# THE VARIETY OF EXPRESS TRUSTS

by

J. D. DAVIES*

## 1. *Introduction*

I would like to demonstrate how widely the modern trust can be used. I am not thinking now of ambiguously worded documents or curious declarations of trusts, or of the intentions required for resulting trusts; and least of all of constructive trusts. I want to ask what a proficient equity draftsman can achieve if he puts his mind to it; or rather, for I do not believe there are many, what types of disposition there are that he can not achieve. Such an inquiry involves looking at the basic requirements of trusts. What certainty requirements exist? What rules of public policy exist that limit what can be achieved? And are such rules justified? The inquiry must also extend from private trusts derived from the family context into trusts in a commercial context, for in that area the express separation of legal and equitable interests has come to be of great interest in the modern law. I do not, however, intend to include charitable trusts, or to consider whether the rule against delegation forbids the creation of certain types of trust in wills.

A considerable variety of expressly created trusts will, I believe, emerge, and then other questions follow. Do they all have the same conceptual nature? Are trustees' duties of administration the same in all of them? And what is the balance of power between the beneficiaries, the trustees, and the court? Specially interesting developments have occurred in the last area. The powers and duties which the modern draftsman assembles for a particular type of trust have changed; the court has shown a greater willingness to supervise; and in some jurisdictions legislation has conferred on the court significant powers in respect of variation and termination of trusts.

Only a brief review can be given in this lecture, but it is hoped to show how far the trust has travelled in recent years and how, chameleon-like, it can be made to serve many ends.

## 2. *The picture of, say, thirty years ago*

First, the subject matter of a trust, which must be ascertainable property. Without knowing what the subject matter is, the trustee can not discharge his duties. The notion of 'property' can, however, be satisfied by a chose in action or an interest in remainder, even a contingent one; though not apparently by future 'property' such as an expectancy, however likely it is to arise.

---

* Fellow of St Catherine's College, Oxford.

Secondly, the objects of a trust. A trustee needs to know who his beneficiaries (both concurrent and successive) are and what interests they take. So a certainty test applies requiring it to be possible to list all the beneficiaries at any relevant time. Their interests may be fixed, or they may have a mere expectation of distribution — discretionary trusts.

Thirdly, the beneficial interests. They must individually be valid within the Rule against Perpetuities and between them cover the whole of the beneficial proprietary ownership in equity — gaps have to be filled by way of resulting trusts. Each interest is in principle assignable, but this will not always be practicable, for instance in the case of trusts for employees or club members while they remain such. And discretionary trusts are generally not easy to fit into the structure in principle or in practice.

Fourthly, the trust must be for persons. Only if it is charitable can there be a trust for purposes, though there are a few anomalous exceptions.

Fifthly, the beneficiaries can between them terminate, but not vary, a trust. This is not possible, however, if one or more of the beneficiaries is unborn, a minor, or of unsound mind. It may also be impracticable or undesirable to terminate discretionary trusts, which are sometimes linked to protective trusts designed to protect a beneficiary against the consequences of bankruptcy.

Sixthly, although a trust is mandatory overall on the trustees, only some of their particular duties are mandatory in the sense that they must be carried out, the duty to distribute income for instance. Many powers and duties are discretionary, and though they must always be considered and exercised in a fiduciary manner, breach is not easy to establish. Trustees can decide on them without consulting the beneficiaries, who can not insist on knowing the trustees' reasons for their exercise or non-exercise. The balance of power is decidedly in the favour of trustees.

These rules, derived from the family trust of earlier centuries, provided a method both of validating and of controlling trusts within acceptable limits. Given those limits, the duties and discretions of trustees were clear and comprehensible. The question is, how much of them remain ?

Beyond the trust, however, is the power of appointment. Here a donee of a power may or may not exercise a dispositive power given to him to confer a benefit on a range of possible objects. If he decides not to do so, no-one can complain. Indeed the donee can release the power by indicating that he will never exercise it — something a trustee with his fiduciary duty to consider his discretions from time to time can never do. Hence, the traditional picture does not exclude non-fiduciary discretions, though it keeps them within the confines of the power of appointment.

3. *How much remains of the certainty of object requirement?*

(a) This is a difficult topic, but it is where a start has to be made. If a settlor wishes his beneficiaries to share equally or in defined proportions, the trustee must be able to compile a complete list of them. Otherwise, he cannot do his division. No departure should be made from this rule, for it implements what the settlor has himself required. The onus of proof on those who wish to establish the validity of such trusts by proving that a complete list can be compiled is not however an unduly high one.[1]

(b) But this is not the only option open to a settlor. If he is willing to delegate to others the task of distribution among a range of beneficiaries, he is not required to satisfy the list test. A different test, derived from special powers of appointment, applies. Can you say of anyone in the world that he is within or without the range? This test has been developed in the context of trusts within companies. In *Re Baden's Deed Trusts*,[2] a settlor directed distribution of a fund at the absolute discretion of the trustees among the 'officers and employees or ex-officers' [of his erstwhile family company] and 'relatives and dependants of any such persons'. Such a direction would not satisfy the complete list test, but it was held valid under the in/out test. There has to be conceptual certainty in the definition of the group to benefit, but it was thought that 'relatives and dependants' were conceptually certain — though 'friends' for instance might not be — and that, given conceptual certainty, the administrative problems of the trustees would not be unduly difficult. There was a context, namely the company, and absolute discretion as to who is to benefit and by how much. The 'size of the problem' was manageable. The range of possible beneficiaries was not infinite, and evidentiary or other uncertainties at the fringes would not matter.

