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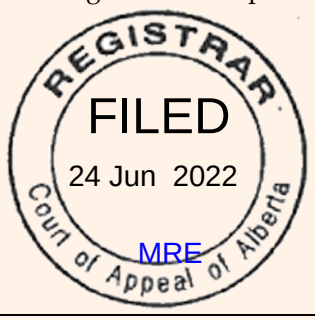

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, C. T-8, AS AMENDED

AND IN THE MATTER OF THE SAWRIDGE BAND *INTER VIVOS* SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now know as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANT:	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("1985 SAWRIDGE TRUSTEES")
STATUS ON APPEAL:	Respondents
RESPONDENT:	THE OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL:	Appellant
RESPONDENT:	CATHERINE TWINN
STATUS ON APPEAL:	Respondent
INTERVENORS:	SAWRIDGE FIRST NATION AND SHELBY TWINN
STATUS ON APPEAL:	Interveners
DOCUMENT:	**FACTUM**

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STATUS ON APPEAL:	Appellant
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Appeal from the Decision of
The Honourable Mr. Justice J.T. Henderson
Dated the 4th day of February, 2022
Entered May 13, 2022

FACTUM OF THE APPELLANT, CATHERINE TWINN

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INTRODUCTION

1. The Appellant, Catherine Twinn is a former trustee and current beneficiary of the Sawridge Band Inter Vivos Settlement created by Chief Walter Patrick Twinn (the "**Settlor**"), of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation (the "**First Nation**"), on April 15, 1985 (the "**1985 Trust**") and the Sawridge Trust, settled by the Settlor on August 15, 1986 (the "**1986 Trust**") and collectively referred to as the "**Trusts**".

2. This appeal arises from the decisions and directions of the Case Management Justice, Justice J.T. Henderson ("**CMJ**") in the application for advice and direction filed by the trustees of the 1985 Trust (the "**1985 Trustees**") on January 9, 2018[1] to seek the advice and direction of the Court in relation to the definition of "beneficiary" pursuant to the 1985 Trust deed (the "**2011 Action**").

3. Despite the limited advice being sought from the CMJ, the CMJ directed that the 1985 Trustees bring an application to interpret the "meaning and effect" of a prior Consent Order granted in the 2011 Action by the Honourable Justice D. Thomas on August 24, 2016 (the "**ATO**") that resolved earlier direction sought by the 1985 Trustees in these proceedings[2].

4. It is respectfully submitted that the decision under appeal constitutes a collateral attack, as defined by the Supreme Court of Canada, on the unappealed ATO, as the CMJ utilized and structured his self-directed application to substitute his decision making for that of Justice Thomas. Further, the CMJ made reviewable errors of law and fact. More particularly, and most significantly, he incorrectly applied the well-established test for interpretation of Orders of the Court and created a record that did not exist before Justice Thomas at the time the ATO was granted. This resulted in the CMJ incorrectly interpreting the subsequent

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[1] Application, filed January 9, 2018 [Appeal Record at pp. 11-14]

[2] ATO, heard August 24, 2016 [Appeal Record at pp. 18-20]

directions of Justice Thomas that were made in reliance on the ATO and disregarding clear evidence on the record that demonstrated the proper meaning and effect of the ATO.

5. The issues on this appeal are significant as the decision of the CMJ arose from an application conceived and directed by the CMJ, not the parties, and arguably creates a perception that the Court was acting as both litigant and decision maker. Such conduct carries a risk of calling into question the fair administration of justice. Further, the decisions of the CMJ constituted final and substantive relief in the 2011 Action and were issued without the consent, indeed at the protest of Ms. Twinn and the Office of the Public Guardian and Trustee ("**OPGT**"), and thus without jurisdiction in the case management context.

PART 1 FACTS

Historical Background

6. Chief Walter Patrick Twinn was the Chief of the Sawridge First Nation ("SFN") from 1966 until his death in 1997.[3] On April 15, 1982, Chief Twinn settled a trust for the benefit of "all members, present and future" of the SFN, with the exception of "illegitimate children of Indian women". This trust was called the Sawridge Band Trust (defined as the 1982 Trust in these submissions)[4].

7. At the time the 1982 Trust was settled, membership in the SFN was determined by the qualification provisions of the *Indian Act*, R.S.C. 1970, c. I-6 ("*Indian Act*") which were administered by the Department of Indian Affairs and Northern Development, later known as Aboriginal Affairs and Northern Development Canada. At the time, with a handful of exceptions, registration for Indian status and membership in a particular first nation were one and the same.

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[3] Affidavit of Paul Bujold, filed September 13, 2011 at para 6 [AEKE at p. 6]

[4] 1982 Trust Deed [AEKE at p. 111]

8. In 1985 meaningful changes were being introduced by Parliament to the *Indian Act*. On April 17, 1985, the provisions of Bill C-31, An Act to amend the Indian Act, 33-34 Eliz II c.27 ("Bill C-31"), came into force. The Bill C-31 amendments, amongst other matters, affected who would qualify for Indian status, membership in a band and the band membership process generally. A major change was that the First Nation could elect to administer their own band membership list rather than the list being managed by the Department of Indian Affairs and Northern Development. Following the Bill C-31 amendments, the SFN elected to take control of its band list and introduced its own membership code that allows it to determine who can become a member of the SFN based on their own rules.

9. The membership code provides a high degree of discretion to the SFN in determining who will (and won't) become a member of the SFN. The only individuals who have a right to be placed on their membership list, as per the membership code, are natural children of parents whose names are both entered on the SFN's membership list.[5] The SFN's membership practices have a history of controversy, including, most notably, the long running and unsuccessful constitutional challenge by the SFN to deny membership status to those directed onto its membership list by the coming into force of Bill C-31.[6]

10. A consequence of Bill C-31 was certain individuals who were previously disqualified from status, were directed to be reinstated to membership in their respective First Nation.[7] An additional consequence was that while an individual could qualify for Indian status they may not necessarily become a member of a particular First Nation, thus leaving the individual without membership in any First Nation.

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[5] Questioning on Affidavit of Paul Bujold sworn February 27, 2017 and held on March 7-10, 2017 at Exhibit 7 (the "Membership Code") [AEKE at p. 118]

[6] Memorandum of Decision (Sawridge #12) of the Honourable Mr. Justice John T. Henderson, filed February 4, 2022, at para 84 [Appeal Record p. 36]

[7] *Supra* at footnote 3 at para 13-15

11. Prior to the introduction of Bill C-31, enfranchisement was the process that resulted in a person no longer being considered an Indian under federal legislation. Enfranchisement could be voluntary or involuntary. An example of involuntary enfranchisements are the "Bill C-31 women" who have been referred to many times in these proceedings and are indigenous women who married non indigenous men. Financial compensation was provided to enfranchised individuals, including the Bill C-31 women. The financial compensation would typically be a percentage (per-capita) payment of what their band would have received from the government. From 1951 to 1985 a Treaty Indian who enfranchised would receive an amount equal to twenty years of treaty payments.[8]

12. Prior to the introduction of Bill C-31, the SFN had experienced a high rate of enfranchisement, arising from both voluntary and involuntary enfranchisement. There is an example in or around this time of one family unit receiving a per capita payment of about $1.2 million dollars. In the early 1980s it was not unusual for a SFN per capita distribution to amount to $300,000 to $400,000 a person. The per capita payments were made from the SFN's capital and revenue accounts.[9]

13. The effect of Bill C-31 is the Bill C-31 women who had lost their status had an absolute right to be re-instated into membership. This reinstatement is despite the fact that these women would have already received their per-capita payment and the members of the SFN who did not enfranchise would have not received a similar payment.

14. The SFN was concerned about the impact Bill C-31 would have on their First Nation, particularly in regard to the anticipated influx of additional members to their membership list and that these individuals had already received a per-capita

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[8] Canada, Crown-Indigenous Relations and Northern Affairs Canada (June 2022), online: Remaining Inequities Related to Registration and Membership <https://www.rcaanc-cirnac.gc.ca/eng/1540403281222/1568898803889#_Enfranchisement>

[9] Questioning Transcript of Catherine Twinn March 12, 2020 at pages 21-25 [AEKE at pp. 122-126]

payout. Consequently, the decision was made to settle a new trust for the purpose of preserving assets for SFN members as they had previously been established at the time the 1982 Trust was settled (i.e. utilizing the provisions of the *Indian Act*) in order to mitigate the financial inequalities between members that would result.[10]

15. On April 15, 1985, Chief Twinn settled the 1985 Trust for the benefit of its beneficiaries. The beneficiaries are defined at paragraph 2(a) of the Deed, as:

> "all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of this execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purpose of this Settlement"[11]

16. As a result of the changes arising from Bill C-31 and as previously detailed, it is possible for an individual to qualify as a beneficiary of the 1985 Trust, but be denied or otherwise not receive membership in the SFN. Intervenor, Shelby Twinn, is but one example of such an individual.

