Trusts & Equity – Law 463
Fall Term 2018

Lecture Notes No. 3

POWERS OF APPOINTMENT

"power" = A power is simply the *ability* to do some act, often in relation to another's property. A power of 'appointment' is the ability to transfer ownership of the property to a third party.

The person who gives the power is the **donor** [of the power] and the person who receives it is the **donee**. A person in whose favour such a power may be exercised is the **object** of the power. The property to which the power applies is the **subject** of the power.

While the donee cannot be compelled to exercise the power (it is truly discretionary and thus non-compellable), he or she can be held accountable for a fraud in the exercise of the power.

Example:
A is B's agent in relation to a fund of money, with a power to appoint from the income received to B's children.

'discretionary trust' = A discretionary trust is a true trust but where the trustee enjoys a discretion in either or both selecting objects from the class of beneficiaries set out in the settlement, or, the amount to appoint to beneficiaries.

The trustee has an *obligation* to appoint under the trust and can be compelled to fulfil that obligation notwithstanding its exercise involves discretion; failure to fulfil the obligation is a breach of trust.

Examples:
S creates a trust wherein T has discretion to pay reasonable sums for B's maintenance and education in her absolute discretion; gift over to B's children.

S creates a trust to pay for the university education of any of the beneficiaries provided S approves of the course of study; gift over to charity.

It is often the case that a trustee will be armed with a number of powers that may be exercised by the trustee in his or her discretion. This allows for flexibility in the administration of the trust. A common example is where the trustee holds capital property on trust with income to go to one person for life, with remainder to another. The income

and capital entitlements are precise. It may be prudent to allow the trustee to encroach upon capital in the interest of the income beneficiary. Whether the trustee exercises the power is a matter in his or her discretion. Courts will not interfere with the exercise of fiduciary discretions by the trustee lightly; after all, the settlor chose to provide the trustee with the discretion to exercise the power for a reason. It is important to understand how and when the Court will become involved in such matters, for it will only do so exceptionally.

(a) Supervision: Duty to Consider

Turner v Turner
[1984] Ch 100

Mervyn Davies J:

> When a discretionary power is given to trustees they come under certain fiduciary duties. In a context removed from the present case Sir Robert Megarry V.-C. said in *In re Hay's Settlement Trusts* [1982] 1 W.L.R. 202, 209c:
>
> > "a trustee to whom, as such, a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose."
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> The Vice-Chancellor said, at p. 210:
>
> > "If I am right in these views, the duties of a trustee which are specific to a mere power seem to be threefold. Apart from the obvious duty of obeying the trust instrument, and in particular of making no appointment that is not authorised by it, the trustee must, first, consider periodically whether or not he should exercise the power;
> >
> > second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments. I do not assert that this list is exhaustive; but as the authorities stand it seems to me to include the essentials, so far as relevant to the case before me."
>
> Accordingly the **trustees exercising a power come under a duty to consider.** It is plain on the evidence that here the trustees did not in any way "consider" in the course of signing the three deeds in question. They did not know they had any discretion during the settlor's lifetime, they did not read or understand the effect of the documents they were signing and what they were doing was not preceded by any decision. They merely signed when requested. The trustees therefore made the appointments in breach of their duty in that it was their duty to "consider" before appointing and this they did not do.

(b) Construction: Power or Trust?

Re Weekes
[1897] 1 Ch 289

Where there is a gift to A for life with a power to A to appoint amongst a class of objects, but no gift to the class and no gift over in default of appointment, the Court is not bound, without more, to imply a gift to the class in default of the power being exercised.

In order to imply a gift there must be a clear indication in the will that the testator intended the power to be regarded in the nature of a trust, so that the class or some of the class should take. Exercise of a mere power cannot be ordered by the court.

Re Lloyd
[1938] OR 32 (HCJ)

T gave her husband a life interest in her estate with a discretionary power "to devise, bequeath and appoint all her estate" among her three named sisters and her niece. There was no gift over in default of appointment nor any disposition of the residue of the estate disclosed in the Will. By the time that T died, her husband and all her siblings had pre-deceased her.

Issue: Was there an 'implied gift' in default of the exercise of the power to the husband (and thus everything goes to the to the surviving niece) or did T die intestate (that is, without a will)?

Rose CJHC:

> [after discussing various authorities]… [in] Halsbury's Laws of England [the text reads]… **"If there is a power to appoint among certain objects, but no gift to those objects and no gift over in default of appointment, the Court may imply a trust for or a gift to those objects equally if the power is not exercised; ... but for the rule to apply there must be a clear intention that the donor intended the power to be in the nature of a trust, and any contrary intention defeats an implied trust."** This statement accords with the opinion that had been expressed by Tomlin J. in *In re Combe*, [1925] Ch. 210.. [where Tomlin J. held that]… he was not to approach the will which he had under consideration governed by an inflexible and artificial rule of construction to the effect that where there is found a power of appointment to a class not followed by any gift in default of appointment, the Court is bound to imply a gift to that class in default of the exercise of the power. On the contrary, he thought that the will ought to be approached for the purpose of construction in the same spirit as any other will is approached, and that **the Court ought to endeavour to construe the will and arrive at the testator's meaning by examining the words expressly used, and ought to imply only those things that are necessarily and reasonably to be implied**.

As T had selected *specific people* from amongst the *general class* of her various relatives, the Court reasoned that it was her intention that a gift-over the survivors of the class was to be implied.

(c) Certainty of Objects

Where a power sets out specific people as the objects of the power (by name or description), there is little problem.

Where the donor sets out the objects as a 'class' (e.g. 'all students enrolled in Trusts'), then questions do arise in respect of the donee's choice from amongst the class.

A trustee / donee exercising a power:

(1) must be able to discern with certainty what it is that the settler or donor intended and thus the language setting up the obligation must be conceptually certain, else the court will consider the grant as void for vagueness;

(2) where the objects are a class, the trustee or donee as the case may be need not be able to ascertain a 'complete list' of all the members of the specified class before considering exercising his or her discretion but only whether a particular person is or is not a member of the class.

