Trusts & Equity – Law 463
Fall Term 2022

LECTURE NOTES NO. 2

I. THE TRUST AS AN INSTITIUTION OF EQUITY

4. TRUSTS COMPARED TO OTHER DOCTRINES

A. TRUST AND AGENCY

Both an agent and a trustee are fiduciaries, but the nature of each doctrine is shaped by rules fashioned in the one case at common law and in the other in equity. Generally, an agency does not admit of trust obligations unless specifically set out in the agreement. As in the *Trident Holdings* case, one can be both a trustee and an agent.

Trident Holdings Ltd. v. Danand Investments Ltd.
(1988), 64 OR (2d) 65 (Ont. C.A.)

The defendant here was a professional trustee (it was paid for acting as trustee out of the trust funds as set out in the trust instrument). The trust property included a real estate development. A dispute arose with an electrical contractor who signed a written contract with the trustee which was then subject of further negotiations for a price reduction. Ultimately the project was abandoned and the contractor sued on the contract. One question was whether the trustee acted as an agent for the beneficiaries of the trust in their personal capacities. The terms of the Trusts Settlement included the following preamble:

> WHEREAS Danand is the registered owner of certain lands in the City of Toronto, in the Municipality of Metropolitan Toronto, in the Province of Ontario, which lands are more particularly described in Schedule "A" annexed hereto.
>
> AND WHEREAS Danand owns the aforesaid lands **as bare nominee and trustee** for and on behalf of Zascorp, the H.T.L. Group [which comprised Hawkdown Investments Ltd., Thorndon Investments Limited and Lanark Sheet Metal Works Limited], Burnbridge and Pennymoor, in the proportions hereinafter set out.
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> AND WHEREAS Zascorp, the H.T.L. Group, Burnbridge, and Pennymoor are entering into this agreement for the purpose of setting forth their relationship inter se.
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> AND WHEREAS Danand is executing this agreement for the purpose of consenting to and agreeing to be bound by the provisions set out herein;

Was the defendant *personally* liable to the contractor?

Per Morden JA:

35 Before relating the particular facts in this case which bear on the question, it will be helpful first to consider a basic analysis of the relevant legal terrain. I set forth the following passages from *Scott, The Law of Trusts* (4th ed., 1987):

An agent acts for, and on behalf of, his principal and subject to his control; a trustee as such is not subject to the control of his beneficiary, although he is under a duty to deal with the trust property for the latter's benefit in accordance with the terms of the trust, and can be compelled by the beneficiary to perform this duty. The agent owes a duty of obedience to his principal; a trustee is under a duty to conform to the terms of the trust. (Vol. 1, p. 88)

. . . . .

A person may be both agent of and trustee for another. If he undertakes to act on behalf of the other and subject to his control he is an agent; but if he is vested with the title to property that he holds for his principal, he is also a trustee. In such a case, however, it is the agency relation that predominates, and the principles of agency, rather than the principles of trust, are applicable.

. . . . .

The beneficiaries of a trust are not subject to personal liability to third persons on obligations incurred by the trustee in the administration of the trust.

The situation in the case of a trust is very different from that which arises in the case of an agency. An agent, acting within the scope of his employment, can subject his principal to personal liability in contract and in tort. A trustee is in an entirely different position. He is not empowered to act on behalf of the beneficiaries personally, and does not act subject to their control. His position is one of greater independence. His duty is to administer the trust property in accordance with the terms of the trust. He may have power to subject the trust property to the claims of third persons, but he is not an agent of the beneficiaries and has no power to subject them to such claims

. . . . .

It is true, however, that a trustee may be an agent as well as a trustee. Where he is a trustee because he holds the legal title to the trust property, but where in addition he has undertaken to act for the beneficiaries and under their control, he is also their agent, and as such can subject them to personal liabilities by acts done by him within the scope of the employment. Where the trustees are also agents of the beneficiaries, the beneficiaries are personally liable upon contracts made by the trustees in the administration of the trust, unless it is otherwise provided in the contracts. So also the beneficiaries are liable to third persons for torts committed by the trustees in the administration of the trust if they are also agents of the beneficiaries.

. . . . .