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[10] Excerpt from the Written Submissions of the Trustees, filed August 17, 2016, para. 6 [AEKE at p. 195]

[11] 1985 Trust Deed [AEKE at p. 135]

Transfer of Assets

17. Immediately following the settlement of the 1985 Trust, the trustees of the 1982 Trust transferred all of the assets of the 1982 Trust into the 1985 Trust and the SFN or individuals holding property in trust for the SFN and its members, transferred additional property into the 1985 Trust. [12]

18. On April 15, 1985, the individual persons forming the beneficiary class of the 1985 Trust were identical to those of the 1982 Trust. These persons were easily identifiable as they were the persons listed on the band list maintained by the Department of Indian Affairs and Northern Development. On August 15, 1986, Chief Twinn settled an additional and separate trust (the "**1986 Trust**") for the benefit of:[13]

> "all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada".

19. Effectively, the 1985 Trust provided for all persons who would qualify for SFN membership pre *Bill C-31* amendments, such rules being in force since 1850 when Indians were first legislatively defined, and the 1986 Trust provides for persons who qualify for SFN membership post *Bill C-31* amendments.

20. The 1985 Trust held wealth that arose prior to its settlement on April 15, 1985 and the 1986 Trust held the wealth that arose after April 15, 1985.[14]

Procedural History

21. The 2011 Action was commenced by way of an Order of Justice Thomas issued August 31, 2011 (the "**2011 Order**"). The 2011 Order directed the Trustees of the 1985 Trust to bring an application for advice and direction for the purpose of:

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[12] *Supra* at footnote 3 at para 22

[13] 1986 Trust Deed [AEKE at p. 146]

[14] *Supra* at footnote 3, at para 29-31

(a) Seeking direction with respect to the definition of "Beneficiaries" contained in the 1985 Trust, and, if necessary, to vary the 1985 Trust to clarify the definition of "Beneficiaries"; and

(b) Seeking direction with respect to the transfer of assets to the 1985 Trust.[15]

22. On August 24, 2016 the ATO was granted at the request of the 1985 Trustees. On January 9, 2018 the 1985 Trustees filed an application stating the remaining issues and relief sought in the 2011 Action. Such application was filed in accordance with the direction from this Court of Appeal to file a constating application "setting out specifics of the relief being sought" and in order to clarify "if and how the Trust will be varied, whose interests will be affected by the variation, and how those interests might be affected."[16] This application did not seek any relief relating to the interest of the 1982 Trust beneficiaries.

23. In 2018 the CMJ replaced Justice Thomas as the case management Justice for the 2011 Action. Both are former lawyers from the Dentons firm. An application was filed by the 1985 Trustees on August 10, 2018 to, *inter alia*, determine the jurisdiction of the Court of Queen's Bench to vary the terms of the 1985 Trust and in accordance with the directions of this Court of Appeal (the "**Jurisdiction Application**")[17]. The Jurisdiction Application did not seek any relief relating to the 1982 Trust or confirmation as to the interest of the 1982 Trust beneficiaries in same.

24. The morning the Jurisdiction Application was to be heard, the CMJ sent an email to the parties raising concerns with the ATO and seeking submissions on its meaning and effect. This resulted in the Jurisdiction Application being adjourned *sine die* by the CMJ. By direction of the CMJ, the 1985 Trustees filed an application

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[15] Appeal Record pp. 6-10

[16] *Twinn v Twinn*, 2017 ABCA 419

[17] Jurisdiction Application filed on August 10, 2018 [AEKE at p. 155]

on September 13, 2019 seeking directions, *inter alia*, on the meaning and effect of the ATO.[18]

PART 2 GROUNDS OF APPEAL

25. Ms. Twinn appeals the decision of the CMJ on the following grounds that amount to errors in law and/or fact. It is respectfully submitted that:

(a) The CMJ failed to correctly apply the accepted legal test for interpretation of a Court Order, including by failing to interpret the ATO on an objective basis grounded in the context, facts and circumstances of the proceedings and record that were before the Court at the time the ATO was granted;

(b) The CMJ effected a collateral attack on the ATO by substituting the CMJ's legal interpretation for that of the Court that granted the ATO in order to reach the CMJ's desired result in relation to the subject transfer;

(c) The CMJ misinterpreted and misapplied the applicable law governing the authority of the trustees of the 1982 Trust to transfer the subject trust assets to the 1985 Trust;

(d) Exceeding the CMJ's authority by making an order affecting substantive rights, which was effectively a final order, without the consent of all parties and without jurisdiction.

PART 3 STANDARD OF REVIEW

26. The typical standards of review are applicable on this appeal. Questions of law engage the correctness standard.[19] The CMJ's findings of fact or inferences of fact are entitled to deference and are not to be overturned absent palpable and overriding error. Questions of mixed fact and law such as questions that involve the application of legal standard to a set of facts and errors in principle such as applying an incorrect standard or failing to consider a required element of a legal test, require deference and the standard is palpable and overriding error.

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[18] Appeal Record pp. 15-17

[19] *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, at paras 52-55

However, if it is clear that the CMJ made some extricable error in principle with respect to the characterization of the standard or its application, the error may amount to an error of law, and is subject to the standard of correctness.[20]

27. The standard of review of discretionary decisions is palpable and overriding error unless there is an error in principle, consideration of irrelevant factors, overemphasis of relevant factors, failure to consider or provide sufficient weight to a relevant factor, or where the decision is clearly wrong[21].

PART 4 ARGUMENT

A. Failed to correctly apply the accepted legal test for interpretation of a Court Order

28. Ms. Twinn contends that the CMJ failed to correctly state or apply the legal test for interpretation of orders of the Court, which is an error in law and reviewable on a standard of correctness. In addition, the CMJ interpretation of the ATO based on the context, facts and circumstances of the proceedings and record that were before the Court at the time the ATO was granted was so wholly deficient that it gives rise to palpable and overriding error as the conclusion CMJ draws from these matters is not accurate and is unreasonable.

Legal Test

29. The CMJ cited a portion of the decision of the British Columbia Court of Appeal in *Yu v. Jordan* as the guiding principles for interpretation of Orders of this Court and thus limited the interpretive exercise to the pleadings, language of the order itself and the circumstances in which the order was granted.[22]

30. While forming part of the analysis, the CMJ failed to canvass and thus consider the fulsomeness of the principles of the interpretive function. Even more critically, the CMJ failed to properly apply the manner in which the circumstances of the

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[20] *Housen v. Nikolaisen*, 2002 SCC 33 at para 36

[21] *Koma v Tomich Estate*, 2011 ABCA 186, at 10, 338; *PricewaterhouseCoopers Inc v 1905393 Alberta Ltd,* 2019 ABCA 433, at 9, 98

[22] Decision of Justice Henderson [Appeal Record at p. 40, paras. 110-111]

Order were to be considered and thus resulting in the CMJ incorrectly applying this principle.

31. The interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.[23] The principles to be considered when interpreting an Order of the Court are as follows:

(a) The pleadings of the action in which the order is made;

(b) The language of the order itself;

(c) The circumstances in which the order was granted, *so far as these circumstances were before the Court and patent to the parties*;

(d) Evidence before the Court when making the Order;

(e) Reasons for making the order as given by the Court in its judgment.24 [*Emphasis added*]

32. When interpreting the circumstances in which the ATO was granted, the CMJ made a judicial determination as to the "*status quo*" immediately prior to the ATO being granted. This analysis involved the CMJ determining whether the assets had in fact been properly transferred from the 1982 to the 1985 Trust *and the effect of an improper transfer*. This legal and factual determination by the CMJ, along with the relief granted, was not before the Court or patent to the parties at the time the ATO was granted by Justice Thomas.[25] Therefore, it was not part of the circumstances, or context that gave rise to the request for the ATO.

33. The CMJ furthered this error by utilizing his findings to interpret the pleadings and the language of the ATO itself and thus resulted in a significant flaw in the CMJ's analysis of the remaining factors. More particularly, the CMJ utilized his finding that the assets had been improperly transferred as a lens for interpreting

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[23] *Sans Souci Limited v VRL Services Limited*, [2012] UKPC 6 at para. 13.

[24] *Campbell v. Campbell*, 2016 SKCA 39 at paras. 15 – 18; *Manseau & Perron Inc. v. ThyssenKrupp Industrial Solutions (Canada) Inc.*, 2018 ABQB 949 at 31.

[25] Decision of Justice Henderson [Appeal Record at p. 41]

the pleadings and subsequent proceedings in the 2011 Action, despite the fact that the ATO was granted without any finding that the transfer had been improper and that the transfer was void in law. It was wholly incorrect in law for the CMJ to have engaged in this analysis when interpreting the ATO. The ATO should be interpreted in the absence of this finding.