The trustee who holds a mere power must be careful not to act arbitrarily in exercising the power as it would be a breach of his or her fiduciary duty.

Re Gulbenkian's Settlement Trusts
[1970] AC 508 (HL)

At issue was a power given to the trustees as set out in a rather complex trust settlement:

> ... at their absolute discretion pay all or any part of the income of the property hereby settled and the investments for the time being representing the same (hereinafter called the trust fund) to or apply the same for the maintenance and personal support or benefit of all or any one or more to the exclusion of the other or others of the following persons.

Among those persons were

> ... any person or persons in whose house or apartments or in whose company or under whose care or control or by or with whom the said Nubar Sarkis Gulbenkian [the beneficiary] may from time to time be employed or residing.

The House of Lords maintained the difference between an obligation and a mere power; the former must be satisfied, the latter carries no obligation. In defining the class of objects of a power, the trustee or donee need only be able to say whether a particular individual is within the class of objects. However, when a trustee is exercising a power, he or she must take care not to act capriciously.

Lord Reid:

The sole question in this appeal is whether this class of potential beneficiaries is so uncertain that these provisions cannot be operated by the trustees. It is not disputed that if the description of the class which I have quoted is too uncertain then the whole provision fails even although the other potential beneficiaries are easily ascertainable.

This clause does not make sense as it stands... [b]ut the client must not be penalised for his lawyer's slovenly drafting. Under modern conditions it may be necessary to relax older and stricter standards. If I adopt methods of construction appropriate for commercial documents and documents inter rusticos I must consider whether underlying the words used any reasonably clear intention can be discerned...

One argument, as I understand it, is that because this is admitted to be a mere power, it really imposes no duties on them at all. I find that difficult to understand. **It is a power given not to the individuals who happen also to be trustees but to the trustees as such** so that new trustees duly assumed or appointed can exercise it. In my view it must follow that the trustees are to act in their fiduciary capacity. They are given an absolute discretion. So if they decide in good faith at appropriate times to give none of the income to any of the beneficiaries the court cannot pronounce their reasons to be bad. And similarly if they decide to give some or all of the income to a particular beneficiary the court will not review their decision... But **their "absolute discretion" must, I think, be subject to two conditions.** It may be true that when a mere power is given to an individual he is under no duty to exercise it or even to consider whether he should exercise it. **But when a power is given to trustees as such, it appears to me that the situation must be different. A settlor or testator who entrusts a power to his trustees must be relying on them in their fiduciary capacity so they cannot simply push aside the power and refuse to consider whether it ought in their judgment to be exercised. And they cannot give money to a person who is not within the classes of persons designated by the settlor: the construction of the power is for the court.**

If the classes of beneficiaries are not defined with sufficient particularity to enable the court to determine whether a particular person is or is not, on the facts at a particular time, within one of the classes of beneficiaries, then the power must be bad for uncertainty. If the donee of the power (whether or not he has any duty) desires to exercise it in favour of a particular person it must be possible to determine whether that particular person is or is not within the class of objects of the power. And it must be possible to determine the validity of the power immediately it comes into operation. It cannot be valid if the person whom the donee happens to choose is clearly within the objects but void if it is doubtful whether that is so. So if one can reasonably envisage cases where the court could not determine the question the power must be bad for uncertainty. But it is not bad merely because such determination may be difficult in a particular case. The respondents have inserted in their case at the request of the trustees a statement that in the view of the trustees "it must be unlikely that they would in practice be able to exercise the said power or discretion except after obtaining a decision of the court whether any particular suggested object thereof did or did not fall within the said description." That in itself is not sufficient to warrant a decision that the power fails for uncertainty. **It may be that there is a class of case where, although the**

description of a class of beneficiaries is clear enough, any attempt to apply it to the facts would lead to such administrative difficulties that it would for that reason be held to be invalid.

Lord Upjohn:

It is curious that there is no long line of decided cases as to what is the proper test to apply when considering the validity of a mere power when the class of possible appointees is or may be incapable of ascertainment, but there is a body of recent authority to the effect that the rule is, that provided there is a valid gift over or trust in default of appointment... a mere or bare power of appointment among a class is valid if you can with certainty say whether any given individual is or is not a member of the class; you do not have to be able to ascertain every member of the class.

... So I propose to make some general observations upon this matter.

If a donor (be he a settlor or testator) directs trustees to make some specified provision for "John Smith," then to give legal effect to that provision it must be possible to identify "John Smith." If the donor knows three John Smiths then by the most elementary principles of law neither the trustees nor the court in their place can give effect to that provision; neither the trustees nor the court can guess at it. It must fail for uncertainty unless of course admissible evidence is available to point to a particular John Smith as the object of the donor's bounty.

Then, taking it one stage further, suppose the donor directs that a fund or the income of a fund should be equally divided between members of a class. That class must be as defined as the individual; the court cannot guess at it. Suppose the donor directs that a fund be divided equally between "my old friends," then unless there is some admissible evidence that the donor has given some special "dictionary" meaning to that phrase which enables the trustees to identify the class with sufficient certainty, it is plainly bad as being too uncertain. Suppose that there appeared before the trustees (or the court) two or three individuals who plainly satisfied the test of being among "my old friends," the trustees could not consistently with the donor's intentions accept them as claiming the whole or any defined part of the fund. They cannot claim the whole fund for they can show no title to it unless they prove they are the only members of the class, which of course they cannot do, and so, too, by parity of reasoning they cannot claim any defined part of the fund and there is no authority in the trustees or the court to make any distribution among a smaller class than that pointed out by the donor. The principle is, in my opinion, that the donor must make his intentions sufficiently plain as to the objects of his trust and the court cannot give effect to it by misinterpreting his intentions by dividing the fund merely among those present. **Secondly, and perhaps it is the more hallowed principle, the Court of Chancery, which acts in default of trustees, must know with sufficient certainty the objects of the beneficence of the donor so as to execute the trust.** Then, suppose the donor does not direct an equal division of his property among the class but gives a power of selection to his trustees among the class; exactly the same principles must apply. The trustees have a duty to select the donees of the donor's bounty from among the class designated by the donor; he has not entrusted them with any power to select the donees merely from among known claimants who are within the class, for that is constituting a narrower class and the donor has given them no power to do this.