37 The underlying reason why a trustee, who is acting as a trustee in the

> circumstances, cannot subject the beneficiaries to liability is… [that] the trustee is not acting under a duty of obedience to the beneficiaries but, rather, under a duty to carry out the terms of the trust. Professor Waters, *The Law of Trusts in Canada* (2nd ed., 1984), p. 1107, has succinctly put the matter this way:
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> It is because common law trustees (he is comparing the trust with certain civil law institutions) contract in furtherance of their 'ownership' rights to manage and dispose, that the third party can only look to the trustees for damage for breach of such a contract.

In this case, it was apparent that the trustee was the barest of 'bare trustees' (meaning that it had no duties other than to hold the property). Given that, the trust really operated to facilitate a joint ventureship and as such 'the beneficiaries contemplated being liable on contracts relating to the construction of buildings on the property'; the trustee was their agent and nothing more.

That is, the beneficiaries worked through the trustee in respect of the development and it is they, not the trustee, that should pay the third party regardless of whether they signed the contract directly.

How to determine the question in future? Determine *the intention of the parties* which will then allow for the content of the obligations owed to another.

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One consequence of an agent acted badly and breaching fiduciary obligations owed to the principal deliberately may be punitive damages regardless of whether the principal has suffered a loss. The policy is deterring bad behaviour. This recent case is a rather stark example.

Oskar v. Chee
2012 ONSC 1545 (Ont. S.C.J.)

Here the defendant was an agent for the plaintiff land developer and took an opportunity himself through a corporation that he controlled; the plaintiff sued for punitive damages for breach of fiduciary duty. After holding that an ad hoc fiduciary relationship existed based on the criteria set out in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, para. 30, McCarthy J held that $25,000 in punitive damages was to be paid by the defendant:

> [67] I conclude that Peter Chee breached his fiduciary duty to the plaintiffs by failing to disclose his interest in the Bachly property to his principals, by failing to act in the interest of his principal, by deceiving and misleading his principal and by purchasing the property through MKU.
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> [76] I find that Chee embarked on a conscious, deliberate course of conduct beginning in April 2007 to deceive his principal and to lull it into the belief that
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Chee was continuing to act on its behalf and in its best interest. This included dissuading Oskar United from making use of another real estate agent.

[77] From at least April 2007, Chee must have known (having his own designs on the Bachly property) that he was in a hopeless conflict of interest. Having won the trust of his principal and having enjoyed the financial benefits of providing advice to Oskar United as a planning consultant, Chee was in a classic fiduciary position. It was clear that Oskar United was moving forward on the Oskar/Bachly initiative on the strength of his advice and recommendations. In the face of that state of affairs, Chee blatantly lied to Stanley about the status of talks with Bachly. He forwarded to his principal a proposal summary ostensibly intended for Bachly. It is clear that this document was never given to Bachly. I find that Chee had no intention of doing so. He withheld pertinent information from Oskar United (i.e. that Bachly would not sell to a developer). Until the very end, he created the appearance that he was moving the transaction forward on behalf of his principal. The climax of events, culminating on May 31 and June 1, took on an almost comedic quality with Chee providing Oskar United with a purchase and sale document naming the newly formed MKU as purchaser.

[78] I find that Chee, in preparing an offer to purchase and forwarding it on to Oskar United, intended to lull his principal into the belief that the completion of the deal was imminent. It is impossible to say what would have prompted Chee to send a document to his principal containing proof of his double dealing. What is certain is that he had in his possession a corrected and executed purchase document on June 1, 2007, from his client. He elected to ignore the interest of his principal and the instructions of his client. He failed to convey the Oskar United offer to Bachly. Instead, he went ahead some 19 days later to acquire the property for himself.

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[80] ... Chee's conduct went far beyond a mere breach of fiduciary duty to act in the best interest of his client. **His conduct was deceitful, capricious, arbitrary, vexatious, intentional, wilful, egregious, high-handed, reprehensible, scandalous, outrageous, shameful and shameless. It cries out for the sanction of this court.**

B. TRUST AND CONTRACT

The two concepts are closely related in the sense that a trust and contract each grow out of an agreement; however, in a trust situation, the settlor loses rights to the property and cannot himself enforce the trust (that power accrues to the beneficiary).