Application of Legal Test

34. In addition to creating a record (namely CMJ's analysis and findings in relation to the "*status quo*" immediately prior to the ATO) that did not exist before Justice Thomas at the time the ATO was granted, the CMJ disregarded the clear history and context surrounding the circumstances and submissions before Justice Thomas when the ATO was granted in order to arrive at the CMJ's intended conclusion. The relevant pleadings, evidence and submissions that were before the Court at the time the ATO was granted were as follows:

    (a) The 2011 Order;

    (b) The Affidavit of Paul Bujold, filed September 13, 2011 and associated questioning and undertakings arising therefrom;

    (c) The written submissions of the 1985 Trustees filed August 17, 2016.[26]

35. The 2011 Order sets out the following issues for which the 1985 Trustees were seeking direction:

    (a) The 1985 Trustees were seeking direction on the beneficiary definition contained in the 1985 Trust and possibly a variation to same;

    (b) The 1985 Trustees were seeking direction with respect to the transfer of assets to the 1985 Trust from the 1982 Trust.[27]

36. The context for this relief is discussed at length in the Affidavit of Paul Bujold filed September 13, 2011 in support of the 2011 Action. Notably that that "the asset

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[26] Written Submissions of the 1985 Trustees filed August 17, 2016 [AEKE p. 191]

[27] 2011 Order [Appeal Record pp. 6-10]

transfer was proper and that the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust."[28] This relief and context is correctly noted by the CMJ.[29] The CMJ also correctly observes that the written submissions filed by the 1985 Trustees in support of the ATO provide case law in support of the propriety of the transfer and that the Order is being sought to protect the assets of the 1985 Trust for the benefit of the beneficiaries.[30]

37. Despite this procedural history, the CMJ finds it is unclear which beneficiary group is being referred to by the 1985 Trustees as receiving the benefit of the transfer.[31] With respect, this is a wholly unreasonable interpretation of the record before the Court as both the pleadings, the written submissions of the 1985 Trustees and the evidence filed in support of those submissions make it clear that it is the 1985 Beneficiary class for which the relief is sought. This is logical as the 1985 Trustees were understood to be speaking on behalf of the 1985 Beneficiary group and as same had been represented to the Court on numerous occasions throughout the history of case management up to that point.[32]

38. CMJ fails to consider that the written submissions filed by the 1985 Trustees state at paragraph 20 that "It is submitted that it is in the best interests of the beneficiaries of the 1985 Trust that the transfer of assets be approved, *nunc pro tunc*."[33] If the CMJ had considered this portion of the submissions, it would have clearly and unequivocally illuminated which beneficiary group was being referred to and to whom the benefit of the transfer was being conferred.

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[28] *Supra* at footnote 3, para. 25

[29] Decision of Justice Henderson [Appeal Record at p. 62, para. 243]

[30] Decision of Justice Henderson [Appeal Record at p. 63, para. 247]

[31] Decision of Justice Henderson [Appeal Record at p. 64, para 252]

[32] *Twinn v Twinn*, 2017 ABCA 419, at para. 18

[33] *Supra* at footnote 26

39. It was also illogical for CMJ to conclude that the purpose of the application was to protect the assets for the beneficiaries yet conclude that the resulting Order only confirms the obvious state of affairs. More specifically, the 1985 Trust has held legal title to the assets for almost 40 years. There would be no need to seek direction from the Court to confirm this obvious fact.

40. The CMJ attempts to address the reason the parties would have been seeking a meaningless Order (and expending significant resources to achieve same) by concluding that it would accomplish two purposes.[34] Both purposes containing the inherent finding that the 1985 Trust was holding assets for a different class of beneficiaries and was not required to return the assets to the 1982 Trust. **In other words, the CMJ transformed the 1985 Trust into the 1982 Trust**.

41. The CMJ provides no analysis as to how the 1985 Trust could be tasked with permanently holdings assets for another beneficiary group and under the terms of the 1982 Trust Deed. This finding is incorrect in law as the 1985 Trust exists solely to hold assets for its named beneficiaries, as stated in the terms of the 1985 Trust Deed.[35] If the 1985 Trustees received assets as a result of a transfer that was void in law, and subject to the application of limitations defences and other applicable defences, they would be required to return those assets to the 1982 Trust, assuming same continues to exist. **The 1985 Trust is not the 1982 Trust**.

42. This position is supported by the subsequent proceedings in the 2011 Action. In a 2017 case management decision, Justice Thomas cautioned the parties and any person seeking participation in the proceedings that substantial cost consequences could flow if collateral attacks on prior Court directions occurred. Justice Thomas stated that "True outsiders to the Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that

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[34] Decision of Justice Henderson [Appeal Record at p. 68, para. 284]

[35] *Supra at* footnote 12, para. 3

property in equity, namely, the Trust beneficiaries."[36] The term "Trust" was defined in the decision as the 1985 Trust. This statement from Justice Thomas makes clear that the beneficial interest in the transferred assets had been resolved.

43. Further, CMJ fails to consider that the trustees of the 1982 Trust differ from those in the 1985 Trust.[37] A significant difference between the 1982 and 1985 Trusts, is rather than the Chief and Council of the SFN comprising the trustee group, the 1985 Trust provided for a group of five trustees, at least two of which must be beneficiaries of the 1985 Trust. [38] As such, CMJ's conclusion as to the purpose of the transfer had the effect of usurping the role of the 1982 Trustees and conferring a trustee role on the 1985 Trustees which had not previously existed nor been accepted by them.

44. The CMJ incorrectly found that the trustees of the 1982 and 1985 Trusts were the same which resulted in the CMJ failing to consider this critical factor and thus leading to an incorrect analysis.[39] Further, the terms of the 1985 Trust Deed only authorize the 1985 Trustees to receive property if it is held under the terms of the 1985 Trust. They are not authorized to hold property for any other purpose.[40] It is clear on the record that **no** submissions were made before Justice Thomas (or even parenthetically referenced) on why the role of the 1982 Trustees should be usurped or why the 1985 Trustees should be tasked with holding property in trust for another trust.[41] As such, it is illogical to suggest that this was the purpose of the ATO.

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[36] *1985 Sawridge Trust v Alberta (Public Trustee),* 2017 ABQB 299 at para. 30

[37] Decision of Justice Henderson [Appeal Record at p. 69, para. 286]

[38] *Supra* at footnote 4 and footnote 11

[39] Decision of Justice Henderson [Appeal Record at p. 69, para. 286]

[40] *Supra* at footnote 11, para. 3

[41] *Supra* at footnote 26

45. The CMJ also finds that the written submissions of the 1985 Trustees did not make clear that the relief would extinguish any possible interest the 1982 Beneficiary class may have had.[42] With respect, this is not accurate.

46. The written submissions of the 1985 Trustees clearly state the purpose of the 1985 Trust and the subject transfer was to protect the assets of the 1982 Trust from the incoming membership to the SFN that would arise as a result of the impending Bill C-31 amendments and to maintain the benefit of the assets for the membership of the SFN as it existed pre Bill C-31.[43] As such, by approving the transfer, the protectionist nature of its purpose was also clearly being approved. Further, the ATO did not restrict the approval of the transfer to only legal title. If the Court had not intended to extinguish the potential interest of the 1982 beneficiaries, such a clarification would presumably have been clearly carved out given its significance.

47. This is particularly so in light of the CMJ's correct finding that the 1982 Trustees intended to convey legal and beneficial ownership in the transfer to the 1985 Trust.[44] It is inconsistent that the intent of the "transfer" in 1985 was found by CMJ to have been of legal and beneficial ownership, yet CMJ interprets the use of the word "transfer" as contained in the ATO and its ratification therein as connoting only legal title.[45]

48. The decision in *Pilkington v. Inland Revenue Commissioners,* HL 8 Oct 1962 ("*Pilkington*")[46] cited by the 1985 Trustees in support of the transfer is a decision interpreting the scope of authority under a power of advancement to effect a trust to trust transfer. In other words, it is a decision determining a trustees' ability to

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[42] Decision of Justice Henderson [Appeal Record at p. 64, para. 253]

[43] *Supra* at footnote 26, para. 6

[44] Decision of Justice Henderson [Appeal Record at p. 43, para. 127]

[45] Decision of Justice Henderson [Appeal Record at p. 69, para. 285]

[46] *Pilkington v. Inland Revenue Commissioners* HL 8 Oct 1962 ("Pilkington")

transfer legal and beneficial ownership of an asset to another trust despite that trust not being a beneficiary of the current trust. Further, and in oral submissions to Justice Thomas, Justice Thomas was advised by counsel to the 1985 Trustees that the purpose of the Order was to resolve the direction being sought in relation to the transfer of assets.[47] Such a submission is illogical if the issue of beneficial ownership was to remain outstanding.

