Trusts & Equity – Law 463
Fall Term 2022

Lecture Notes No. 3

E. TRUST AND PERSONAL REPRESENTATION

The personal representative of the testator / testatrix (in Ontario we call that person the 'Estate Trustee with a Will' or the 'Estate Trustee Without a Will') as the fiduciary of the deceased's assets after his or her death may hold assets in trust for the estate and for those interested in the estate. Legatees under a will, unlike beneficiaries under a conventional trust, have little or no rights until distribution takes place (but equity will still act on their behalf against the personal representative of the deceased).

Continuing Duties of Executor / Estate Trustee:

Attenborough v Solomon
[1913] AC 76 (HL)

The testator died. Under the Will, he appointed two people as 'his executors and trustees' and directed them to sell the residue of the estate and distribute the proceeds. They did so, and 'passed their accounts' – that is, accounted to the court for their dealings with the property (an audit) and, in the normal course, would have been paid for their serves and been allowed to retire (i.e. their duties were recognized as having been completed). However, assets remained in the estate. Years later, one of the executors pledged the assets that truly formed part of the residuary estate (that part of the estate not given to any one person in particular) to a pawnbroker. The executor died. An action for possession was brought against the pawnbroker. The action was successful as the executors became trustees when they assented to hold as such under the terms of the Will, and, thus, the pledge was in breach of trust.

Viscount Haldane LC:

> **When A.A. Solomon handed over these articles of silver to Messrs. Attenborough he had no property to pass as executor; and they got no contractual rights which could prevail against the trustees.** The latter were the true owners end they are now in a position to maintain an action, which under the old forms would have been an action of trover or detinue, to recover possession of the chattels free from the restrictions on the right to reclaim possession which it was sought to impose by the contract between A.A. Solomon and the appellants. **The property, if I am right in the inference which I draw from the circumstances of the case, was vested not in A.A. Solomon, but in A.A. Solomon and his co-trustee jointly in 1892, when the attempted pledge was made; and I see no answer to the case made for the respondents that the present trustees, in whom that property is now vested, are entitled to recover it.**

TRUST AND CHARGES / PERSONAL OBLIGATIONS

The key to these cases is to concentrate on the nature of the transfer and the rights and duties intended by the transferor and accepted by the transferee. Note that these cases are old and reflect the drafting conventions of the time; modern drafting aims to avoid these sorts of ambiguities.

Re Oliver
(1890), 62 L.T. 533 (Ch)

A testator by his Will gave some lands to a nephew – the lands featured twice in the Will.

In one clause, it seemed that the nephew was a trustee in respect of a £1000 legacy to another if he accepted the gift, and, in another clause, it seemed that the £1000 legacy was a charge against the land subject of the gift.

It was held the use of the word 'charge' removed it from a personal trust obligation as that was what the testator had intended.

Re Lester
[1942] Ch. 324

A gift with a 'personal obligation' does not create a proprietary interest but creates a *chose in action* against the donee by the third party entitled under the agreement / Will / etc.

The deceased made the following provision in his will:

> I bequeath the remainder of my shares [in two companies] to my said son Albert William Lester subject .... (c) To the payment by him to my said son Alfred John Lester during his lifetime of the sum of 8l. per week; (d) to the payment by him after the death of the said Alfred John Lester of the sum of 6l. per week to the widow of the said Alfred John Lester during her lifetime or until her remarriage; (e) to the payment by him (after the death of the survivor of the said Alfred John Lester and his wife or after her remarriage as the case may be) to their daughter Dorothy Louise Lester during her lifetime or until her marriage of the sum of 2l. per week.

Thus, one son was gifted shares and the other sums of money to himself, his widow, and daughter. What rights would Alfred, his widow and daughter have against Albert?

The issue was in respect of the nature of the rights of third parties in equity – the rule is really one of construction. A gift to a person subject to a condition will sometimes be regarded as a trust of that property for those purposes, but is usually regarded as a personal obligation of the donee only. Thus, **normally there is only scope to sue the donee personally by the third party but if the document is sufficiently clear, then there may be a proprietary remedy as well**.

II. 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."
>
> 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 provided with a power come under a duty to consider its exercise**.** 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.