Re Schebsman
[1944] Ch. 83

The deceased made an agreement with his former employer for a compensation package after his contract of employment terminated. Under its terms, payments were to be made to him, and if he died, to his wife and daughter. He became bankrupt and then later died. The trustee in bankruptcy asked for a declaration that all sums payable under the agreement to the widow and the daughter formed part of the estate of the debtor, on the grounds that, although the sums were, by the agreement, to be paid to the widow or the daughter, the deceased always had the ability to have them paid to him instead (rejected as a question of fact). What of the fact that neither the widow or daughter were parties to the contract and thus only the trustee of Schebsman's estate could enforce the contract?

It was held that there was no trust as their was no intention to create a trust. Rather there was a contract (between Schebsman and his employer) for the benefit of a third party (the widow and daughter). Neither the deceased nor the trustee had any right to substitute anyone for the wife and daughter. The deceased could have struck a new contract with the employer depriving the wife, but the termination of the contract at issue was not possible by the deceased or the trustee without a breach of contract.

Per Lord Greene MR:

> **It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third.**
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> …
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> When he made the contract the debtor did not constitute the English company his mandatory to transfer property of his own to his wife and daughter. **Not only was the money in question never his property, but, once having made the contract, he had, as I have already pointed out, no right to call on the company to make the payment to his estate. In making the contract he set in motion a piece of machinery which he had no power to stop by his own unilateral action save by releasing the company from the contract. Its operation would inevitably result in money reaching the hands of his widow and daughter, assuming, as we must assume, that the English company would perform its contract.** This, therefore, was no revocable mandate, nor was there any lack of completeness in the constitution of the machinery devised for securing these benefits for the widow and daughter. When he made the contract, the debtor intended that his widow should receive those benefits for herself. It was part of the bargain between himself and the two companies that she should receive them, and he reserved to himself no right to call for payment to himself. The trustee could, presumably, release the

> company from its undertaking, but this would do no more than deprive the trustee of the right to sue for damages for its breach. The fact that such a release can be effected is no argument for saying that the trustee can claim the moneys as his own.
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> The question, therefore, is not: "Will equity help the widow and daughter to retain the sums which will inevitably be paid to them?" but "Will equity help the trustee in bankruptcy to recover them from the payees?" I can find no principle which calls for an affirmative answer to this question. If it were otherwise, the result would be a curious one. The debtor makes a contract intended to secure benefits for his wife and daughter after his death. It is true that they obtain no right to call for those benefits, but the debtor with good reason trusts the company to make them. The company cannot avoid making them unless it is prepared to break its contract.

Thus, even if it could be said that Schebsman or his trustee might be required to secure the company's performance on the contract, it could not be said that Schebsman or his trustee could cause the company to pay someone else. [Since remedied in the UK through the Contracts (Rights of Third Parties) Act 1999 c.31]

C. TRUST AND DEBT

When one party lends money to another a simple debt usually arises; it is enforceable in contract against the debtor with the remedy being an award of damages. The successful creditor is thus on par with all other general creditors, and the order for damages is itself a *chose in action* which can be sold.

Sometimes, there is no debt, but a trust over the property that had been transferred from one party to the other. Often it is a combination of a contract and conduct that determines what the parties intended.

In these cases, who is the beneficial owner of the money paid to the defendant? Was the defendant an agent or fiduciary, or, a mere debtor?

Segregation of Funds:

Ontario Hydro-Electric Power Comm'n v Brown
[1960] OR 91 (Ont. C.A.)

Here the issue was simple: whether a 'collection agent' was an agent of the principal or merely a debtor in respect of money that had been collected (and subsequently stolen). Held: debtor. The agent suffers the loss not the principal.

The agent was appointed through a letter which read in part:

> Kindly be advised that you have been approved as a Collection Agent for Townsite No. 2. The customary remuneration allowable by the Commission to Collecting Agents is a charge of seven cents (7 cents) for bills up to $15., and ten cents (10 cents) for all bills over $15.

> Remittances are to be forwarded payable to the Hydro-Electric Power Commission of Ontario to Mr. B.I. Graham, Lancaster, Ontario, immediately following the last discount date which, in all instances, will be shown on the stub portion of the bill. Accounts collected subsequent to the last discount date will, of course, be for the gross amount and a further remittances covering these is to be forwarded so as to reach its destination in time for banking within the current month. ...
>
> In respect to the deduction for collection fees, etc. it will be necessary to attach to the detailed statement a receipt for the amount involved, as this will be required by our representative for reimbursement purposes.