49. In order to attempt to side step all of these inconsistencies, the CMJ finds the Court's subsequent comments regarding beneficiary identification as relating to the class of beneficiary *vis a vis* the 1982 versus 1985 Trust, rather than in the context of the litigation in which the only remaining issue was resolving the concerns surrounding the definition of beneficiary as contained in the 1985 Trust Deed and whether same could be varied.[48]

50. CMJ fully ignores the preamble to the ATO which states:

> *Preamble: AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust;*[49]

51. The preamble is clear that the assets were transferred **into** the 1985 Trust. The approval of the "transfer" contained in paragraph 1 of the ATO must be interpreted with reference to the preamble which confirms for whose benefit the "transfer" has occurred.

52. Respectfully, in grasping to reach the desired conclusion and to escape the clear meaning and effect of the ATO, the CMJ attributes a lack of clarity to terms that would have been readily understood by the Court and the parties at the time the ATO was granted. The CMJ instead attributes an interpretation and effect to the ATO that was not even argued before the Court and would have been alien to the parties.

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[47] Transcript from August 24, 2016 proceedings [AEKE at p. 250]

[48] Decision of Justice Henderson [Appeal Record at p. 66, paras. 264-266]

[49] ATO [Appeal Record pp 18-20]

53. The decision of CMJ is unreasonable, incorrect and illogical and is clearly designed to achieve a pre-determined result that was desired by the CMJ. The Supreme Court of Canada has held that "It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[50]"

54. With respect, the CMJ had to divorce himself from the pleadings, evidence and context of the 2011 Action in order to perform the judicial gymnastics necessary to arrive at his interpretive conclusion for an application that was conceived and directed by the CMJ and not the parties. Such a result should be concerning to this Court as it calls into question the fair administration of justice in this Province.

B. The CMJ effected a collateral attack on the ATO by substituting the CMJ's legal analysis for that of the Court that granted the ATO in order to reach a different result

55. The ATO is an unchallenged and unappealed order of this Honourable Court and thus there was no jurisdiction on the application before the CMJ to disturb its directions. The findings of the CMJ constituted a collateral attack on the ATO as the CMJ utilized the interpretive process to substitute his decision making for that of Justice Thomas in relation to substance that was not even before Justice Thomas.

56. The Supreme Court of Canada has held that a collateral attack is "an attack on an order made in proceedings other than those whose specific object is the reversal, variation or nullification of the order". There is a general rule against collateral attacks on court orders.[51] Indeed, Justice Thomas in these proceedings had stated in no uncertain terms that collateral attacks on prior orders would be met with punitive consequences.[52]

57. The ATO was presented to Justice Thomas for approval by the parties with a view to resolving the advice and direction the trustees were seeking in relation to the

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[50] *Chatel v. The Queen*, 1985 CanLII 56 (SCC), [1985] 1 SCR 39 at 13

[51] *R. v. Bird, 2019* SCC 7 (CanLII), [2019] 1 SCR 409 at para 21

[52] 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 299 at para. 30

transfer of assets to the 1985 Trust. The Trustees filed written submissions in support of the Consent Order on August 17, 2016 for the purpose of providing the Court with the factual and legal basis for granting the Consent Order. These submissions include the authority in *Pilkington* as the basis for substantiating the transfer and resolving the relief sought in relation thereto. *Pilkington* was the only legal authority referenced in the submissions. These submissions were considered by the Court. The Trustees advised in their written submissions that:

> "The Trustees have advised all parties that the approval of the transfer of assets from the 1982 Trust to the 1985 Trust is sought for certainty and to protect the assets of the 1985 Trust for the benefit of the beneficiaries. To unravel the assets of the 1985 Trust after 30 years would create undue costs and would have the potential impact of destroying the trust."
>
> "In addition, it is submitted that the Sawridge trust to trust transfer could have been achieved through a series of transactions and as *Pilkington* says, the transfer should not be held as inappropriate just because it was done directly instead of indirectly if this was the case with the transfer to the 1985 Trust. **It is submitted that it is in the best interests of the beneficiaries of the 1985 Trust** that the transfer of assets be approved, *nunc pro tunc*." [53] **[Emphasis added]**

58. In oral submissions to the Court, counsel for the Trustees stated that:

> "Sir, you'll recall that in this application, there were basically two issues. One was the beneficiary designation and the second was to confirm that the transfer of assets from the 1982 Trust to the 1985 Trust were – was appropriate, and that we've put that issue behind us. And through the work of counsel we've been able to reach agreement on the issue of the transfer of assets. I believe, Sir, you received a brief from us and a copy of the consent order."[54]

59. In response, the Court stated:

> "I did. And thank you very much for the brief, because it makes it pretty clear – well, what the basis for it is, and I'm certainly satisfied that the consent order is appropriate and properly based in law."[55]

60. As *Pilkington* was the only legal authority submitted in support of the application, it is clear that Justice Thomas endorsed the authority in *Pilkington* as an appropriate basis in law on which to approve the transfer from the 1982 Trust to

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[53] *Supra* at footnote 26

[54] Supra at footnote 47 at page 3

[55] *Ibid.*

the 1985 Trust. *Pilkington* does not speak in any way to authority to simply transfer legal title, it is about transferring both legal title and beneficial interest through the power of advancement.

61. Through engaging in the determination of the "*status quo*" immediately prior to the ATO, the CMJ is patently substituting his decision making for that of Justice Thomas and thus carrying out a collateral attack on the ATO and is incorrect in law. To illustrate this position, CMJ finds that *Pilkington* "did not give the 1982 Trustees the power to proceed with the 1985 Asset Transfer"[56]. Contrarily, Justice Thomas endorsed the *Pilkington* authority as granting this power as *Pilkington* was the only legal authority presented to him in support of the ATO.

C. The CMJ misinterpreted and misapplied the applicable law governing the authority of the trustees of the 1982 Trust to transfer the subject trust assets to the 1985 Trust;

62. The CMJ correctly finds that it is "clear, and I conclude, that the 1982 Trustees intended to transfer the 1982 Trust assets to themselves as 1985 Trustees and to hold the trust assets for the 1985 beneficiaries"[57].

63. The CMJ then engaged in an analysis as to whether the 1982 Trustees had the necessary authority to effect such a transfer. This analysis was undertaken at the protest of Ms. Twinn and the OPGT on the basis that it was improper and outside the jurisdiction of a case management justice. These parties advised the CMJ that the ATO was a negotiated compromise. The CMJ committed numerous errors in law, mixed law and fact and fact when considering the propriety of the transfer.

Error in Defining Beneficiaries

64. A critical interpretive error committed by the CMJ that flawed his remaining analysis was his determination as to whom the beneficiaries of the 1982 Trust were

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[56] Decision of Justice Henderson [Appeal Record at p. 57, para. 211]

[57] Decision of Justice Henderson [Appeal Record at p. 43, para 127]

and thus to whom the 1982 Trustees owed a fiduciary duty. The 1982 Trust defines its beneficiaries as "all members, present and future, of the Band".[58]

65. It is submitted, that the language, "present and future" is meant to clarify that the beneficiaries of the 1982 Trust at any given time are the current members of the SFN and that such definition is not to remain static to only those members who existed at the date of settlement. Such definition does not confer a vested beneficial interest on those who have yet to gain membership in the SFN.

66. CMJ erred in finding that future members of the SFN formed part of the beneficiary class to whom the 1982 Trustees owed a duty.[59] CMJ's interpretation is inconsistent with the requirement that a trust define its objects with certainty.

67. Dr. Waters in his learned text confirms this position:

> These are questions that will be pursued later, but in the meantime it should be noted that an unincorporated association, like a golf club pr play-reading society, cannot itself be the recipient of a property interest under a trust. Having no legal personality, the unincorporated association has no capacity to receive property. It is only the sum of its members. They are the recipients of the beneficial interest under the trust, and unless it is clear that the trust interest is for the members as persons, the trust for the association will be void. **However, if the trust interest is for the members of the association, then the issue is as to the certainty of the class. If the court discovers that the gift is for future as well as present members, then the trust will fail for uncertainty of objects,** but this is a different issue from capacity.[60]

68. It is submitted that defining the beneficiaries as including all future members of the SFN would create uncertainty as it would be generally impossible to identify these individuals. Further, this would mean that persons without membership in the SFN could claim a current beneficial interest in the 1982 if they could establish that they were a "future" member. It is not clear how such status could be established which reinforces the concern with object identification.

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[58] *Supra* at footnote 4

[59] Decision of Justice Henderson [Appeal Record at p. 54, para. 188]

[60] *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2021) at 135

69. A consequence of this flawed analysis is CMJ incorrectly determined that the persons who qualified as beneficiaries of 1982 Trust and 1985 Trust on April 15, 1985 were not identical.[61] While it is acknowledged that the method of beneficiary identification diverged in the future, it is submitted that the identity of the current beneficiaries and the manner in which they were determined was identical between both trusts on April 15, 1985.