This is a task with which trustees can be entrusted. They must 'make such a survey of the range of objects or possible beneficiaries as will enable them to carry out their fiduciary duty'.[3] The scope of the survey is relative to the range of the possible beneficiaries, a sliding scale in fact; the smaller the group, the more rigorous the survey, the more diffuse the group, the less rigorous the survey. Validity thus depends on what is feasible; what trustees can do, they need not be prevented from doing. Theoretical difficulties of control ought not to stand in the way; though in my view practical ones should.

The use of this type of trust has increased in recent years for tax reasons. The beneficiaries lose their fixed interest guarantee for an

1 The modern statement of the rule is to be found in *IRC* v. *Broadway Cottages Trust* [1955] Ch. 20, itself a case on discretionary trusts hence no longer an authority on its own facts. Cross J. in *Re Saxone Shoe Co.'s Trust Deed* [1962] 1 W.L.R. 943, 954-5, explains the onus of proof point, again however in the context of discretionary trusts for employees.

2 [1971] A.C. 424; [1973] Ch. 9. In the House of Lords, the case is named *McPhail* v. *Doulton*.

3 [1971] A.C. 424, 457 *per* Lord Wilberforce.

expectation of receiving more from a fund less mulcted by taxation. And the settlor and the trustees are provided with a device of astonishing flexibility. The settlor can indicate that each beneficiary must receive something, but he need not. This can apply to capital and income. He can give the trustees a power to accumulate income. He can provide for gifts in default of exercise of their powers by trustees. It does not matter what the mixture of duty and discretion is, so long as it is feasible for it to be carried out.

There need to be some limits to this, however. First, from the point of view of the court. Ultimately the trust must be susceptible to control by the court. *Re Baden's Deed Trusts* showed the court to be willing to meet this need in a generally flexible manner, but the court may be less willing to do so where there is an express or implied duty to distribute, as distinct from a mere fiduciary power to distribute, among a diffuse group.[4] This would be true particularly of discretionary trusts with no gift over. For such a trust to be initially valid, an additional requirement of something resembling a 'class' may be required in addition to the in/out test being satisfied, in order to make the trust 'administratively workable'.[5] It may also be true that the court will refuse its aid to the enforcement of what it regards as capricious trust objects so that such a trust also will be invalid *ab initio*.[6]

But it is possible and, I think, preferable, to see some aspects from the point of view, not of the court, but of the trustees. If there is to be a rule, there is a lot to be said for one that requires a discretion given to trustees to be about an issue to which they can put their minds in a fiduciary manner. The range of beneficiaries may be capricious or so wide that, without narrowing it down, there seems no rational way of selecting within it. That itself may be sufficient reason why a trust is void *ab initio*; and would apply to mere powers vested in trustees as well as to trust powers. If so, a rule emerges that a capricious or irrational power of distribution can be given only to non-fiduciary donees of a power, who can of course decide to release it, and where no question of enforcing it will ever arise. A simple example might be a trust for 'bearded students in the University of Tasmania'. This would pass the certainty test but gives no indication of why some bearded students should be selected rather than others. Lord Wilberforce's example of the 'residents of Greater London'[7] may be getting at the same idea; and

4 In his *Discretionary Trusts,* 2nd ed., 3-4, 37-8, Dr Hardingham distinguishes 'trust power' and 'mere power' on the basis of the absence or presence of takers in default of appointment. But there is no established uniformity of usage. In some cases too, a trust power in respect of income will be coupled with a gift over of capital. Also, a mere power may be followed by a gift over of capital to a very diffuse class. It is difficult in the light of the developments to see equitable property placed in all cases as neatly as Dr Hardingham suggests it is, either in those amongst whom a power must be exercised or in those entitled in default.

5 [1971] A.C. 424, 457 *per* Lord Wilberforce. This is where the 'residents of Greater London' *dictum* occurs.

6 This is suggested by Templeman J. in *Re Manisty's Settlement* [1974] Ch. 17, 27.

7 [1971] A.C. 424, 457.

so may Templeman J.'s reference to a group which is 'an accidental conglomeration of persons who have no discernible link with the settlor or an institution'.[8] In such cases, where there is nothing in the trust deed or in relevant external evidence to guide the trustees, the trustees could only go about their task in a rational manner by inventing criteria for themselves, such as poverty or blindness among London residents. But this is not what the settlor has provided and so would not be a fiduciary manner of exercising the larger discretion that he has in fact given them.