But when mere or bare powers are conferred upon donees of the power (whether trustees or others) the matter is quite different. As I have already pointed out, the trustees have no duty to exercise it in the sense that they cannot be controlled in any way. If they fail to exercise it then those entitled in default of its exercise are entitled to the fund. Perhaps the contrast may be put forcibly in this way: in the first case it is a mere power to distribute with a gift over in default; in the second case it is a trust todistribute among the class defined by the donor with merely a power of selection within that class. The result is in the first case even if the class of appointee among whom the donees of the power may appoint is clear and ascertained and they are all of full age and sui juris, nevertheless they cannot compel the donees of the power to exercise it in their collective favour. If, however, it is a trust power, then those entitled are entitled (if they are all of full age and sui juris) to compel the trustees to pay the fund over to them, unless the fund is income and the trustees have power to accumulate for the future.

Re Hay's Settlement Trusts
[1982] 1 W.L.R. 202 (Ch)

Megarry J:

…. Clause 2 reads as follows:

> 'PENDING the execution of an effective and irrevocable appointment of the whole of the capital and income of the Trust Fund and so far as any appointment thereof shall not for the time being and from time to time extend the trustees shall hold the Trust Fund upon trust until the lastest [sic] date for the vesting of the trust funds under the last preceding Clause hereof to pay the income of so much of the Trust Fund as is for the time being unappointed to or for the benefit of any person or persons whatsoever (save as hereinafter provided) whether or not related to Lady Isobel Rose Hay or to any Charity in such manner and in such shares and proportions as the trustees shall think fit.'

There are only two other clauses in the deed of appointment. Clause 3 prohibits any 'appointment under any power' in the deed, or 'under any other power exercisable by the trustees in relation to the Trust Fund', to be made in favour of the settlor, any husband of hers or any existing or former trustee of the settlement. In view of the words 'save as hereinafter provided' in cl 2, I think that the words 'any other power' in cl 3 must be read as including any discretion under any trust, and so as applying to cl 2.

> Clause 4 reads as follows:
> 'SUBJECT as aforesaid and from and after the date for vesting provided by Clause 2 hereof the trustees shall stand possessed of the capital of the Trust Fund upon the trusts in default of appointment declared in Clause 4 of the Settlement but subject to the proviso for hotchpot therein contained.'
>
> …

The starting point must be to consider whether the power created by the first limb of cl 4 of the settlement is valid. The rival arguments were presented by counsel for the defendants in his primary contention, and by counsel for the Attorney General, in favour of validity, and by counsel for the defendants, in his alternative contention, against validity. The essential point is whether a power for trustees to appoint to anyone in the world except a handful of specified persons is valid. Such a power will be perfectly valid if given to a person who is not in a fiduciary position: the difficulty arises when it is given to trustees, for they are under certain fiduciary duties in relation to the power, and to a limited degree they are subject to the control of the courts. At the centre of the dispute there are *Re Manisty's Settlement Trusts* [1973] 2 All ER 1203, [1974] Ch 17 (in which Templeman J differed from part of what was said in the Court of Appeal in *Blausten v Inland Revenue Comrs* [1972] 1 All ER 41, [1972] Ch 256); *McPhail v Doulton* [1970] 2 All ER 228, [1971] AC 424 (which I shall call *Re Baden (No 1))*; and *Re Baden's Deed Trusts (No 2)* [1972] 2 All ER 1304, [1973] Ch 9, which I shall call *Re Baden (No 2)*. Counsel for the defendants, I may say, strongly contended that *Re Manisty's Settlement* was wrongly decided.

In *Re Manisty's Settlement* a settlement gave trustees a discretionary power to apply the trust fund for the benefit of a small class of the settlor's near relations, save that any member of a smaller 'excepted class' was to be excluded from the class of beneficiaries. The trustees were also given power at their absolute discretion to declare that any person, corporation or charity (except a member of the excepted class or a trustee) should be included in the class of beneficiaries. Templeman J held that this power to extend the class of beneficiaries was valid. In *Blausten v Inland Revenue Comrs* which had been decided some eighteen months earlier, the settlement created a discretionary trust of income for members of a 'specified class' and a power to pay or apply capital to or for the benefit of members of that class, or to appoint capital to be held on trust for them. The settlement also gave the trustees power 'with the previous consent in writing of the settlor' to appoint any other person or persons (except the settlor) to be included in the 'specified class'. The Court of Appeal decided the case on a point of construction; but Buckley LJ ([1972] 1 All ER 41 at 49, [1972] Ch 256 at 271) also considered a contention that the trustees' power to add to the 'specified class' was so wide that it was bad for uncertainty, since the power would enable anyone in the world save the settlor to be included. He rejected this contention on the ground that the settlor's prior written consent was requisite to any addition to the 'specified class'; but for this, it seems plain that he would have held the power void for uncertainty. Orr LJ simply concurred, but Salmon LJ expressly confined himself to the point of construction, and said nothing about the power to add to the 'specified class'. In *Re Manisty's Settlement* [1973] 2 All ER 1203 at 1213, [1974] Ch 17 at 29, Templeman J rejected the view of Buckley LJ on this point on the ground that *Re Gestetner (deceased)* [1953] 1 All ER 1150, [1953] Ch 672, *Re Gulbenkian's Settlement Trusts* [1968] 3 All ER 785, [1970] AC 508 and the two *Baden* cases did not appear to have been fully explored in the *Blausten* case, and the case did not involve any final pronouncement on the point. In general, I respectfully agree with Templeman J.