70. Finally, while at the time of the transfer some of the impact of Bill C-31 on the membership in the SFN was understood, a challenge to the validity of that legislation was planned by the SFN and ultimately resulted in a long running constitutional challenge in Federal Court. As such, in 1985 and contrary to the findings of the CMJ, the actual future membership in the SFN and thus beneficial status in the 1982 Trust was not fully understood by anyone for decades and in fact is still not fully understood to this day.

Error in Interpreting the Power of Advancement

71. The CMJ erred in determining the scope of authority of the 1982 Trustees to make advances, including complete capital advances, from the 1982 Trust as a consequence of his incorrect determination as to who the beneficiaries of the 1982 Trust were and a misapplication of the even hand principle. It is submitted that the beneficiaries of the 1982 Trust should be interpreted as those persons who are current members of the SFN. The 1982 Trust Deed, at paragraph 6, contains a power of advancement:[62]

> "The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for the beneficiaries set out above; and the Trustees may make such payments at such time, and from time to time, and in such manner as the Trustees in their uncontrolled discretion deem appropriate."

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[61] Decision of Justice Henderson [Appeal Record at p. 54, para. 185]

[62] *Supra* at footnote 4, at paragraph 6

72. It is notable that this power of advancement is highly discretionary, permits **complete** capital distributions at any given time and does not mandate that beneficial distributions be made personally to a beneficiary, but rather in any manner as the 1982 Trustees deem appropriate. Given that that 1982 Trust deed grants the authority to make complete capital distributions at any given time, the settlor clearly contemplated distributions that would nullify the interest of future beneficiaries in the 1982 Trust. The general rule in regard to the even hand principle is as follows:

> It is the primary duty upon trustees that in all their dealings with trust affairs they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer on him and otherwise receives no advantage and suffers no burden which other beneficiaries do not share. In this way the trustees act impartially; they hold an even hand[63].

73. It is accepted law that the settlor can "opt out" of the even hand principle through the terms of the trust. In his learned text, Dr Waters states:

> *The settlor or testator may choose to give disproportionate interests to various beneficiaries, and he or she very often does so in practice, but that is his or her privilege.*[64]

74. The terms and conditions of an estate or trust, either explicitly or by inference, may exempt a trustee from the duty to act even handedly thereby affording greater discretionary power to the trustee.[65] It is submitted that the CMJ erred in finding that the even hand principle applied to distributions from the 1982 Trust as the terms of the deed clearly contemplate complete capital distributions of the 1982 Trust which implicitly acknowledges that the 1982 Trustees had the unfettered discretion to not act with an even hand between current and future beneficiaries.[66]

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[63] Waters' Law of Trusts in Canada, 5th ed. (Toronto: Thomson Reuters Canada, 2021) at 1090

[64] *Ibid.*

[65] *Dicks v. Scott,* 2010 NLCA 35 at 29, 30, 36

[66] Decision of Justice Henderson [Appeal Record at p. 53, para. 175]

Erred in Application of *Pilkington*

75. The issue of a trust to trust transfer under a power of advancement was considered by the House of Lords in *Pilkington*. *Pilkington* is the foundational decision that considers the scope of the power of advancement and whether it can be used to settle a new trust. In considering the application of the principles arising from *Pilkington*, CMJ incorrectly finds that its application is dependent upon the subject transfer being in the best interests of the beneficiaries of the original trust.[67] With respect, this is not correct in law.

76. In contrast, it is submitted that *Pilkington* stands for the proposition that a transfer of trust property to a new trust, even a trust that includes new beneficiaries, is permissible so long as same is permissible under the scope of authority granted by the relevant power of advancement and is for the benefit of a current beneficiary, with a residual power by the Court to correct any exercise that can be shown to be merely wanton or capricious and not attributable to a genuine discretion.[68]

77. In *Pilkington*, a good deal of the argument against the arrangement was directed at whether the power of advancement could be utilized to settle a new trust for the benefit of the contingent beneficiary, Miss Penelope, and whether the power of advancement could be utilized to benefit persons who presently did not have an interest in the trust (i.e. Miss Penelope's unborn children).

78. The effect of making a distribution to Miss Penelope prior to her interest in the trust becoming crystalized is she would gain an advantage over the other contingent beneficiaries (her living and yet unborn siblings). In other words, and not unlike the circumstances affecting the future beneficiaries of the 1982 Trust, a distribution to Miss Penelope was disadvantageous to the future beneficiaries of the current trust.

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[67] Decision of Justice Henderson [Appeal Record at p. 52, para. 170]

[68] *Pilkington*, *supra* note 41 at page 18

79. The Court in *Pilkington* considered the benefit of the transaction to Miss Penelope, a contingent beneficiary. However, the transaction itself was not beneficial to the other contingent beneficiaries as it had the potential to dilute their interest in the trust to the benefit of Miss Penelope.

80. CMJ's incorrect finding in this regard is significant as it causes the CMJ to place incorrect weight on the obligations of the 1982 Trustees to contingent or future beneficiaries. The CMJ's analysis continues in this flawed path when considering whether those who gained a benefit from the transfer were incidental. The manner in which membership in the SFN is determined has shifted over time through forces both within and outside the control of the SFN. The effect of the transfer was to forever preserve how membership in the SFN was determined on the date the 1982 Trust was settled. The fact that membership has diverged from this process is incidental to the intention of Chief Twinn when he settled the trust.

81. The British Columbia Court of Appeal in *Mclvor v. Canada (Registrar of lndian and Northern Affairs)* ("Mclvor")[69] held that discrimination was justifiable when it existed to preserve rights that were vested under the former legislation.

82. This finding is analogous to the incidental benefit received by those persons who would qualify in the future for beneficial status in the 1985 Trust given that at the time of settlement of the 1985 Trust membership in the SFN was determined pursuant to the provisions of the *Indian Act* and would have had an entitlement to the membership had the law not changed.

83. It is also notable (and not considered by CMJ) that those persons who have a beneficial interest in the 1985 Trust, but are not a SFN member or have been denied membership, such as Shelby Twinn the granddaughter of Chief Twinn, have ancestral ties and are often not a member of the SFN simply due to the political will of the SFN.

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[69] *McIvor v. Canada (Registrar of Indian and Northern Affairs),* 2009 BCCA 153 at 126, 134

Interference by the Court with an Exercise of Discretion

84. The CMJ correctly identifies that the Court has a very limited role in supervising the exercise of an unfettered discretion granted to a trustee. When a Court should interfere with an exercise of trustee discretion was considered by the Ontario Court (General Division) in *Hunter*, which cites with approval the proposition from *Re Hastings-Bass*, that a Court may not interfere with a trustee's good faith exercise of a discretionary power, unless: "(1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account."[70]

85. When analyzing this portion of the test, the Court in *Hunter* considered whether the purpose for which the discretion was exercised was to accomplish a purpose quite alien from the intention of the settlor.[71] It is submitted that the CMJ erred in his application of the test for whether the discretion was exercised to accomplish a purpose alien to the intentions of the settlor by failing to consider the relevant evidence before him.

86. In considering this portion of the test and whether a Court should interfere with an exercise of discretion, the CMJ failed to take into account that the architect of the transfer was also the settlor, namely Chief Twinn. CMJ also failed to consider that the purpose of the transfer was to honour Chief Twinn's intention when the 1982 Trust was established and to address the consequences Bill C-31 would have on the SFN's membership and which consequences were alien to Chief Twinn when the 1982 Trust was established.

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[70] *Hunter Estate v. Holton,* 1992 CarswellOnt 537 (ONSC) at para. 19

[71] *Ibid* at para. 19-20

87. CMJ also fails to consider that the Bill C-31 women had already received their per-capita payment from the SFN upon enfranchisement. This is unlike the other members of the SFN who would have not received such benefit. CMJ failed to consider the evidence before him that Chief Twinn wished to equalize these financial benefits by establishing the 1985 Trust which held the wealth created to the date of settlement and then the 1986 Trust which would hold the wealth post settlement of the 1985 Trust and in which the C-31 women would and have significantly benefited from.

88. While CMJ may disagree with Chief Twinn's views on these matters, to suggest that the subject transfer would have been alien to his intentions is wholly incorrect and an unreasonable interpretation of the evidence before him. The result of CMJ's decision is to impact a group of beneficiaries in a manner wholly inconsistent with the settlor's intention.

89. Ms. Twinn submits that to distribute the assets of the 1982 Trust to a new trust that determined beneficial entitlement on identical terms to which beneficiary entitlement would have been determined at the time of settlement of the 1982 Trust, persevered and honoured the intention of Chief Twinn when he settled the 1982 Trust.

90. Further, the impact of CMJ's analysis is to undermine the manner in which Chief Twinn, on behalf of the SFN, had decided to manage their resources. Chief Twinn established the 1982 Trust on the basis of his understanding of how membership in the SFN was determined at the time and had been since approximately 1850. It was within the purview of the SFN to make this determination and the legislative decisions of the Government of Canada should not retroactively interfere with this discretion and neither should the Court.