If this approach is right, there is no additional requirement as such for the initial validity of trusts containing a duty to distribute. It is still a matter of feasibility, plus an overall capacity in the court to control.

(c) Let us now look at another option available to a settlor. He can direct his trustees that the beneficiaries of his trust are to be found listed in Schedule B of the trust deed; he can then direct their attention to persons or institutions or groups listed in Schedule C and instruct the trustees to consider from time to time whether any of them should be added as beneficiaries into Schedule B. The beneficiaries at any one time will be known, so there is no problem about certainty of objects. But how significant is the existence of a Schedule C? In *Re Manisty's Settlement*,[9] Templeman J. held that it is not significant, and that trustees can be empowered to add anyone they choose to Schedule B. Schedule C is not essential, though a Schedule A will be in order to list those who, for tax reasons, must never be added to Schedule B, for instance the settlor himself. Again, it is feasibility that matters. If the trustees indicate that they can follow the trust provisions, why stop them? Thus in the case itself, the settlor's mother was added to Schedule B. But Templeman J. did not go so far as to say that such a power would be valid if its exercise was mandatory.[10]

What does this conclusion do for the certainty of objects requirement? It is true that the membership of Schedule B is known, so there is certainty of those who are eligible to benefit under the trust at any one time. But it is equally true that the trustees' power, subject only to fiduciary considerations, is to select potential beneficiaries. This is a far remove indeed from trustees choosing from among beneficiaries selected by the settlor.

(d) But the settlor's options go even beyond that. In *Re Manisty's Settlement* there was a Schedule B to provide some fiduciary guidance to the trustees. How essential is a Schedule B? Again, the answer is that it is not essential at all.

---

8 [1974] Ch. 17, 27.

9 [1974] Ch. 17.

10 [1974] Ch. 17, 29.

In *Re Hay's Settlement Trusts*,[11] Megarry V.C. held valid a power conferred upon trustees to distribute assets of a trust among anyone in the world save those listed in a Schedule A. That would not enable the trustees to appoint themselves as beneficiaries, unless such a power was expressly conferred,[12] but that and Schedule A apart, they could appoint generally, and it can not be said that they have 'anything like a class' to judge by. Yet they have a duty to consider exercising such a power in a fiduciary manner, and presumably cannot release it. There is little or nothing for them to consider in a fiduciary capacity, but this only reflects the low level in such a case of the duty on the sliding scale, and is not a ground for invalidity *ab initio*. The principle is still, let them get on with it. But in practice it comes down to trustees selecting beneficiaries. As with Templeman J., however, Megarry V.C. was careful to indicate that such a power might not be valid if its exercise was mandatory[13] — and the trust deed included a gift over in default in favour of a small specific class.

(e) So far no Australian authority has been cited. Yet the next case to be discussed, *Horan* v. *James*,[14] is not only Australian, but may have taken the settlor's options even further. For, unlike Templeman J. and Megarry V.C., neither Helsham J. nor the Court of Appeal of New South Wales had doubts about applying the feasibility approach to powers of almost unlimited width vested in trustees without any gift over in default of their exercise, so that the trustees were expected to exercise them, and not just consider doing so in a particular context. The provision in *Horan* v. *James* could scarcely in fact have been wider. The testator devised his residuary estate to his trustees 'with power to pay and/or transfer the same to whomsoever they shall mutually decide' other than his ex-wife and with a hope that his sons also would not be benefited. There was an express provision dealing with dissent among the trustees, and no gift over. All four judges held that such a provision would be valid in a deed, but in the Court of Appeal (reversing Helsham J. on this point only) it was held invalid as a failure to exercise testamentary power.

If this is right, a trust deed can provide for the beneficiaries to be chosen by the trustees, coupled with a direction to exclude just a few persons or institutions, and the trustees must not only consider how to

---

11 [1982] 1 W.L.R. 202. Such powers are known as 'intermediate' or 'hybrid' as distinct from 'special' (*i.e.* among a specified group). Powers given to trustees which might seem to be 'general' (*i.e.* unrestricted) are necessarily hybrid as they can not appoint to themselves without express authority. *Calcino* v. *Fletcher* [1969] Qd. R. 8 is not right on this point.

12 *Re McEwen* [1955] N.Z.L.R. 575, approved in *Horan* v. *James* [1982] 2 N.S.W.L.R. 376, 378. If this is done, the line between a trust and a gift becomes rather technical.

13 [1982] 1 W.L.R. 202, 213-4.

14 [1982] 2 N.S.W.L.R. 376. In his unreported judgment, Helsham J. says 'Certainty is here rendered sufficiently certain by the ability of the trustees to excise from the whole world all persons or bodies that might have the remotest connection with the testator's ex-wife, and choose from what was left'.

do so, but must do so. They can not release themselves from the obligation, and if they fail to carry it out, the court will appoint other trustees who will. The court does not seem to approciate how much further this goes than *Hay*. It is not only the almost undiluted selection of beneficiaries by trustees but, through the court's willingness to replace trustees, an ultimately enforceable obligation to select. The capacity of the court to control the obligation also needs further elucidation and consideration. Hutley J.A. seems to think that there will always be someone to bring the matter before the court and postulates next-of-kin.[15] Yet it will be in their interest to argue that the trust is void, so that the policemen take. The difficulties are no less in a disposition *inter vivos*. Where there is no gift over, will it be the settlor himself? And what happens in the case of a residuary provision, in a will or a deed, in favour of a very diffuse class?