I propose to approach the matter by stages. First, it is plain that if a power of appointment is given to a person who is not in a fiduciary position, there is nothing in the width of the power which invalidates it per se. The power may be a special power with a large class of persons as objects; the power may be

what is called a 'hybrid' power, or an 'intermediate' power, authorising appointment to anyone save a specified number or class of persons; or the power may be a general power. Whichever it is, there is nothing in the number of persons to whom an appointment may be made which will invalidate it. The difficulty comes when the power is given to trustees as such, in that the number of objects may interact with the fiduciary duties of the trustees and their control by the court. The argument of counsel for the defendants carried him to the extent of asserting that no valid intermediate or general power could be vested in trustees.

That brings me to the second point, namely, the extent of the fiduciary obligaitons of trustees who have a mere power vested in them, and how far the court exercises control over them in relation to that power. In the case of a trust, of course, the trustee is bound to execute it, and if he does not, the court will see to its execution. A mere power is very different. Normally the trustee is not bound to exercise it, and the court will not compel him to do so. That, however, does not mean that he can simply fold his hands and ignore it, for normally he must from time to time consider whether or not to exercise the power, and the court may direct him to do this.

When the does exercise the power, he must, of course (as in the case of all trusts and powers) confine himself to what is authorised, and not go beyond it. But that is not the only restriction. Whereas a person who is not in a fiduciary position is free to exercise the power in any way that he wishes, unhampered by any fiduciary duties, a trustee to whom, as such, a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose. It is not enough for him to refrain from acting capriciously; he must do more. He must 'make such a survey of the range of objects or possible beneficiaries' as will enable him to carry out his fiduciary duty. He must find out 'the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to the possible claimants, a particular grant was appropriate': per Lord Wilberforce in *Re Baden (No 1)* [1970] 2 All ER 228 at 240, 247, [1971] AC 424 at 449, 457.

I pause there. The summary of the law that I have set out above is taken from a variety of sources, principally *Re Gestetner (deceased)* [1953] 1 All ER 1150, [1953] Ch 672, *Re Gulbenkian's Settlement* [1968] 3 All ER 785 at 787, 592-594, [1970] AC 508 at 518, 524-525 and *Re Baden (No 1)* [1970] 2 All ER 228 at 246, [1971] AC 424 at 456. The last proposition, relating to the survey and consideration, at first sight gives rise to some difficulty. It is now well settled that no mere power is invalidated by it being impossible to ascertain every object of the power; provided the language is clear enough to make it possible to say whether any given individual is an object of the power, it need not be possible to compile a complete list of every object: see *Re Gestetner (deceased)* [1953] 1 All ER 1150 at 1155, [1953] Ch 672 at 688; *Re Gulbenkian's Settlement* [1968] 3 All ER 785, [1970] AC 508; *Re Baden (No 1)* [1970] 2 All ER 228, [1971] AC 424. As Harman J said in *Re Gestetner (deceased)* [1953] 1 All ER 1150 at 1056, [1953] Ch 672 at 688, the trustees need not 'worry their heads to survey the world from China to Peru, when there are perfectly good objects of the class in England'.

That brings me to the third point. How is the duty of making a responsible survey and selection to be carried out in the absence of any complete list of objects? This queston was considered by the Court of Appeal in *Re Baden (No 2)*. That case was concerned with what, after some divergences of judicial opinion, was held to be a discretionary trust and not a mere power; but plainly the requirements for a mere power cannot be more stringent than those for a discretionary trust. The duty, I think, may be expressed along the following lines: I venture a modest degree of amplification and exegesis of what was said in *Re Baden (No 2)* [1972] 2 All ER 1304 at 1310, 1315, [1973] Ch 9 at 20, 27. The trustee must not simply proceed to exercise the power in favour of such of the objects as happen to be at hand or claim his attention. He must first consider what persons or classes of persons are objects of the power within the definition in the settlement or will. In doing this, there is no need to compile a complete list of the objects, or even to make an accurate assessment of the number of them: what is needed is an appreciation of the width of the field, and thus whether a selection is to be made merely from a dozen or, instead, from thousands or millions. (Incidentally, in order to avoid the relevant passage in the judgment of Sachs LJ being self-contradictory I think a comma needs deletion: the words 'it refers to something quite different, to a need to provide ... ' should read 'it refers to something quite different to a need to provide ... ', or, preferably, 'it refers to something quite different from a need to provide ... ': see [1972] 2 All ER 1304 at 1310, [1973] Ch 9 at 20). Only when the trustee has applied his mind to 'the size of the problem' should he then consider in individual cases whether, in relation to other possible claimants, a particular grant is appropriate. In doing this, no doubt he should not prefer the undeserving to the deserving; but he is not required to make an exact calculation whether, as between deserving claimants, A is more deserving than B: see *Re Gestetner (deceased)* [1953] 1 All ER 1150 at 1155, [1953] Ch 672 at 688, approved in *Re Baden (No 1)* [1970] 2 All ER 228 at 243-244, [1971] AC 424 at 453.

If I am right in these views, the duties of a trustee which are specific to a mere power seem to be threefold. Apart from the obvious duty of obeying the trust instrument, and in particular of making no appointment that is not authorised by it, the trustee must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments. I do not assert that this list is exhaustive; but as the authorities stand it seems to me to include the essentials, so far as relevant to the case before me.

…

The second ground of invalidity if there is no requirement for the settlor's consent seems to be that the power is so wide that it would be impossible for the trustees to consider in any sensible manner how to exercise it, and also impossible for the court to say whether or not they were properly exercising it. With respect, I do not see how that follows. If I have correctly stated the extent of the duties of trustees in whom a mere power is vested, I do not see what there is to prevent the trustees from performing these duties. It must be remembered that Buckley LJ, though speaking after *Re Gulbenkian's Settlement* and *Re Baden (No 1)* had been decided, lacked the advantage of considering *Re Baden (No 2)*, which was not decided until some

five months later. He thus did not have before him the explanation in that case of how the trustees should make a survey and consider individual appointments in cases where no complete list of objects could be compiled. I also have in mind that the settlor in the present case is still alive, though I do not rest my decision on that.