91. It is unfortunate that the SFN now wishes to change course on how it wished to manage its resources in 1985 through supporting an argument that its actions in 1985 were unlawful. It is respectfully submitted that the SFN is utilizing the Bill

C-31 women to its advantage in these proceedings in order to achieve an outcome that has little to do with the actual benefit to be conferred on the Bill C-31 women and more to do with avoiding their obligations to other categories of beneficiaries. More specifically, most of the Bill C-31 have now passed away and the three remaining are elderly and receiving benefits from the 1986 Trust and previously received their per-capita enfranchisement payment. The Bill C-31 women are not going to benefit from a challenge to the subject transfer, but are rather being utilized as a straw man to achieve the SFN's larger objective which is to reverse the decision made in 1985. Such conduct only serves to further the indignities these women of history have suffered and to prejudice many vulnerable persons with Sawridge lineage who presently qualify as beneficiaries of the 1985 Trust and may have no other access to benefits.

D. Exceeding the CMJ's authority by making an order affecting substantive rights, which was effectively a final order, without the consent of all parties and without jurisdiction.

92. The relief granted by the CMJ constituted final and substantive relief in the 2011 Action. Ms. Twinn and the OPGT were very clear that they did not consent to the CMJ granting this relief and that if the CMJ determined that the ATO did not address beneficial ownership of the subject assets, that this issue remained extant and must be determined by the trial judge. While the application before the CMJ was brought by the 1985 Trustees, it was brought at the direction of the CMJ.

93. The Application before CMJ requested that he interpret the ATO. More specifically the remedy claimed was defined as follows:

> Determination and direction of the affect of the consent order made by Mr. Justice D.R.G. Thomas pronounced on August 24, 2016 respecting the transfer of assets from the Sawridge Band Trust dated April 15, 1982 to the Sawridge Band Intervivos Settlement dated April 15, 1985, more particularly described below.)[72]

[72] Application [Appeal Record, at p. 16]

94. The Application did not seek the advice and direction of the Court on the propriety of the transfer. The CMJ used his role to provide a determination of the propriety of the transfer and upon determining the impropriety of same made a finding as to the proper beneficial owners of the subject assets.[73] This determination was granted without authority.

95. Further, the 2011 Action was grounded in an application by the 1985 Trustees for advice and direction as set out in the 2011 Order.

96. The CMJ failed to properly consider and apply the law relating to the Court's role on an application for advice and direction.

97. The law is clear that an application for advice and direction is not a procedure to be utilized to affect the rights of parties to property.[74]

98. Justice Dorgan of the British Columbia Court of Queen's Bench dealt with a request for advice and direction over the management or administration of trust property, and the use of estate funds, in a situation where there was a conflict between the interested parties. She found that the directions sought did not fall within the scope of authority granted by the equivalent provisions in the British Columbia *Trustee Act*. She held that these legislative provisions were intended to allow the Court to help trustees administer the trust by giving advice, not in respect of conflicting parties, but advice regarding the obligations of a trustee.[75]

99. In reaching this finding, Justice Dorgan relied on the following passage from Dr. Waters' authoritative text:

> "management or administration as a limitation upon the *Trustee Act* power of the court to give its opinion, advice, or direction has been more particularly raised in connection with motions which turn out to involve a conflict as to ownership of the assets. The courts refuse to give such assistance when there is essentially a conflict between interested parties, and this is not merely because the court has not the necessary

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[73] Decision of Justice Henderson [Appeal Record at p. 69, para. 286]

[74] *Tomlinson Estate (Re)*, 2016 BCSC 1223 at para. 51

[75] *Ibid* at para. 54

> evidence before it, but because it is felt that a 'fight', whether or not it is patent, is not a matter of management or administration."[76]

100. The authoritative text, Widdifield on Executors and Trustees, also takes this view. The learned author cites the foundational decision in *Lorenz's Settlement* for the position that a court's jurisdiction on advice and direction is confined to:

> …advising "a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties *inter se* …Judges generally now consider that it ought not to be done."[77]

101. By determining that the transfer of assets was void in law, the CMJ in effect deprived the 1985 beneficiaries of their claim to the subject property. This is especially concerning in light of the CMJ's acknowledgment that the 1985 Trustees may be conflicted in their duties between the interests of the 1982 and 1985 beneficiaries.[78] This is notable because this is the first time this conflict has been identified in these proceedings and the adult beneficiaries of the 1985 Trust have been denied party status primarily on the basis that the 1985 Trustees were advocating for their interests.

102. The CMJ also failed to give adequate consideration to the fact that the subject transfer occurred almost forty years ago and the application of the *Limitations Act* to any remedial relief that could be instigated against same. More particularly, there is no conflict on the evidence that the transfer of assets was open and notorious. As such, it is arguable that the beneficiaries and trustees of the 1982 Trust would be barred by the *Limitations Act* from seeking the recovery of the transferred property.

103. The issue before the CMJ clearly engaged issues of substantive rights to property and went beyond matters of mere management or administration.

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[76] *Ibid* at para. 53

[77] Widdifield, *Executors and Trustees*, 6th ed (Toronto: Thomson Reuters, 2016) at 12.3.7; citing *Lorenz's Settlement, Re*, (1861) 1 Dr. & Sm. 401 (Eng. V.-C.)

[78] Decision of Justice Henderson [Appeal Record at p. 30, para. 39]

104. The effect of CMJ's decision is that any advancement of property under a trust is subject to indefinite scrutiny. This is a matter of significant public policy concern and was not considered by the CMJ. The effect of such a decision is that without Court approval, trustees cannot be assured that any historical advance of trust property will not be set aside. This should be of significant concern to the Court and to the trust legal community.

105. In sum, the CMJ had the ability to abstain from granting advice and direction on both the propriety of the transfer and perhaps more importantly, **the consequence of any deemed impropriety**. It was an error in law for the CMJ to grant relief affecting property rights on application for advice and direction or alternatively was an unreasonable exercise of his discretion.

PART 5 RELIEF SOUGHT

106. The Appellant seeks an Order setting aside the decision of the CMJ and confirming that the meaning and effect of the ATO is to confirm that the subject assets are held subject to the terms of the 1985 Trust Deed and for the benefit of the 1985 Trust beneficiaries.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 24th day of June, 2022.

Estimate of time required for the oral argument: 45 minutes.[79]

[79] Rule 14.32(4) provides that unless the panel otherwise permits, oral argument must not exceed 45 minutes for each separately represented party in the appeal, with any consolidated appeals to be treated as one appeal.

Table of Authorities

[2012] UKPC 6
Privy Council Appeal No 0088 of 2010

JUDGMENT

SANS SOUCI LIMITED
(Appellant)
v
VRL SERVICES LIMITED
(Respondent)

From the Court of Appeal of Jamaica

before

Lord Hope
Lord Clarke
Lord Sumption
Lord Reed
Lady Paton

JUDGMENT DELIVERED BY
LORD SUMPTION
ON

7 March 2012

Heard on 1 February 2012

Appellant
Vincent Nelson QC
Gavin Goffe

(Instructed by Myers, Fletcher & Gordon)

Respondent
Richard Mahfood QC
Javan Herberg QC
Dr Lloyd Barnett
Weiden Daley

(Instructed by Charles Russell LLP)

LORD SUMPTION:

1. The Board has before it an appeal and a cross-appeal arising out of arbitration proceedings in Jamaica. The appeal is concerned with the scope of an order made by the Court of Appeal of Jamaica remitting the award to the arbitrators. The cross-appeal raises two discrete questions on costs.

The facts

2. The Appellant company was the proprietor of the Sans Souci Hotel at White River, St. Mary. The Respondent entered into a contract dated 12 October 1993 to manage the hotel. It is convenient to refer to the parties as "the Proprietor" and "the Manager" respectively. The agreement was for a period of just over ten years to 31 March 2004, plus a further ten years at the Manager's option. At the relevant time, the option had been exercised, and the agreement was therefore due to expire in 2014. For present purposes, the provisions which matter are clauses 4(A) and 13-16. By clause 4(A) the Manager was entitled to an annual management fee based on the gross revenue and gross operating profit of the hotel business. Clause 14 conferred on either party a right of termination in certain events, including force majeure. By clause 15, the agreement would also terminate if the Proprietor sold the hotel during its term, but before doing this he was required to offer it to the Manager. Clause 13 provided for disputes to be referred to arbitration before two arbitrators and an umpire in accordance with the laws of Jamaica.

3. In March 2003, the Proprietor purported to terminate the agreement under clause 14 on the ground of force majeure. This provoked a dispute which was referred to arbitration. It was common ground throughout the arbitration proceedings that the agreement was at an end. The issues were defined in general terms in Terms of Reference prepared by the arbitrators at the outset of their proceedings. Paraphrasing this document, they were (i) whether the termination of the agreement had come about by the lawful exercise of the Proprietor's right of termination or by their unlawful repudiation; and (ii) if the latter, what damages were recoverable by the Manager in consequence.