Even if we agree with the extension of *Hay* to dispositions involving the duty to distribute, that should not allow the overall capacity of the court to control to be overlooked. Like feasibility, in the end it is a question of fact. Until it is considered more thoroughly, I would doubt the wisdom of putting full reliance on *Horan* v. *James*.

(f) Is there anything at all left of the certainty of objects requirement for *inter vivos* trusts? On the basis suggested above, the answer must be Yes, if you want distribution in equal or specified proportions; but otherwise No. Though in consequence, greater significance must attach to feasibility and control as requisites for validity *ab initio*.

Does such a view consign Lord Wilberforce's 'residents of Greater London' dictum to oblivion? As a test of certainty, the answer would seem to be, Yes. But as a limit on what trustees can be required to do, No. If you want to demand of trustees that they consider their discretion to appoint from among a class in a fiduciary manner, you must prescribe a class from which they can appoint rationally, whether it be a mere power or a trust power. If you want an irrational class, you can only give the discretion to appoint to a non-fiduciary, who can release it.

Yet you can under *Hay* confer on trustees a fiduciary power to appoint on a virtually open-ended basis without any requirement of a class. The conclusion must be this — that a settlor only attracts a certainty requirement by wanting to do specific things. Equality among beneficiaries and he must provide a list; a class to be appointed from rationally, and the class must be rational. But if he wants neither of those things, he is not bound to provide a list or a class, and the trust (certainly if it is a mere fiduciary power that is involved) is still valid. That is a long way from the traditional view that the settlor must set out 'the metes and bounds' of his trust.

Astonishment must not conceal the achievement, however. The extremes of *Horan* v. *James* do not reflect the main gain, which is to

15 The passage in Hutley J.A.'s judgment at 379 on which this is based is not wholly clear.

provide a degree of interchangeability between capital and income[15a] and total discretion to provide for the needs of families as and when they arise. As capital taxation grows, the gain may well be seen to outweigh the theoretical difficulties.

4. *How much remains of some other basic propositions of the older trust law?*

(a) The rule about subject matter should also, it can be argued, descend from the level of doctrine to that of feasibility. There would then be no terrible obstacle to allowing a trust declared in respect of future 'property' before it came into existence to take effect, as intended, on it coming into existence. A trust takes effect in such circumstances if value is present, and the requirement of value does not seem essential if the declaration was intended to have immediate and continuing effect (as distinct from being only a promise to give). Neither would equity be perfecting a gift in favour of a volunteer, for the gift need not be regarded as imperfect. This development has not yet occurred, however, leaving us with a number of difficulties.[16]

Some movement has occurred though in respect of gifts of 'what is left'. If I give $20,000 in my will to my old gardener, apparently absolutely, but add 'and what is left at his death to go to X charity', must this fail, even though the old gardener scarcely survives probate and the $20,000 is clearly available? Technically the subject-matter was all expendable, but in the event the gift over is feasible. Brightman J. in *Ottoway* v. *Norman*[17] opens the door a little way in such cases, but doctrine has it that an absolute gift can not be cut down and that what I ought to have done to achieve my wishes was to confer a life interest followed by a remainder coupled with a right to encroach on capital.[18] But if my wishes can be achieved in this way, why should they not also be achieved, in a case where it is feasible, by treating certainty of subject matter as less than mandatory?

(b) It can also be suggested that the rule forbidding non-charitable purpose trusts should be by-passed. If the impersonal object of a disposition is sufficiently certain, if the disposition is to last for only a limited period, say twenty-one years, if there is a gift over after the end of that period, why need the disposition be invalid? Vested in trustees it would be a fiduciary power and not releasable so perhaps capricious or useless powers should be held void *ab initio*; vested in donees it would not be fiduciary and so releasable, hence voidness *ab initio* on such grounds might not be necessary. Let the trustees or donees get on with it; subject to there being residuary beneficiaries able to bring maladministration or non-administration before the court. In Canada, legislation validating these trusts as powers is already in effect.[19]

---

15a Some modern trusts go further and provide almost total interchangeability.
16 E.g. *Re Cook's Settlement Trusts* [1965] Ch. 902 and *Le Compte* v. *Public Trustee* [1983] 2 N.S.W.L.R. 109.
17 [1972] Ch. 698, 713.
18 Cf. *Re Comstock* [1918] V.L.R. 398 and *Re Rollings* (1974) 9 S.A.S.R. 418.
19 Ontario *Perpetuities Act*, R.S.O., 1980, s. 16.