As per his custom, the agent kept the money he collected in a box and placed the box in his store's safe at night. The store was burgled, the safe broken into, and the money stolen.

Morden J.A.:

> 2. It is trite law that an agency relationship is a fiduciary one which imposed upon an agent many well defined duties in his dealings with and on behalf of his principal. But this description does not mean that in every situation where an agent collects money, he is a bailee or trustee of the bills and specie or a trustee of the money in his possession or deposited in his bank. In *Henry v. Hammond*, [1913] 2 K.B. 515, Channell, J., said, at p. 521
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> **It is clear that if the terms upon which the person receives money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his *cestui que trust*. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases and when called upon to hand over an equivalent sum of money, then in my opinion, he is not a trustee of the money.** All the authorities seem to me to be consistent with that statement of the law.
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> ...
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> 4. **In the case at bar there is no evidence that it was a term of the defendant's employment that he should keep the moneys he collected separate from his own.** The letter appointing him agent does not touch the point.
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> 5 **An agent has been held to be a trustee of moneys he has received from or for his principal where he is specifically instructed to keep such moneys separate... The result is the same where the agent is to hold the money and invest it or manage for his principal... On the other hand and in contrast, where the sole duty of the agent with respect to the money is to pay it to his principal, the relationship between the parties is that of debtor and creditor**...

6 In the instant case the defendant was in my opinion the debtor of the plaintiff to the amount of the moneys collected less his commission. He was under no duty to keep this money separate from his own and the fact that he did so cannot alter what I find to be the basic relation between the parties.

No Segregation of Funds, But Intent Clear:

Air Canada v. M & L Travel Ltd.
[1993] 3 S.C.R. 787

Here a travel agency was obliged to hold the proceeds from its sale of Air Canada tickets in trust for the airline, but the agency breached its trust obligation and used the proceeds to reduce its indebtedness to its bank. There was little question that a trust existed rather than a simple debt given that the travel agency treated the money not as its own (until the breach) but as the beneficial property of the airline. The fact that the travel agency allowed the money held on trust to be deposited into the same bank account with other monies not subject of the trust was relevant circumstantial evidence to be considered, but was not determinative. The totality of the circumstances were consistent with a trust.

Iacobucci J.:

20 In this Court, the appellant initially argued that the relationship between M & L and the respondent airline was one of debtor and creditor, rather than one of trust. However, at the hearing, the appellant properly conceded that the relationship was one of trust. Given this concession, I will consider this question only briefly.

21 **The appellant relied on the fact that the agreement between the airline and M & L did not require it to keep the proceeds of Air Canada tickets in a separate account or trust fund, or to remit the funds forthwith. Rather, M & L was permitted to keep such funds for a period of up to 15 days, and then for a further 7-day grace period. Furthermore, M & L was liable for the total sale price of all tickets sold, less its commission, regardless of whether it had actually collected the full amount from its customers. That is, M & L was free to sell Air Canada tickets on credit to its customers.** Prior to his concession on this point, the appellant submitted that, in these circumstances, M & L was not a trustee of the sale proceeds of the Air Canada tickets.

22 In concluding that the relationship between M & L and the airline was one of trust, the Court of Appeal relied on *Canadian Pacific Air Lines, Ltd. v. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233. Although the Court of Appeal's decision in that case (1990), 71 O.R. (2d) 63 (note), was brief, the reasons of the trial judge, at p. 237, went into greater depth:

> **In order to constitute a trust, an arrangement must have three characteristics, known as the three certainties: certainty of intent, of subject-matter and of object. The agreement ... is**

> **certain in its intent to create a trust. The subject-matter is to be the funds collected for ticket sales. The object, or beneficiary, of the trust is also clear; it is to be the airline. The necessary elements for the creation of a trust relationship are all present.** I find that such a relationship did exist between CP and the two travel agencies.
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> 23. **This analysis is clearly applicable to the facts of the present case. That the intent of the agreement is to create a trust is evident from the following wording: "All monies, less applicable commissions to which the Agent is entitled hereunder, collected by the Agent for air passenger transportation (and for which the Agent has issued tickets or exchange orders) shall be the property of the Airline, and shall be held in trust by the Agent until satisfactorily accounted for to the airline." The object of the trust is the respondent airline, and its subject-matter is the funds collected for ticket sales.**

In both these cases, the Court is left to find what the parties intended through construction of the agreement, industry norms, commercial practice and custom, and whether the property was segregated. The parties' intentions are key.