From what I have said it will be seen that I cannot see any ground on which the power in question can be said to be void. Certainly it is not void for linguistic or semantic uncertainty; there is no room for doubt in the definition of those who are or are not objects of the power. Nor can I see that the power is administratively unworkable. The words of Lord Wilberforce in *Re Baden (No 1)* [1970] 2 All ER 228 at 247, [1971] AC 424 at 457 are directed to discretionary trusts, not powers. Nor do I think that the power is void as being capricious. **In *Re Manisty's Settlement* [1973] 2 All ER 1203 at 1211, [1974] Ch 17 at 27 Templeman J appears to be suggesting that a power to benefit 'residents in Greater London' is void as being capricious 'because the terms of the power negative any sensible intention on the part of the settlor'. In saying that, I do not think that the judge had in mind a case in which the settlor was, for instance, a former chairman of the Greater London Council, as subsequent words of his on that page indicate. In any case, as he pointed out earlier, this consideration does not apply to intermediate powers, where no class which could be regarded as capricious has been laid down. Nor do I see how the power in the present case could be invalidated as being too vague, a possible ground of invalidity considered in *Re Manisty's Settlement* [1973] 2 All ER 1203 at 1208, [1974] Ch 17 at 24. Of course, if there is some real vice in a power, and there are real problems of administration or execution, the court may have to hold the power invalid: but I think that the court should be slow to do this. Dispositions ought if possible to be upheld, and the court ought not to be astute to find grounds on which a power can be invalidated. Naturally, if it is shown that a power offends against some rule of law or equity, then it will be held to be void: but a power should not be held void on a peradventure. In my judgment, the power conferred by cl 4 of the settlement is valid.**

FORMALITIES OF EXPRESS TRUSTS

'Formalities' refers to compliance with any procedural aspects of a given transactions; for example, purchase of real estate in Ontario requires suitable registration of title to the land in the local registry office.

The sequence of the establishment of a trust:

1. Settlor (who is legally capable of so doing) makes a declaration of trust (evidencing intent) in respect of specific property (the subject of the trust) in favour of a specific beneficiary (or class of beneficiaries). The trust may be gratuitous or as part of a larger arrangement involving consideration (and thus a contract).

2. The trust is constituted when the property vests in the trustee. **Writing may be required to give effect to the transaction.** If the trust is based on contract and valuable consideration passes to the settlor, the court may order the trust to be fully constituted when the transaction is not yet complete. When the settlor acts gratuitously, the court will only rarely make an Order to allow the trust to be completed.

3. Once constituted, the trustee holds the property under a valid trust for the beneficiary (the object of the trust).

General Considerations

Very little is required to formalise the trust, but in some cases writing of some kind is required as an attempt to control fraud. This is especially true of transactions involving land. The governing statute, the ***Statute of Frauds*, RSO 1990, c.S.19**, has traditionally been regarded as having twin goals:

(1) *To Protect Trustees*: **to ensure that the trustees know the identities of beneficiaries, and the precise nature of their obligations under the trust settlement.** Memories fade and disputes naturally arise and trustees must themselves be in a position to discharge their duties.

(2) *To Protect Beneficiaries*: **to prevent fraud** by oral agreement to the harm of the real beneficial owners.

One must look to the statute itself to determine whether its provisions apply and for the consequences of non-compliance.

The Statute of Frauds, RSO 1990, c. S.19

Selected Provisions:

Writing required for certain contracts

4. No action shall be brought to charge any executor or administrator upon any special promise to answer damages out of the executor's or administrator's own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of any other person, or to charge any person **upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto lawfully authorized by the party**. R.S.O. 1980, c. 481, s. 4; S.O. 1994, c. 27, s. 55, in force December 9, 1994 (R.A.)

Declarations or creations of trusts of land to be in writing

9. Subject to section 10, **all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by a writing signed by the party who is by law enabled to declare such trust, or by his or her last will in writing, or else they are void** and of no effect. R.S.O. 1980, c. 481, s. 9.

Exception of trusts arising, transferred, or extinguished by implication of law

10. Where a conveyance is made of lands or tenements by which a trust or confidence arises or results by implication or construction of law, or is transferred or extinguished by act or operation of law, then and in every such case the trust or confidence is of the like force and effect as it would have been if this Act had not been passed. R.S.O. 1980, c. 481, s. 10.

Assignments of trusts to be in writing

11. **All grants and assignments of a trust or confidence shall be in writing signed by the party granting or assigning the same, or by his or her last will or devise**, or else are void and of no effect. R.S.O. 1980, c. 481, s. 11.

Thus, the writing requirement attaches to:

- contracts creating a trust of land (s.4)
- creation of an interest in land (s.9)
- and assignments of equitable interests (s.11). Section 10 excepts trusts that arise by operation of law, such as a resulting or constructive trust, as there is no prospect of fraud and the judicial order itself will always be sufficiently certain to inform trustees as to their duties (or else directions may be sought from the Court).

'Equity Will Not Allow a Statute to be Used as an Instrument of Fraud'

The principle is a simple one: **where one party uses non-compliance with the statute to act unfairly towards a vulnerable party, the court may intervene to allow for the transaction to complete notwithstanding non-compliance** with the statute through the mechanism of a constructive trust.

A note on *equitable fraud*:

While courts of equity and law have for some time had concurrent jurisdiction to deal with actual fraud in the sense of dishonest acts, the equitable jurisdiction to deal with fraud both pre-dates the common law jurisdiction and is a wider concept.