In England and Australia, purposes can at the present time be furthered by gifts over from one beneficiary to another within the limits of the Rule against Perpetuities or in perpetuity by making both beneficiaries charitable institutions.[20] If what you wish can be achieved in these strange ways, why not make it more straightforward and open, but limited in duration ?

It may be that dispositions for purposes, drafted as powers, would already be upheld, though no case authoritatively decides this. Goff J. in *Re Denley's Trust Deed*[21] took a step in the right direction, however, by deciding that a trust for employees restricted within the perpetuity period, and followed by a gift over, was valid even though the employees were only enabled to enjoy the subject matter of the trust, a field, for recreation. If that purpose, coupled with persons, can be furthered through trusts or powers, why not other purposes so coupled ?[22] Then, one can add, why are the persons essential to validity if the disposition is otherwise feasible ? And finally, would not a power to appoint drafted as in *Hay*, but restricted to specified educational purposes only and within perpetuity, be as feasible as *Hay* itself ?

(c) There has also been a departure from the traditional conceptual picture. How many trusts to-day can be said to have individual assignable beneficial interests that between them cover the totality of beneficial ownership ? Trusts for employees, discretionary trusts generally, the wide dispositions held valid in recent years, just do not fit the old picture. It is difficult to see where equitable 'property' lies in some of them. The House of Lords saw the difficulty in *Gartside* v. *I.R.C.*,[23] but did not let it deter them in the tax context. Neither did the difficulty deter the judges in *Hay* or *Horan* v. *James*. Equitable 'property' either has no significance or is allocated somewhere to avoid it seeming to be in trustees. Possibly it is better to regard it as in suspense or under the control of the court in a manner analogous to that of property during administration by executors.[24] As for property, so for assignability. With the expansion of discretionary trusts, the practicability of assignment has diminished — see *Baden* and *Manisty* for instance — and in the *Hay*

20 The Rule in *Christ's Hospital* v. *Grainger* (1849) 1 Mac. & G. 460 produces bizarre results as in *Re Lopes* [1931] 2 Ch. 130 and is indefensible. Dr J. H. C. Morris pointed to it as the last surviving method of creating an unbarrable entail: *Rule against Perpetuities* (2nd ed.) p. 194.

21 [1969] 1 Ch. 373. Again, difficulties can be imagined. What happens if the field is compulsorily acquired for a new road and compensation paid ? There are also more objections to purpose trusts imposed on land, which should in principle always be alienable, than on purpose trusts imposed on funds.

22 This may be happening already — see *Hay* [1982] 1 W.L.R. 202, 204. Trusts for only the education of children within family or company contexts are probably supportable too. Does the principle extend to spendthrift-type trusts ? And cf. Gibson J. in *Carreras Rothmans* v. *FMT* [1985] 1 All E.R. 155, 164, 166 — very wide statements that may or may not affect non-commercial situations.

23 [1968] A.C. 553.

24 See *Carreras Rothman* v. *FMT* [1985] 1 All E.R. 155, 166, quoting from Megarry V.C.; and cf. n. 4 above. Assignability seems compatible with there being no equitable property in *Re Leigh's Will Trusts* [1970] Ch. 277.

context clearly does not exist at all. It is also difficult to see how the rule of termination of a trust by unanimous consent can operate in some of these cases. While in some situations it is almost too easy,[24a] in others it does not seem practicable at all. Perhaps the Variation of Trusts procedures can deal with the problem, but this also is not too clear. It is a long way from the older type of discretionary trust for incompetent relatives and the disabled.

5. *What rules of public policy limit the creation of trusts?*

Nothing illegal is allowed of course, but trusts for individuals rarely are illegal, save in cases of fraud or tax evasion, and even there the issue may be made to turn on how events turn out. If purpose trusts are made generally valid, a rule based on illegal or useless objects or objects in conflict with public policy will be required, but that is not yet the position. Frequently, policy has degenerated into technical drafting. It is difficult to detect any overall policy governing the decisions made under the rules against inalienability and indestructability for instance, and their impingement is erratic.[25]

More importantly, there is the role of the Rule against Perpetuities to consider. The rule limits the period within which beneficial interests under trusts and powers may be made to commence in the future. But since the introduction of 'wait and see' provisions, the rule affects fewer dispositions *ab initio*. The rule seems quite basic, yet Canada has commenced its abolition.[26] The rule is extremely complex, has been made more so by attempts to reform it, and frequent resort has been made to artificial devices such as 'lives' clauses (used in *Re Denley's Trust Deed* for example) to avoid it. Few settlors these days provide in detail how succeeding generations are to enjoy a single large capital sum, for in most jurisdictions capital taxation will reduce it too much. Even if a settlor does so provide, if the beneficiaries dislike what he has done, the court can be asked to vary it under Variation of Trusts Act procedures, in effect splitting the capital up. The 'wait and see' rule in fact merely alters the actuarial calculations. So why keep it? Though it does in my view need to be retained in one area, namely to prevent conditions subsequent enjoying perpetual validity, especially when attached to charitable gifts. Any policy behind its other aspects can be dealt with more simply, a point to which I shall return.