4. Before the arbitrators, the Manager claimed damages under three heads. The main claim was for the gross management fees which would have accrued from the termination of the agreement until 2014, discounted for early receipt. This was disputed mainly on the ground that the correct measure of damages was the Manager's loss of profit, and that in arriving at the loss of profit it was necessary to deduct from the gross fees the so-called "unrecoverable expenses". These were expenses which, according to the Proprietor, the Manager would have incurred in performing its

functions and could not have recovered under the terms of the agreement. The main issue about them was whether they were really unrecoverable. Second, there was a claim for the value of the Manager's right of first refusal on the sale of the hotel, if it should be held that the hotel would have been sold before the natural expiry of the agreement. This head of claim appears to have been introduced in case the Proprietor should contend that the hotel would have been sold and the payment of management fees thereby brought to an end before 2014. In the event, however, the Proprietor did not say this. Its case was that there was no evidence of any intention to sell and no reason to suppose that if there was a sale the Manager would emerge as the buyer. At some stage, the Manager appears to have conceded this, and the point fell away. Finally, the Manager claimed certain expenditure said to have been wasted as a result of the termination. This head was, in the event, unchallenged.

5. The arbitrators issued their award on 16 July 2004. They held that the Proprietor had repudiated the agreement, and awarded damages of US$6,034,793. A small proportion of this sum represented the wasted expenditure. The rest was the present value of management fees accruing between the termination of the contract and 2014, on assumptions about the gross revenue and operating profit during that period which were derived from expert evidence given at the hearing. The tribunal made no deduction from the projected management fees for "unrecoverable expenses". Apart from referring briefly to this issue as arising from a "set-off" claimed by the Proprietor, they said nothing about it at all.

6. After receiving the award, the Proprietor applied to the Court under Section 11 of the Arbitration Act to set it aside or remit it to the arbitrators. One of the grounds of the application was the arbitrators had not dealt with the "unrecoverable expenses". A number of other grounds were also put forward, but they failed and are not part of this appeal. It is unnecessary to say anything about them.

7. The Judge, Harris J, dismissed the Proprietor's application in its entirety. The Proprietor appealed, and the Court of Appeal gave judgment on 12 December 2008. On most points, they agreed with the Judge. However, they allowed the appeal on the ground based on the "unrecoverable expenses". They held that by characterising the Manager's case about these expenses as being based on set-off, the arbitrators had misunderstood it. As a result, they had failed to make the appropriate findings about the expenses, or to take them into account in the assessment of damages, or to explain why they had not done so. They remitted the award to the arbitrators in the following terms:

> "The appeal against the award of damages is allowed and the matter is remitted to the Arbitrators to determine the issue of damages only."

This order was perfected on 2 January 2009.

8. When the matter came back before the tribunal, the Proprietor sought to raise two points on damages in addition to the question of "unrecoverable expenses", and to lead fresh evidence in support of them. The first was that the Proprietor had in fact sold the hotel on 10 September 2005. This was presumably the prelude to an argument that management fees could not in any event have been earned beyond that date. The second additional point was that economic problems adversely affecting the Jamaican tourist industry after the termination of the agreement would have reduced the management fees below the level which the tribunal, in their award, had derived from the expert evidence. The tribunal refused to entertain either point. In a preliminary ruling on 20 February 2009, they ruled that the award had been remitted to them for the limited purpose of dealing with the "unrecoverable expenses" to be deducted from the future management fees. They were not therefore entitled to reassess the value of the management fees themselves.

9. The Proprietor responded with fresh court proceedings to challenge the arbitrators' preliminary ruling. Their case was that the Court of Appeal had remitted the question of damages generally, and that all points relevant to damages were therefore in principle open before the arbitrators. This was rejected in the Supreme Court and again in the Court of Appeal. The issue now comes before the Board some seven years after the date of the original award.

The appeal: the scope of the remission

10. Section 11 of the Arbitration Act empowers the Court to "remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire." This statutory power has its origin in section 8 of the English Common Law Procedure Act 1854. It exists in order to enable the tribunal, which would otherwise have been *functus officio* from the publication of its award, to address issues which were part of the submission to arbitration but were not resolved, or not properly resolved, in the award. Leaving aside the perhaps anomalous category of cases in which an award has been remitted on the ground that fresh evidence has become available since it was made, the essential condition for the exercise of the power is that something has gone wrong with the proceedings before the arbitrators. Some error, oversight, misunderstanding or misconduct must have occurred which resulted in the tribunal failing to complete its task and justifies reopening what would otherwise be a conclusive resolution of the dispute.

11. It is apparent from the reasons given by the Court of Appeal in December 2008 that, in ordering a remission, they were concerned only with the way in which the arbitrators had dealt with, or failed to deal with, the "unrecoverable expenses".

Harrison P., delivering the leading judgment, identified the error or oversight which justified the remission at paragraph 69:

> "Whether or not expenses incurred by the Respondent were in fact 'unrecoverable', as claimed by the appellant in its Points of Defence, or reimbursable as contended by the Respondents, should have been determined by the arbitrators. The arbitrators were required to demonstrate in their award that they accepted that the expenses were 'unrecoverable', or alternatively payable by the Appellant. At its lowest, the arbitrators should have demonstrated that they considered the issue of 'unrecoverable expenses' as contended for by the Appellant."

No other matter is identified by the Court of Appeal as warranting a remission. Indeed, no other criticism was made of the way in which the arbitrators had dealt with damages.

12. The Proprietor's response is simple, perhaps too simple. It is that the scope of the remission is determined by the Court of Appeal's order. The order allowed "the appeal against the award of damages", and remitted the award to the arbitrators to determine "the issue of damages". In the absence of any words of limitation, it is said that this unambiguously means the entire issue as to damages as formulated in the arbitrators' Terms of Reference. In the absence of any ambiguity in the language of the order, it should not be construed by reference to the limited reasons given for making it.

13. In the opinion of the Board, this approach to the construction of a judicial order is mistaken. It is of course correct that the scope of a remission depends on the construction of the order to remit. But implicit in the Proprietor's argument is the suggestion that the process of construing the order is to be carried out in two discrete stages, the first of which is concerned only with the meaning of the words, and the second with the resolution of any "ambiguities" which may emerge from the first. The Court's reasons, so it is said, are relevant only at the second stage, and then only if an "ambiguity" has been found. The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.

14. It is generally unhelpful to look for an “ambiguity”, if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.

15. As with any judicial order which seeks to encapsulate in the terse language of a forensic draftsman the outcome of what may be a complex discussion, the meaning of the order of the Court of Appeal in this case is open to question if one does not know the background. The order refers generally to “the issue of damages” because if the arbitrators were to decide that there were “unrecoverable expenses”, they would not simply deduct them from the amount which they had awarded. They would have to deduct them from the undiscounted gross management fees, and then discount the net figure for early receipt. But the reference in the order to “the issue of damages”, although necessary, begged the question “Which issue of damages?” The order does not itself answer it. Only extrinsic evidence can do that. The Proprietor accepts this. Mr Nelson’s case was that it is admissible to consult the arbitrators’ Terms of Reference to identify “the issue of damages” to which the order referred. But it appears to the Board that this concession, which was clearly rightly made, exposed the illogicality of the Proprietor’s case. If it is admissible to construe an order of remission by reference to the issues in the arbitration, it cannot rationally be held inadmissible to construe it by reference to the issues which the remitting court regarded as calling for reconsideration by the arbitrators. As Rix J pointed out in his valuable judgment in *Glencore International A.G. v. Beogradska Plovidba (The "AVALA")* [1996] 2 Lloyd's Rep. 311, 316:

> “When... a Court remits an award to an arbitrator, it is not remitting a whole dispute, unless upon the terms of the order it expressly does so. It generally remits something narrower, and where it does so against the background of an arbitration which has already been defined by pleadings and argument before an arbitrator, it is some one or more of the issues as so defined within the scope of the reference that in general must be considered to be the subject matter of the remission.”

16. Of course, it does not follow from the fact that a judgment is admissible to construe an order, that it will necessarily be of much assistance. There is a world of difference between using a Court’s reasons to interpret the language of its order, and using it to contradict that language. The point may be illustrated by the decision of the Court of Appeal in England in *Gordon v. Gonda* [1955] 1 WLR 885, where an attempt was made to contradict what the Court regarded as the inescapable meaning of an order, by arguing that the circumstances described in the judgment could not have justified an order which meant what it clearly said. Therefore, it was said, the judge must have meant something else. The answer to this was that any inconsistency between the circumstances of the case or the reasoning of the Court and the resultant

order was properly a matter for appeal. A very similar argument was rejected by the Board for the same reason in *Winston Gibson v Public Service Commission* [2011] UKPC 24. Decisions such as these (and there are others) are not authority for the proposition that a Court's reasons are inadmissible to construe its order. They only show that the answer depends on the construction of the order and that the reasons given in the Judgment may or may not make any difference to that.

