, there was a promise that is enforceable (and, like contract, we look for consideration to bring the beneficiary outside the category of a 'volunteer'). At other times, the court may hold it would be unconscionable not to assist, principally when the settlor has done everything he or she can and something outside his or her control prevents the trust being constituted.

1. Self-Declaration of Trust

The settlor must clearly intend to become a trustee of the property, as a matter of fact.

(a) **Richards v Delbridge (1874) LR 18 Eq 11** (S endorsed a lease on premises 'this deed and all thereto belonging I give to Edward Bennetto Richards from this time forth with all stock in trade' and dies. Held: no trust).

(b) **Jones v Lock (1865) LR 1 Ch App 25** (S produced a cheque for £900 payable to himself, and said 'look you here, I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it.' Held: no trust).

(c) **Paul v Constance [1977] 1 WLR 54 :** S and B lived together. S opened a bank account in his name alone, with his common law spouse having a right to withdraw or deposit such that their joint bingo winnings were paid in and their joint Christmas expenses were withdrawn, there is a trust where S said to B 'the money is as much yours as mine' - these were simple people who the court found intended a trust obligation.

Carson v Wilson
[1961] OR 113 (CA)

In this case deeds of conveyance were executed by the testator during his lifetime and the deeds were lodged with his solicitor pending the testator's death. As inter vivos gifts, the deeds failed for want of delivery. As testamentary gifts, they failed for non-compliance with formalities of the wills legislation. As trusts, they failed as the testator had not intended that he be obligated as a trustee by virtue of his execution of the deeds.

Per Schroeder JA:

> I refer also to *Richards v. Delbridge* (1874), L.R. 18 Eq. 11. There the owner of leasehold business premises and stock in trade shortly before his death purported to make a voluntary gift in favour of his grandson, who was an infant and who had assisted in the operation of the business, by the following memorandum signed and endorsed on the lease: "This deed and all thereto belonging I give to E. from this time forth, with all the stock-in-trade." The lease was then delivered to the mother of E on his behalf. Holding that there had been no valid declaration of trust of the property in favour of the grandson, Sir G. Jessel, M.R., stated at p. 14:
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> The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. **It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.**
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> The Master of the Rolls approved the law as laid down by Lord Justice Turner in *Milroy v. Lord, supra*, and at p. 15 he quoted the following extract from the judgment of Lord Justice Turner in that case:
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> The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.
>
> The law laid down in these cases disposes decisively of the alternative contentions advanced on behalf of the respondents, and the gifts cannot be

supported on the theory that a valid and effectual trust has been created in their favour.

2. Direct Transfer and Imperfect Gifts:

Equity will not perfect an imperfect gift:
The court will not order a trust constituted as a curative measure to save a failed trust.

***Equity will not assist a volunteer*:**
As a general rule, the court will not order equitable remedies to cure an otherwise failed trust indirectly.

In ***Milroy v Lord*** **(1862), 45 ER 1185 (Eng. C.A.)**, the settlor (Medley) owned shares in a bank (The Louisiana Bank) which he purported to transfer to Lord, who was to hold them on trust for Milroy. Lord was the settlor's agent under a Power of Attorney; he never made the transfer during the settlor's lifetime and paid the dividends to Milroy. When the settlor died, the share certificates were given to the settlor's executor. Milroy argued that Lord held under a valid trust for him; the executor argued that the trust never arose because the shares were never actually transferred to Lord – the company registry never showed a change of ownership of the shares from the settlor to Lord and such a change in registration was necessary for any assignment to be valid in law.

Turner LJ described **the basic rule:** there is no equity to perfect an imperfect gift, and there is also no equity for the court to order complete constitution of a trust in a mode other than that contemplated by S – the settlor must do everything that he can to constitute the trust. **"If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be effectual by being converted into a perfect trust."**