Provisionally, we can conclude that not many rules based on public policy are needed to limit the creation *ab initio* of trusts.

---

24a Cf. *Re Trafford's Settlement* [1985] Ch. 32 and n. 45 below.

25 What is the real policy, if any, in *Congregational Union of New South Wales* v. *Thistlethwayte* (1952) 87 C.L.R. 375? And cf. n. 21 above. See generally Ford and Lee: Principles of the Law of Trusts, Ch. 7.

26 *Perpetuities and Accumulations Act* 1983 (Manitoba). The Law Reform Committee of South Australia in its 73rd Report (1984) suggests the adoption of similar legislation. See further below at text accompanying notes 43-5.

6. *Developments in 'commercial' areas*

(a) The word 'commercial' is used loosely. The trust mechanism has proved useful for a number of modern institutions — pension trusts, investment trusts of various types, trading trusts, trusts in which nominees hold securities. The duties differ greatly between them, being minimal in the last mentioned example, considerable in the first, more specialized in the investment context. The single characteristic they all possess is the deliberate separation of the legal and beneficial interests in property in order to further managerial or administrative convenience. Beneficial interests represent very different situations in reality. In the nominee situation, the beneficiary has virtually the rights of an absolute owner, a very different situation from that which prevails under a pension trust deed. In this area then, the isolation of a legal interest in trustees does not determine the qualities of the equitable interests beneath them, in particular the manner in which the relationship between trustee and beneficiary is worked out in practice. There is nothing undesirable in all this — the concept of the trust, though widened, is being employed to good ends. *E converso*, since the lead given by Brightman L.J. in *Conservative Central Office* v. *Burrell*,[27] trust concepts are not being forced on to factual situations for which they are inappropriate, such as the funds of unincorporated associations controlled in practive by meetings of the members, and for which agency and mandate are better explanations.

(b) Considerable problems arise however in relation to the express injection of the trust relationship into commercial contracts.

*Re Kayford*[28] concerns a successful attempt by the directors of a company experiencing liquidity problems to protect their limited liability while continuing to keep the company trading. The company ran a mail order business, and it was decided by the company — those ordering the goods did not know of the arrangement — that payments in by those ordering goods should be held in a trust account for the payors until the goods were dispatched. Only when the latter event occurred, did equitable property in the money payments pass to the company. Megarry J. held that the requirements of a trust were satisfied and that such payments in were validly subjected to a trust by their recipient. An argument could be raised on fraudulent preferences, but the intention was to receive money from the payors only on the basis that they never were general creditors. At least the aim of the directors — to avoid early closure — was praiseworthy.

The aim in *Barclays Bank* v. *Quistclose Investments*[29] may well have been less praiseworthy. One company lends a sum of money to another company to enable the latter to pay a dividend and for no other purpose,

27 [1982] 2 All E.R. 1. We have moved a long way from the rigid approach of Viscount Simonds in *Leahy* v. *AG* (N.S.W.) [1959] A.C. 457; and what a good thing.

28 [1975] 1 W.L.R. 279.

29 [1970] A.C. 567. The two companies were not being independently controlled.

and on terms that the former recovers the money if the dividend is not paid. The arrangement is couched in the language of trusts, and gives the former company priority on the latter's liquidation. It is a curious form of trust, part purpose, part resulting, but expressly constituted and held by the House of Lords to be effective to protect what seems more like a commercial loan. In consequence some policy problems arise that raise difficult issues of registration of charges. Nevertheless, the *Quistclose* principle was developed further in *Carreras Rothmans* v. *FMT*.[30] The plaintiffs employed the defendants to run their advertisement campaign, paying sums to the defendants when the latter needed it to meet liabilities to advertisers. The defendants had a liquidity problem and the plaintiffs thereupon insisted on providing the defendants with the assets needed to pay the advertisers only through a special account which was not used for any other purpose. It was held that the assets in the special account did not become the defendant's property beneficially but were held by the defendants in trust for the benefit of the advertisers and, if not in the event for them, for the plaintiffs. Both the plaintiffs and the advertisers had rights of enforcement against the defendants in respect of this special arrangement to discharge an antecedent debt.

A limit exists however in respect of the requirement of separate property for a trust. This is what seems to emerge from *Re Andrabell*.[31] Under the *Romalpa*[32] doctrine it is possible for a seller to provide for the retention of equitable title in himself over goods delivered to an intermediary for sale, until sale occurs, and then for equitable title in the proceeds of sale that arise in the intermediary's hands also to vest in himself. This device did not work in *Re Andrabell*, and one factor that led to this conclusion was that there was no obligation or expectation that the intermediary would keep the seller's goods or the proceeds of sale thereof distinct. The requirement of identifiable subject matter remains here of importance.[33]

Both *Carreras Rothmans* v. *FMT* and *Re Andrabell* are decisions of Gibson J., and it is interesting to see how he approaches the issues. He adopts no *prima facie* view of strict or benevolent construction. Whether the requirements of the law of trusts are satisfied in these commercial contexts involves no particular judicial attitude;[34] and this is right, for the law of trusts cannot concern itself with the motives and ultimate aims of setting up a trust, short of course of fraud. The question is whether the requirements of a trust are satisfied, and in *Re Andrabell* it was not so. But is Gibson J. being totally consistent with this objective approach, which was also the approach adopted by Megarry J. in *Re Kayford*,

30 [1985] 1 All E.R. 155.