D. TRUST AND BAILMENT

Bailment is difficult because it bridges property, tort and contract. It exists where one person (the bailee) is voluntarily possessed of goods which belong to another (the bailor). The bailee has a 'special form of property' in the thing bailed and may be able to use and exploit the property; the bailor retains the ultimate property right good against the world. The bailee must take reasonable care of the goods and must keep to the terms of the bailment; where the bailee departs from the terms of the bailment, he may find himself the bailor's insurer and be liable for every loss no matter that he or she acted reasonably at the time.

Thus, bailment imposes certain obligations on the bailee but does not confer the entirety of the property right sufficient to alienate it and thus can be distinguished from a trust.

The word "trust" does not create a trust where a bailment was intended:

Elgin Loan and Savings Co. v National Trust Co.
(1904), 7 OLR 1 (HCJ)

Elgin Loan (π):	**Atlas Loan (debtor to π):**	**National Trust (Δ):**
Loans money to Atlas. Contract with National Trust to hold shares and dividends.	Becomes insolvent.	Contract with π to hold shares and dividends. Appointed liquidator of Atlas' assets upon its insolvency.

1. Atlas becomes insolvent; National Trust appointed liquidator.
2. Elgin demands shares.
3. National Trust refuses to deliver shares.

   Issue: *Is National Trust a trustee (for creditors) or a bailee (for Elgin)?*
   Held: Bailment. National Trust liable.

Here two loan companies entered into a contract in respect of certain shares.

The shares had been pledged as security in a loan agreement between the plaintiff and a third party (Atlas Loan). The plaintiff then contracted with the defendant trust company to hold the shares and dividends received. The defendant trust company would be paid for those services.

The plaintiff's debtor (Atlas) became insolvent. The defendant was appointed to be the liquidator of the debtor. The plaintiff demanded the shares and dividends; the defendant failed to deliver up. The plaintiff sued for damages.

Thus, the simple issue was whether this was a bailment or a trust. The trust company argued that it may not have delivered up when the demand was made but they had acted reasonably and honestly and ought to be excused from suffering liability. The argument was rejected. It was held that the fact that the word 'trust' was used in the documents setting up the transaction was relevant but not determinative. Here the circumstances were more consistent with a bailment: title was transferred to the 'trust company' pursuant to the contract (of bailment).

Boyd J:

> Though the word "trust" is used in some of the letters, the word "agent" used in others is more pertinent. As said by Lord O'Hagan in Kinloch v. Secretary of State for India (1882), 7 App. Cas. 619, 630, there is no magic in the word "trust," and, except in the name of the defendants, the word is not used in the "Receipt and Guarantee" which manifests the transaction. **Regard must be had to the nature of the transaction**

and the terms of the instrument relating thereto in order to determine whether the grantor, donor, settlor, or bailor intends to create a trust for the benefit of another cestui que trust) or merely to arrange for the disposal of property to suit his own convenience by giving some revocable direction to the transferee of the property. In the one case the instrument is one of trust properly speaking, one in which we find the three parties, the owner--the maker of the instrument--transferring property to a trustee for the advantage of the beneficiaries; in the other case the owner gives directions to an agent for his own convenience, with express or implied power at any time to countermand the instructions and recall the property…

…

I have a strong impression that this bailment for the sole advantage of the bailor is not such a trust as is contemplated by the statute of 1899 [which would provide the defence to the trustee]. And this view is strengthened when the property deposited has been recalled by the bailor and the depositary withholds in wrongful detention that which he should at once transmit to the owner from whom he received it. The relation of trust, if it existed, had been revoked, and the depositary, acting in plain violation of the terms of the contract, cannot invoke the aid of the Act relating to trustees… It would seem undesirable to extend the law of trusteeship to these dealings of commercial and financial import, where the law has settled into definite lines of responsibility and relief.