Re Rose
[1952] Ch 499

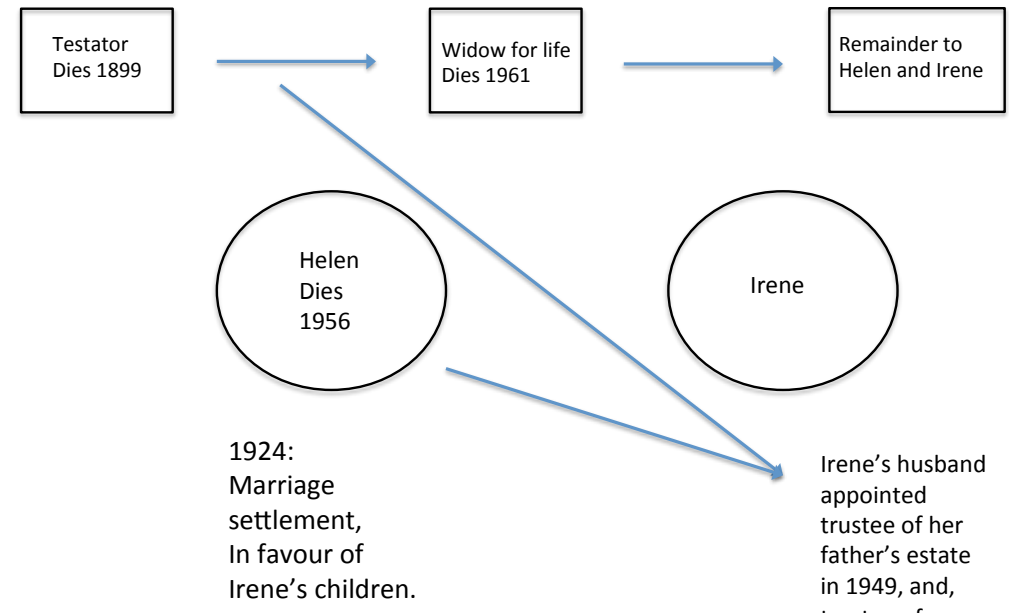
The court modified the rigidity of the rule in *Milroy v Lord* such that where the transfer is not yet complete but where S has done everything that he or she can, S holds for B pending completion. This softened a rigid approach at the time based on dicta in *Milroy v Lord* itself and hence the two cases sit well together.

Here the settlor held two blocks of shares and transferred them to a trustee under a deed of settlement of a trust. The transfer met the company's regulations for change in share ownership. The date of the transfer of ownership was made by the company 3 months later. The settlor died 5 years later. A tax was payable on voluntary disposition of property made within 5 years of death. The date of the transfer on the company's registry feel within that 5 year period. Was the transfer effective on the date of the delivery of the share assignment form to the company (and thus outside the tax window) or on the date of the change on the registry (and thus tax was payable). Held: No tax

liability as the transfer was effective on the date on which the settlor did all that he could to give effect to the trust.

3.Indirect Transfer – Third Parties

Re Ralli's Will Trusts
[1964] Ch 288



Question: after the widow's death in 1961, Irene's husband holds the half the remainder interest for Irene. Can he resist the demand of Helen's estate that it is entitled to the other half because Helen herself never transferred the property into trust.

Here the testator left his residuary estate to his wife for life, remainder to his two daughters (Helen and Irene). Helen made a 'marriage settlement' under which she promised to settle property that she held and would obtain in future for Irene's children.

1892: Testator's Will executed.
1899: Testator dies – to wife for life, remainder to two daughters absolutely.
1924: Helen's marriage settlement in favour of Irene's children.
1946: Irene's husband appointed trustee of marriage settlement, and, trustee of testator's estate.
1956: Helen died.
1961: Testator's widow died.

In 1961, then, the trustee of the testator's estate was Irene's husband. He held the title to the trust property. Helen was now dead. Helen's estate claimed a half-share of the remainder of the testator's estate arguing that the marriage settlement had failed given that she had never herself transferred property to the trustee of her marriage settlement, and thus her share ought to revert to her estate.

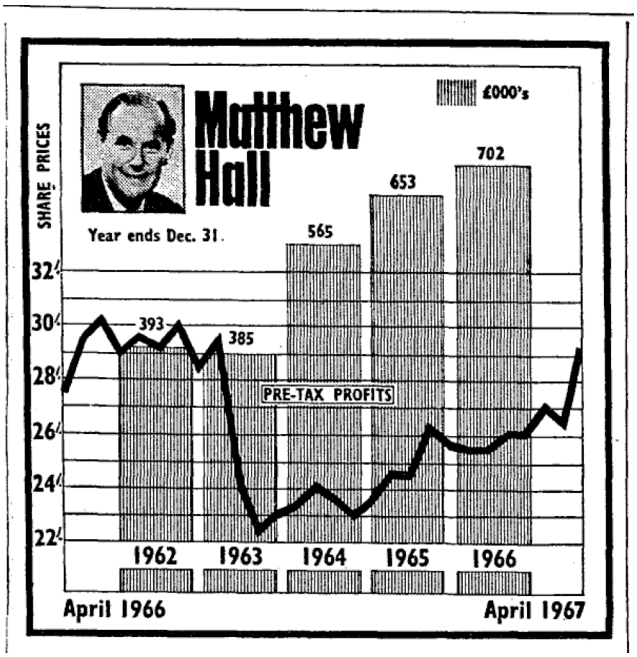
It was held that once the trustee has the property – under either trust – the obligations from both trusts could be enforced. Equity here was not needed to vest the trust property in the trustee, however equity will enforce the trust however as it is fully constituted – if there was improper conduct in constitution, the result may be different. In any case, that is not the case here and the terms of the marriage settlement were binding on the trustee.