The concept of *equitable fraud* or *constructive fraud* allowed a court of equity to relieve against an act that was **neither intended as dishonest or committed recklessly**. Lord Haldane LC said in *Nocton v Lord Ashburton* [1914] AC 932, 954 (HL):

> … **it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a court of Equity imposes upon him. His fault is that he has violated however innocently because of his ignorance, an obligation which he must be taken by the court to have known**, and his conduct has in that sense always been called fraudulent…

Thus the concept of equitable fraud is rooted in a pragmatic view of equity as being able to respond to an infinite variety of offensive acts and has accordingly been left as a fluid rather than rigidly defined concept as a matter of judicial policy. Lord Macnaghten once said that "[f]raud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it;" *Reddaway v Banham* [1896] AC 199, 221. At the same time, equitable fraud can be a doctrine bound up with some degree of fault. **The difficulty is in assessing the degree of fault that speaks, to some extent, to moral standards of conduct.**

A technical issue arises in respect of an abuse of the statute that may yield an unconscionable result - that is, a reliance on non-compliance with the statute by a trustee already vested with ownership as a means of retaining the beneficial interest in the property personally. Is the better approach to construe the trust as an enforceable express trust, or, to recognise a constructive trust and thus dispense with the problem of writing?
In ***Rochefoucauld v. Bousted*** **[1897] 1 Ch 196**, it was held that the trustee cannot retain the legal title and claim the property as his own where the trust fails on the basis that it is not in writing, and in such a case the court accepted that parol evidence was sufficient to evidence the trust. In other words, where the trustee relies on the statute to retain beneficially, the court may still allow the trust to be effective notwithstanding non-compliance with the writing requirements to prevent the fraudulent enrichment of the trustee.

In ***Bannister v. Bannister*** **[1948] 2 All ER 133**, the plaintiff sold some cottages to her brother-in-law for less than full market value on the basis of the oral promise that she would be allowed to live in one of the cottages for the remainder of her life without having to pay rent. The issue thus was whether the purchaser held on trust for the vendor for her life with a reversionary interest in the cottage. Scott LJ held that the insistence on the letter of the conveyance by the defendant was a fraud and a constructive trust arose which need not be in writing.

The latter approach seems more intellectually pleasing and is the contemporary practice.

SECRET AND HALF-SECRET TRUSTS

Formalities of Testamentary Trusts:
Succession Law Reform Act, R.S.O. 1990, c. S.26

3. A will is valid only when it is in writing.

4.--(1) Subject to sections 5 and 6, a will is not valid unless,

(a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;

(b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and

(c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

(2) Where witnesses are required by this section, no form of attestation is necessary. R.S.O. 1980, c. 488, s. 4.

6. A testator may make a valid will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

7.--(1) In so far as the position of the signature is concerned, a will, whether holograph or not, is valid if the signature of the testator made either by him or her or the person signing for him or her is placed at, after, following, under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will.

A *secret trust* is one where:

T(estator) devises to the Primary Donee (PD), who has agreed to be bound by a trust obligation during the life of T. Thus, if T makes a gift of property to PD without stating in the will that he is to hold it on trust, and either before or after making his will tells PD directly or through an authorised agent that he wishes him to hold the property on trust for a Secondary Donee (SD), or to make a will in SD's favour, PD (or his personal representatives) will be compelled to carry out the trust *if PD either expressly promises that he will do so, or by silence implies it*. Why? There are different explanations but it is most often argued that the agreement between T and PD has induced T to leave the property to PD (thus an argument rooted in reliance but where that promise is enforceable in equity rather than through estoppel in law).

A *half-secret or semi-secret trust* is one where:
T devises to PD on trust, explicitly, but the terms of the trust are not disclosed in the will. This is very difficult to justify. One common explanation is that the trust then operates completely outside the will ('*dehors* the will') and the provisions of the estates legislation are inapplicable*; Re Snowden* [1979] 2 All ER 172.

Requirements for Secret Trusts

Four elements are required in respect of fully secret trusts per ***Ottaway v. Norman*** **[1971] 3 All ER 1325, 1332; cb, p.879:**

1) an intent by S to subject the primary donee (PD) to an obligation in favour of the secondary donee (SD);
2) communication of that intent to the PD;
3) acceptance of the obligation by the PD, either expressly or implicitly; and
4) the above conditions are satisfied before or after the execution of the will (i.e. during the life of T). If the trust fails, the PD will be entitled absolutely as devisee with no obligation to the SD based on the validity of the will.

What if the beneficiary pre-deceases the testator? Is the gift still binding on the trustee?

Re Gardner
[1920] 2 Ch 523 (CA), cb, p.875, note 5

Where the testatrix left the property to he husband "to carry out my wishes" and that the husband knew that those wishes were to the benefit of B1-B3 and B2 predeceases T, the estate of B2 receives the property as the trust operates outside the will. Thus the death of the B before the T does not invalidate the trust as it operates wholly outside the will. The text writers doubt the validity of this case in that the trust property did not pass to the PD and thus the trust was not fully constituted and that there was a continuing power of revocation by T during her life; see Hodge, "Secret Trusts: The Fraud Theory Revisited" [1980] Conv 341; Perrins, "Secret Trusts: The Key to the *Dehors*" [1985] Conv 248.

Standard of proof required?

Re Snowden
[1979] Ch 528; cb, p.882, fn.1

T left the residue of her estate to her brother and told the solicitor that drafted the will that the brother would distribute the residue between all nephews and nieces equally. The brother agreed. Six days later T died, 6 days after that, the brother died. Issue: whether the secret trust was imposed on the brother. Held: the standard of proof is the normal civil standard. The T clearly entered into the agreements with the consent of the brother but did she intend for the obligation to be more than a moral one? The test not satisfied; the obligation no more than a moral one. There was no sufficient intent.

Please also note the provisions of the Evidence Act, RSO 190, c.E-23:

> **Actions by or against heirs, etc.**
> 13. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

Thus, for example, **Re Dhaliwal Estate, 2011 ABQB 279**, per Burrows J.:

> [26] The only evidence of the existence of this "secret trust" is in the affidavits of the three Respondents. Each of the Respondents swore affidavits in 2004 and 2010 relating to this subject. There are inconsistencies between their original affidavits and the affidavits they swore six years later. There is no evidence from anyone else except the three Respondents who, of course, are the chief beneficiaries of the alleged "secret trust".
>
> [27] The *Alberta Evidence Act*, s. 11 provides…
>
> [28] The Respondents point to no evidence outside their own affidavits as corroborating their evidence concerning the secret trust. In my view the evidence of one sister who would benefit from the existence of the trust does not appreciably help me to believe the evidence of either of the other sisters. The required corroboration has not been provided.
>
> [29] The claim that a secret trust exists is dismissed.