31 [1984] 3 All E.R. 407.

32 [1976] 2 All E.R. 552.

33 This issue is of importance too for bank accounts. Goulding J. seems to overlook it totally in *Chase Manhattan* v. *British Israel Bank* [1981] Ch. 105.

34 [1984] 3 ALL E.R. 407, 410. *C.f.* the similar approach of the Court of Appeal in *Clough Mills* v. *Martin* [1984] 3 All E.R. 982.

when he says in *Re Andrabell* that he does not 'think it helpful to analyse the *Quistclose* type of case in terms of the constituent parts of a conventional settlement'?[35]

An expression of an intent to create a trust relationship is obviously not sufficient. The requirements for trusts apply. But perhaps not all of the older ones. Is that a fair summary? How far is it from the view developed earlier of — if it is feasible, let the trust be valid? It is difficult to judge; but what is evident is the capacity of draftsmen to inject trusts into commercial contexts where the criteria for the validity of trusts stand a reasonable chance of being complied with.

(c) Further problems arise in the context of *U.S. Surgical* v. *Hospital Products*.[36] A contract between a manufacturer of goods and his exclusive distributor may need to protect the former in the event of misuse of confidential information by the latter. A restraint of trade clause is the conventional method of so doing. But is it possible also to turn the distributor into a fiduciary so that any profits that he makes in breach can be recovered? Fiduciary status may be made express in the contract, and trust 'property' may be held to exist either in the information itself or in any goods manufactured by the distributor in breach. But it is uncertain as yet how such express clauses in a contract are to be drafted, and in what fashion they will attract the remedies available in equity for illegitimately made profits. The difficulties are adverted to by Mason J. and Deane J., both of whom emphasize the importance of identifying the right role for trusts in commercial areas.[37]

### 7. *Changed patterns in administration of trusts*

The old concept was of trustees of family settlements in absolute control, doing the job themselves, and not being paid for it. With the complexities that face such trustees today, particularly of tax and investment, a considerable degree of delegation by trustees is inevitable, save for the smallest trusts. Frequently too, corporations are appointed as trustees, and they will not only require to be paid for their services but will insist on a clause exempting them for negligence in the administration of the trust.[38]

The content of trust deeds has changed too. The limits placed in Trustee Acts on the exercise of powers by trustees are often removed in trust deeds leaving trustees with, in many situations, virtually the powers of absolute owners. Generally in this area, as we have seen, it is the day of the discretion. Trustees are given an overall task to perform and are provided with the means of accomplishing it, subject only to fiduciary

35 [1985] 1 All E.R. 155, 165. It has been alleged that Gibson J. treated the requirements of a trust too cavalierly: see 101 *L.Q.R.* 269.

36 (1984) 55 A.L.R. 417.

37 See especially at 456-7, 475.

38 It tends of course to become a question of who pays the insurance premiums. In Canada it has been proposed that legislation should deny effect to such clauses: *Ontario Report on Trusts* 39-42. This report is a mine of valuable information on trust administration generally.

considerations, in the manner they think most effective. Though, correlatively, the court has recently been showing signs of wanting to strengthen the standard of the fiduciary duty of care ordinarily to be expected.[39]

The balance of power between trustees and beneficiaries in this area has not shifted so much. Trustees still have little explaining to do, and frequently this will be the situation intended by the settlor, and for good reasons. There is now however the important judgment in *Karger* v. *Paul*[40] to provide something of a corrective. McGarvie J. suggests that to review discretions 'exercised irresponsibly, capriciously, or wantonly' is necessary for, without 'real and genuine consideration' of the relevant issues, the discretions have not been exercised *bonafide* which is to say, not at all.[41] This seems right, and what is needed is for a procedure to develop that will protect trustees from querulous or insistent inquiry and beneficiaries from irresponsibility.[42] The increasing conferment of wide discretionary powers on trustees, not in itself a bad thing, needs to be accompanied by a greater ability in beneficiaries or those entitled in default than is provided in the nineteenth century authorities to bring potential cases of maladministration before the court for review. This may not mean so much at the *Hay* end of the spectrum, but will be a valuable safeguard in less extreme cases; and most probably corresponds with a settlor's expectations.

The picture that forms is one of trustees being provided with the range of administrative and dispositive powers suited to the objects of their particular trust. This is true also of trusts developing in the commercial area. Within the general framework of fiduciary duties, it is very much a la carte. The powers of the trustees of a pension trust or an investment trust, the pattern of administration and of reporting to beneficiary owners in such trusts, the factors that will govern the discharge of the duties involved, will all reflect the particular circumstances and requirements of the trust. The trust here has become a management vehicle, and the law of trusts has proved able to provide the mechanism of administration that is apposite to each need; a most considerable achievement.