Buckley J:

> In my judgment **the circumstance that the plaintiff holds the fund because he was appointed a trustee of the will is irrelevant. He is at law the owner of the fund, and the means by which he became so have no effect upon the quality of his legal ownership. The question is: For whom, if anyone, does he hold the fund in equity?** In other words, who can successfully assert an equity against him disentitling him to stand upon his legal right? It seems to me to be indisputable that Helen, if she were alive, could not do so, for she has solemnly covenanted under seal to assign the fund to the plaintiff, and the defendants can stand in no better position. It is, of course, true that the object of the covenant was not that the plaintiff should retain the property for his own benefit, but that he should hold it on the trusts of the settlement. It is also true that, if it were necessary to enforce performance of the covenant, equity would not assist the beneficiaries under the settlement, because they are mere volunteers; and that for the same reason the plaintiff, as trustee of the settlement, would not be bound to enforce the covenant and would not be constrained by the court to do so, and indeed, it seems, might be constrained by the court not to do so. As matters stand, however, there is no occasion to invoke the assistance of equity to enforce the performance of the covenant. It is for the defendants to invoke the assistance of equity to make good their claim to the fund. To do so successfully they must show that the plaintiff cannot conscientiously withhold it from them. When they seek to do this, he can point to the covenant which, in my judgment, relieves him from any fiduciary obligation he would otherwise owe to the defendants as Helen's representatives. In so doing the plaintiff is not seeking to enforce an equitable

remedy against the defendants on behalf of persons who could not enforce such a remedy themselves: he is relying upon the combined effect of his legal ownership of the fund and his rights under the covenant. That an action on the covenant might be statute-barred is irrelevant, for there is no occasion for such an action.

The Saga of Bertram Baden's Will Trusts



Matthew Hall & Co. was founded in 1848 as a plumbing and heating company ('Sanitary, Hydraulic and Heating Engineers'). It went public in 1938, and was lead by Bertram Baden, MC, FR San I [Fellow of the Royal Sanitary Institute], MIHVE (Member of the Institute of Heating and Ventilation Engineers] as Chairman and Managing Director for many years. It was a very successful enterprise under his management, and developed a number of domestic and foreign subsidiaries. Eventually, it merged with an international engineering company, AMEC, in 1988.

Baden executed a Will in 1941 setting up a discretionary trust for some of the employees of the company and their relatives. He died in 1960 and his executors (including his widow and other family members) claimed that the trust was invalid and that the funds ought to revert to his estate. The clause of the Will in question read:

> 9. (a) The trustees shall apply the net income of the fund in making at their **absolute discretion** grants to or for the benefit of any of the officers and employees or ex-officers or ex-employees of the company **or to any relatives or dependants of any such persons** in such amounts at such times and on such conditions (if any) as they think fit and any such grant may at their discretion be made by payment to the beneficiary or to any institution or person to be applied for his or her benefit and in the latter case the trustees shall be under no obligation to see to the application of the money. (b) The trustees shall not be bound to exhaust the income of any year or other period in making such grants as aforesaid and any income not so applied shall be dealt with as provided by clause 6 (a) hereof.

Lord Wilberforce reviewed the various cases leading up to the modification of the 'list certainty' approach in respect of objects of a mere power to the 'single postulant' / in-or-out of the class test, and adopted that test for discretionary trusts. Thus, where the trustees had argued that clause 9(a) set up a trust and not a power and that the trust failed for certainty of objects as not allowing for 'list certainty' in respect of the nominated class, Lord Wilberforce said that it was a power properly and in any case the test for objects of a discretionary trust and objects of a mere power are the same. His Lordship said:

> Two final points: first, as to the question of certainty. I desire to emphasise the distinction clearly made and explained by Lord Upjohn between linguistic

> or semantic uncertainty which, if unresolved by the court, renders the gift void, and the difficulty of ascertaining the existence or whereabouts of members of the class, a matter with which the court can appropriately deal on an application for directions. There may be a third case where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form "anything like a class" so that the trust is administratively unworkable or in Lord Eldon's words one that cannot be executed (*Morice v. Bishop of Durham,* 10 Ves.Jr. 522, 527). I hesitate to give examples for they may prejudice future cases, but perhaps "all the residents of Greater London" will serve. I do not think that a discretionary trust for "relatives" even of a living person falls within this category.

The matter was remitted for trial and it was necessary to determine whether the clause could meet this approach. It could. In the Court of Appeal, Sachs LJ held:

> It is submitted on behalf of the executors that each of the words "relatives" and "dependants" imports such an uncertainty that the trusts as a whole are void.
>
> The test to be applied to each of these words is: "can it be said with certainty that any given individual is or is not a member of the class?" *per* Lord Wilberforce…
>
> It is first to be noted that the deed must be looked at through the eyes of a businessman seeking to advance the welfare of the employees of his firm and those so connected with the employees that a benevolent employer would wish to help them. He would not necessarily be looking at the words he uses with the same eyes as those of a man making a will. Accordingly, whether a court is considering the concept implicit in relevant words, or whether it is exercising the function of a court of construction, it should adopt… [a] practical and common-sense approach… which would be used by an employer setting up such a fund.

All members of the Court of Appeal agreed that the clause was conceptually certain enough in respect of both ‘dependants’ and ‘relatives’.

Employees of the Company: 2
Executors and Trustees: 0