Requirements for Half-Secret Trusts

The main distinction between fully and half-secret trusts, is that T must communicate, and the PD must accept the obligation, before or at the time of the execution of the will. Remember that for a fully-secret trust, the obligation can be communicated and accepted anytime prior to the testator's death regardless of the date upon which the will is executed.

A second difference between the two types of secret trusts is the consequence of failure – the failed half-secret trust gives rise to an automatic resulting trust in favour of the T's estate (as the PD is explicitly held out to have no beneficial interest and the beneficial interest is thereafter not adequately disposed of – it must attach to someone and thus it automatically reverts to the estate). For example, *Re Pugh's Will Trusts* [1967] 1 WLR 1262 (Ch), where the solicitor as executor was given no instructions.

Blackwell v. Blackwell
[1929] AC 318; cb, various appearances in the notes to pp.883-886

T gave a legacy of £12,000 to 5 persons on trust "for the purposes indicated by me to them." T had told one of the 5 in detail of his intentions, and the others in less detail. The trustee to whom the detailed instructions (respecting his mistress and his illegitimate son) were given made a memo of them on the same day (but after the execution of the will). The issue was whether the memo and parol evidence was admissible to prove the half-secret trust.

Held: the memo and the parol evidence were admissible to prove the half-secret trust. Viscount Sumner said that where fraud is alleged and proven, equity can act on its normal principles. Thus, **the ability to prove a half-secret trust *against a fraudulent trustee* does not conflict with the Wills Act; that is, the trust has nothing to do with the will, but the exercise of the equitable jurisdiction of the court to prevent fraud on the part of the secret trustee. Where the trust is a fully secret trust in the sense that the will does provide for the trust expressly, equity sees no difference between giving effect to the testator's intention when fully secreted and when partially secreted** - "why should equity forbid an honest trustee to give effect to his promise, made to the deceased testator, and pay another legatee"… The terms of the half-secret trust need not be written expressly into the will as it operates outside the will - but only where the testator communicates the intention to the trustee and the trustee accepts the obligation, else the testator could use this to get around the Wills Act and present the possibility of fraud.

Re Keen, Evershed & Griffiths
[1937] Ch 236 (cited in *Re Mihalopulos*)

The full details of the trust must be communicated to the trustee. Here the testator left £10,000 to executors in a half-secret trust. T gave the executors a sealed envelope at some time before the date of the will with the name of the beneficiary and the instructions not to open the envelope until after his death. The executors were not told of the contents of the envelope. Held: The half-secret trust failed on 2 grounds - first, the testator did not comply with the terms of the will as he had drafted it (communication to executors during his lifetime; it would have been different if he had told the executors of the nature of the contents of the envelope); and second, **the general power to give and rescind**

instructions to the executors was against the policy Wills Act in preventing future unattested-to disposition after the making of the will. Thus *Blackwell* was not directly on par as there the trust had been clearly communicated and there was no wording in the will that was not complied with. It was held further that parol evidence is not admissible to show that the testator intended something inconsistent with the express terms of the will.

Re Mihalopulos
(1956), 5 D.L.R. (2d) 628 (Alta SC – TD); cb, p.885

This was an interesting case involving the analogy to, and the complementary use of, 'the doctrine of incorporation of documents by reference' in the law of succession. Thus, where the will makes reference to a specific document in existence, and that document before the court is proved to be that document, it is implicitly part of the will and its terms can be enforced in the normal way. Here, T left instructions to donate to charities with the specific instructions to be found in a documents "among my papers". The court held that the document adduced was unsigned and thus outside the wills legislation as a will of itself, and, there was doubt as to whether it was indeed the document referred to in the Will. It could not be incorporated by reference. At the same time, it could not be a half-secret trust. As in *Re Keen*, T was attempting to make unattested-to future dispositions of his assets after the execution of his will and the gift ought not be enforced and parol evidence was not admissible to contradict the will.

Per Egbert J:

> There is another ground on which it was suggested that effect could be given to the document, namely, that it created a valid and effective trust. The Courts have on occasion invoked the doctrine of trusts in order to prevent the provisions of the *Wills Act* from protecting a fraud, *e.g.*, where a testator leaves property absolutely to a legatee on a secret trust communicated to and accepted by the legatee. No such situation arises here; there is no suggestion that anyone is attempting to perpetrate a fraud; nor is there any evidence that the terms of the document in question were ever communicated to or accepted by anyone. Certainly they were not communicated to the Canadian executors nor to the witnesses to the will, and there is no evidence that they were communicated to the Greek trustees. In *Johnson v. Ball* (1851), 5 De G. & Sm. 85, 64 E.R. 1029, it was attempted to create certain trusts by a letter signed subsequent to the execution of the will. The Vice-Chancellor pointed out that it was impossible to give effect to the letter as a declaration of trust since that would admit the document as part of the will. He pointed out the difference between these circumstances and the case where the will refers to a trust created by the testator by communication with the legatee antecedent to or contemporaneously with the will. **In *Blackwell v. Blackwell*, [1929] A.C. at p. 339, Viscount Sumner reviewed the authorities and stated: "A testator 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, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime .... To hold otherwise would indeed be to enable the testator to 'give the go-by' to the requirements of the Wills Act, because he did not choose to comply with them. It is communication of the purpose to the legatee,**

coupled with acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the law of trusts."

In my view it is clear from the evidence that the document in question was written by the testator after the execution of the will. It is argued, however, that despite this the trust attempted to be set up by the document may, in fact, have been set up in some other way by the testator prior to the execution of the will, and have at that time been communicated to and accepted by the trustees, and that accordingly an opportunity should be given to the Greek trustees to establish this if it is the fact.