### 8. *Duration of trusts and the court*

A trust was traditionally considered in principle to be irrevocable and invariable, but able to last only as long as the Rule against Perpetuities permitted. This is a long way from the present position and from trends that are now developing. Neither the settlor himself, nor the settlor in conjunction with the trustees, can revoke a trust. What distinguishes a trust is that property rights have been conferred on the beneficiaries which only they can agree to surrender. It is possible of

39 *Bartlett* v. *Barclays Bank* [1980] Ch. 515.

40 [1984] V.R. 161.

41 [1984] V.R. 161, 164-5.

42 Developments are beginning: see *McLean* v. *Burns Philip* (1985) 9 A.C.L.R. 926, 935-7.

course to confer a right of revocation on the settlor or a stranger expressly, but this is common only in jurisdictions where tax considerations do not militate against it. The beneficiaries can consent to termination or variation of course, but before statute intervened this was only possible when all of them were *sui juris*. Variation of Trust Acts, in place in most jurisdictions, now enable the court to agree to variations on behalf of the unborn or incapacitated, and in this way both administrative powers can be altered and beneficial interests redistributed. Even this procedure can be dispensed with if express powers of variation are conferred in the trust deed.

The trust as first constituted by the settlor may therefore not last as long as first envisaged, but may be varied or terminated; in some cases with, in some cases without, the aid of the court. The 'wait and see' aspect of the reformed Rule against Perpetuities adds another uncertain time dimension to the picture also.

Two straightforward but drastic reforms in Canada place these changes in a quite new perspective. Not only is there legislation abolishing the Rule against Perpetuities,[43] but there is legislation abolishing the rule that enables all the beneficiaries if *sui juris* to agree on termination of a trust.[44] The effect of this, coupled with comparatively minor amendments to the Variation of Trusts legislation, is that there is no limitation imposed *ab initio* on the duration of a trust through the perpetuity rule, but that trusts can be varied or terminated, whenever appropriate, by the beneficiaries with the consent of the court. Neither variation nor termination can be achieved without the consent of the court, and the court will of course take into account the purpose of the trust in giving or withholding that consent. This is of particular interest in relation to discretionary trusts and trusts for spendthrifts.

The role of the court thus becomes central to the future of a trust. This is a huge change in emphasis. Its justification is said to lie in the tremendous complexity in practice of the old rules, and in the ease with which the technically competent draftsman can, despite the rules, provide settlors with most of the limitations that they want. It is a change that can not but surprise traditional trust lawyers. Yet the arguments presented by the Ontario Law Reform Commission are not easy to refute.[45]

---

43 *Perpetuities and Accumulation Act* 1983 (Manitoba).

44 The so-called Rule in *Saunders* v. *Vautier* (1841) 4 Beav. 115 is repealed in Manitoba by the *Trustee Amendment Act* 1983, and in Alberta by *Trustee Act* 1980, s. 42 (enacted in 1973).

45 *Report on the Law of Trusts* (1984) Chapter 7. The argument in relation to *Saunders* v. *Vaulier*, at first sight the more surprising of the two changes, is that termination can usually be prevented (save by going to the court for a variation) by the addition of a gift over. The method is artificial and the results can sometimes be inconvenient. It is better for the settlor to say straightforwardly what his aims are, and for the court to reconcile them with the events that emerge.

## 9. *Conclusion*

There is little that a proficient draftsman can not achieve for a settlor at the present time. Few rules affecting the initial validity of trusts really present an obstacle. But the methods of achieving what is desired are frequently complex, and this can obscure the justification of some rules that nevertheless are basic. What is needed is to relate those basic rules and the policies they further to their practical applications. It would be useful to (a) emphasize the capacity of the court to control trustees (b) validate dispositions for purposes (c) simplify the subject matter rules (d) determine more definite roles for the rules against inalienability and indestructability. The future of the Rule against Perpetuities and the degree of the overall control over trusts by the court are wider issues.

Generally, trusts are already providing a comprehensive service in the family property and the commercial areas. The validity rules do not prevent powers and duties being assembled to meet the needs of particular types of trust. In the commercial area, some difficult issues have arisen, both of initial validity and of administration, but the policy aspects are not the technical ones of trusts. They are the wider ones of commercial law and the protection of creditors.

Calls for changes in trust law are thus not aimed so much at liberalization of the law, for this has already occurred. The problem lies in the great variety of trusts that already exist. The less wealthy settlor and his adviser can become lost in the possibilities. With this in mind, some are now urging the preparation of model trust provisions. As the law of trusts expands and provides for more and more different situations, so it is necessary that the central propositions and provisions should be clearly enunciated.

Maitland once referred to the trust as being 'as elastic, as general as contract'.[46] As is so often the case, he was right.*

---

46 *Lectures on Equity* (Brunyate ed., 1947) p. 23.

* An expanded version of a lecture given on 24 July, 1985 in Hobart to honour the memory of the late Michael Scott.