

Trusts – Law 463  
Fall Term 2024

LECTURE NOTES NO. 4

**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 (Ch.); cb, p.152**

**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 (Ch.); cb, p.159**

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 (H.C.); cb, p.160**

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 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.