Not only do I doubt very much if the Greek trustees could furnish such evidence, but in the light of the decision in *Re Keen*, [1937] Ch. 236, I am of the opinion that the evidence would not, in any event, be helpful. In that case a testator by his will gave to his trustees the sum of [pounds]10,000 "to be held upon trust and disposed of by them among such person, persons, or charities as may be notified by me to them or either of them during my lifetime". The testator had on the execution of an earlier will containing a similar clause told one of his trustees that he desired to provide for a person whose name was to be kept secret, and that he had written the name and address of the proposed beneficiary on a sheet of paper enclosed in a sealed envelope which he handed to the trustee to be kept with his will and not opened until after his death. No further communication was ever made regarding the envelope by the testator. After his death it was opened and found to contain a paper bearing the words "[pounds] 10,000 to G". The Court of Appeal held that on the true construction of the will it reserved power to the testator to dispose of his property by a future unattested disposition contrary to the provisions of the *Wills Act* and that the trust sought to be established by parol evidence was one inconsistent with the terms of the will, the notification of it to the trustee being anterior to the will. The trust therefore failed and the legacy fell into residue. Lord Wright M.R. in the course of his judgment, and after having referred to the conditions on which parol evidence is admissible to supplement the terms of a will, pointed out that in this case the trust sought to be established by parol evidence would be inconsistent with the express terms of the will. "In the present case, while clause 5 refers solely to a future definition or to future definitions of the trust subsequent to the date of the will, the sealed letter relied on as notifying the trust was communicated ... before the date of the will .... the notification sought to be put in evidence was anterior to the will and hence not within the language of clause 5, and inadmissible simply on that ground as being inconsistent with what the will prescribed", [p. 248]

In this case, as in the *Keen* case, the will, in my opinion clearly contemplates a future notification of the trust. Reading the will as a whole, and reading it in the light of the evidence as to the non-existence of the designation of trust at the time of execution of the will, there seems no doubt that the will contemplated a future designation and so as in the *Keen* case, was an attempt to reserve to the testator a power to make future disposition of his property by unattested and unsigned instruments, contrary to the provisions of the *Wills Act*. Moreover since the will contemplates some future designation of the trust, and the parol evidence suggested would be of an anterior designation, as in the *Keen* case, such

> **evidence must be excluded as being inconsistent with what the will provides.**

Holvenstot v. Holvenstot Estate
2012 BCSC 923

Poor Bruce. His mother died and left him one cent. She had lots of grievances including that Bruce has stolen from her and used her house to grow marijuana. In one part of the case, Bruce argued for a resulting trust over assets that were put in joint tenancy with one of his sisters; the sister argued a secret trust.

Justice D.A. Halfyard:

> [85] The defendant alleges that her half interest in the Courtenay property was not the subject of the alleged secret trust. The oral agreement that the defendant deposes she had with her mother, if accepted, contradicts the idea that the defendant's joint interest in the Courtenay property was the subject of a secret trust. This makes the subject matter of the trust uncertain. The certainty of the subject of the trust is an essential element of a secret trust. See *Champois v. Prost*, 2000 BCCA 427 (CanLII), 2000 BCCA 427 at paragraphs 15 - 16.
>
> [86] Another serious weakness in the case advanced for a secret trust is that no one knows with any reasonable degree of certainty what bank accounts and what stocks and bonds (or their values) their mother possessed at the time the alleged secret trust was created (which seems to be around the fall of 1996).
>
> [87] I conclude that the defendant has failed to rebut the presumption that all of the assets in question that she received gratuitously from her mother were held on a resulting trust for the mother or the mother's estate.

Poor Bruce remained poor at the end of the day. He was properly disinherited (save for his one cent legacy).

RULES IN RELATION TO INTER VIVOS TRUSTS

1. A sale or conveyance of land must be in writing.

2. An express trust in relation to an interest in land must be in writing; non-compliance will not necessarily invalidate, consistent with the maxim *Equity Will Not Allow A Statute To Be Used As An Instrument Of Fraud.* The court might order a constructive trust; *Bannister v Bannister*.

3. An oral declaration is sufficient to create a trust of pure personalty by a person legally and beneficially entitled.

4. Disposition of an equitable interest could occur in 4 ways and must be in writing: (i) direct assignment (in writing or else void); (ii) direction to the trustee (whose consent is required) by the beneficiary to hold for the benefit of the third party; (iii) a contract for valuable consideration between the beneficial owner and the third party; (iv) sub-trust (the beneficiary holds his or her interest in trust for the third party as a trustee).

RULES IN RELATION TO TESTAMENTARY TRUSTS

1. The equitable maxim *Equity Will Not Allow A Statute To Be Used As An Instrument Of Fraud* applies in relation to testamentary as well as inter vivos trusts; thus, equity can relieve against the provisions of the Succession Law Reform Act.

2. Parol evidence is not normally allowed to vary the will, on the general reasoning that not to do so will encourage testators not to comply with the statute. The rule has no application in the case of fully secret trusts; *Blackwell v Blackwell*. In such a case the evidential standard is the normal proof on a balance of probabilities, except where fraud is alleged and then the standard is higher; *Re Snowden*. In the case of a half-secret trust, the trustee cannot bring parol evidence to show that he is beneficially entitled.

3. *For a fully secret trust*, there are 4 requirements: (i) an intent by S to subject the primary donee (PD) to an obligation in favour of the secondary donee (SD); (ii) communication of that intent to the PD; (iii) acceptance of the obligation by the PD, either expressly or implicitly; and (iv) the above conditions are satisfied during S's lifetime. If the trust fails, the PD will be entitled absolutely as devisee. See *Ottaway v. Norman* [1971] 3 All ER 1325, 1332.

   For a half-secret trust, the terms of the will avert to the fact that T takes as a trustee. The main distinction between fully and half-secret trusts, is that (i) the communication must conform strictly to the terms of the will, and (ii) communication must be prior to, or at the same time as, the execution of the will. The communication to T cannot take place after execution as that would encourage testators not to comply with the estates legislation: *Re Keen.* Many argue that there is no good reason to disallow the trust where the communication takes places after execution of the will, but during T's lifetime - that is, the point of the obligation is one that equity recognises and enforces on the T's conscience; see *Blackwell v Blackwell.*