17. These considerations apply generally to the construction of judicial orders. But there are particular reasons for giving effect to them in the context of the judicial supervision of arbitration proceedings. An arbitration award is prima facie conclusive. The Court has only limited powers of intervention. It exercises them on well-established grounds such as (to take the case arising here) the arbitrators' failure to deal with some matter falling within the submission. The reopening by the arbitrators of findings which there were no grounds for remitting and which they had already conclusively decided would therefore have been contrary to the scheme of the Arbitration Act. The terms of the order may of course in some cases be such that it must be concluded that the Court did exceed the proper limits of its functions. But it should not readily be assumed to have done so, especially when its reasons show that it has not.

18. The arbitrators were right to reject the Proprietor's attempt to introduce new challenges to the assessment of the gross future management fees in February 2009, and the Courts below were right to endorse their decision.

The cross-appeal: Costs of the Proprietor's application to set aside or remit

19. This point may be shortly dealt with, for it turns entirely on the facts.

20. The Court of Appeal reserved judgment for nineteen months on the Proprietor's application to set aside or remit the award. They then handed it down on one day's notice on 12 December 2008, the last day of term. No advance copy of the judgment was available before it was handed down. Counsel who had been engaged for the Manager on the application were unable to attend, and it was necessary to send junior counsel to take the judgment who knew little or nothing about the case. The judgment as handed down dealt with the costs of the application by ordering that half of the Proprietor's costs should be paid by the Manager. But no argument about costs was either invited or heard.

21. Once the Manager's advisers had studied the judgment, they decided to ask for a more favourable order as to costs than the Court had proposed. They wrote to the Registrar of the Court of Appeal on 7 January 2009 asking to be heard. Unfortunately, unknown to the Manager or its representatives, the order had in the mean time been perfected on 2 January 2009. On 20 January 2009, the Manager formally applied for a

more favourable order. On the following day the Registrar wrote in answer to the Manager's letter of 7 January to convey the view of Panton P., the President of the Court of Appeal, that the Court of Appeal was *functus officio* and that in any event the order for costs was right. Panton P. had not been a member of the court that decided the Proprietor's application. Nor, judging by the Registrar's letter, had he consulted those who had been. He also appears to have been unaware of the Manager's formal application of 20 January. The Manager's application on costs was ultimately heard on 9 March 2009 by a division of the Court of Appeal presided over by Panton J himself. On 2 July 2009, they gave Judgment rejecting it. Their reason, in summary, was that that there had been no miscarriage of justice, essentially because "there was ample opportunity for Counsel for the Applicant to make an application to be heard on the issue of costs before the order was perfected": Panton P. at [32]; cf. Cooke at [49]. By leave of the Board, the Manager now cross-appeals against that decision.

22. It is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard. The Court of Appeal included an order for costs in their Judgment of 12 December 2008 without hearing either party upon it. The Practice Direction in Jamaica assumes that submissions on costs, if any, will be made before the Court rises after giving Judgment, a course which it would have been impossible for the Manager's representatives to follow in this case because they had had no advance notice of the contents of the judgment and only one day's notice of the fact that it was to be delivered. This procedure may nevertheless be perfectly acceptable, provided that the order included in the Judgment is provisional, and that parties are given a reasonable opportunity to address the Court on costs later.

23. The importance of finality in litigation has been emphasised by generations of common lawyers. Ultimately there must come an end to the parties' opportunities for reopening matters procedural or substantive which have been judicially decided. This principle is, however, founded on an assumption that they were decided in accordance with the rules of natural justice. Notwithstanding the importance of finality, the rule of practice is that until either (i) a reasonable time has elapsed, or (ii) the order has been perfected, a party who has not been heard on costs or other matters arising out of a judgment, is entitled as of right to be heard. Thereafter, the Court still has an inherent jurisdiction to hear him, but the test is more exacting. The order will be varied only in exceptional circumstances, when the party can demonstrate that the form of the order can be attributed to a miscarriage of justice: *Taylor v. Lawrence* [2002] EWCA Civ. 10, [2003] QB 528 at [55]. The Board would endorse the test which was formulated in *Re Uddin* [2005] I WLR 2398, at [4], and applied by the Court of Appeal in this case, that there must be "special circumstances where the process itself has been corrupted." This is not the occasion for extended review of the circumstances which will satisfy this test, but the Board has no doubt that one of the circumstances which will satisfy it is that the party desiring to be heard did not have a reasonable opportunity to be heard at an earlier stage when the test would have been less formidable.

24. The Board cannot avoid a strong sense of discomfort about the rather peremptory procedure which was adopted in this case. However, the Manager was ultimately heard on costs, and it seems to the Board that when the Court of Appeal came to rule upon it they applied the correct test. The decisive factor was the Court's finding that in the three week period between the delivery of judgment on 12 December 2008 and the perfection of the order on 2 January 2009, the Manager had had a reasonable opportunity to apply to be heard. The Board has been invited to reject this finding. But they are satisfied that it would not be appropriate for them to do so. The Court of Appeal was familiar with the practicalities of litigation in its jurisdiction. It was in a much better position than the Board is to assess what opportunities there were for the Manager to make its application in that period. There are no grounds on which its finding can properly be disturbed.

The cross-appeal: the costs of the guarantee

25. There is brief coda to the cross-appeal. It arises from the fact that in 2005 the Supreme Court stayed enforcement of the award on terms that the Proprietor should pay it in full against a guarantee for its repayment so far as the subsequent proceedings should go the Proprietor's way. The Manager had to pay the substantial charges for setting up the guarantee and maintaining it in force, which it now wishes to claim as part of the costs of the proceedings. However, no application to this effect was made to the Court of Appeal when the Manager sought to vary the order for costs made on 12 December 2008. And if it had been, it would inevitably have met the same fate as the Manager's principal application on costs. Since the premise of this particular argument is that the Manager succeeds in its application to reopen the Court of Appeal's order for costs, the point does not arise.

Conclusion

26. The Board will humbly advise her Majesty that the appeal and the cross-appeal should both be dismissed. The parties will have twenty-eight days in which to lodge written submissions about the order to be made for the costs of the proceedings before the Board.

FCLR

*612 Pilkington and Another Appellants; v. Inland Revenue Commissioners and Others Respondents.

Image 1 within document in PDF format.

House of Lords
8 October 1962

[1962] 3 W.L.R. 1051

[1964] A.C. 612

Lord Reid , Viscount Radcliffe , Lord Jenkins , Lord Hodson and Lord Devlin .
1962 July 9, 10, 11; Oct. 8.

Analysis

[On Appeal from In Re Pilkington's Will Trusts.]

Trusts—Power of advancement—Exercise of power—Statutory power—Fund held on trust for beneficiary for life and after his death for such of his children or remoter issue as he should appoint—Settlement for the benefit of infant child of beneficiary—Advancement of moiety of infant's expectant share on trusts of new settlement Avoidance of death duties —Whether advancement for benefit of object of power—Whether rule against perpetuities infringed— *613 Whether valid exercise of power of advancement— Trustee Act, 1925 (15 Geo. 5, c. 19)

Perpetuity Rule—Power of advancement—Power used for resettlement—Application of perpetuity rule.

Power of Appointment—Power of advancement—Distinction—Perpetuity rule.

By his will dated December 14, 1934, a testator directed his trustees to hold the income of his residuary estate upon protective trusts in equal shares for all his nephews and nieces living at his death with a provision that their consent to any exercise of any applicable power of advancement should not cause a forfeiture of their interests; and after the death of a nephew or niece to hold the capital and income of such beneficiary's share for his or her children or remoter issue as he or she should appoint and in default of appointment for his or her children at 21. The will contained no provision replacing or excluding the power of advancement contained in section 32 of the Trustee Act, 1925. [1] The testator died on February 8, 1935. One of his nephews was married and had three infant children. The second child, a daughter, was born on December 29, 1956, and the trustees, for the purpose of avoiding death duties, desired to exercise the statutory power of advancement in her favour by applying up to one moiety of her expectant share in the testator's trust fund by adding it to a fund, which it was proposed should be subject to the trusts of a new settlement, under which the income of the fund was to be applied for her maintenance until she attained 21, and from then and until she attained 30 was to be paid to her, when the capital was to be held on trust for her absolutely. If she should die under that age the trust fund was to be held upon trust for her children who should attain the age of 21 years and, subject as aforesaid, upon trust for the nephew's other children.

On a summons to determine whether the trustees might lawfully so exercise the power of advancement:-

Held:

(1) that there was nothing in the language of section 32 of the Trustee Act, 1925 , which in terms or by implication restricted the width of the manner or purpose of advancement. In particular, if the whole provision made for the object of the power was for his or her benefit, it was no objection to the exercise of the power that (as might happen here) other persons benefited incidentally as a result of the exercise, nor was it bad merely because moneys were to be tied up in a proposed settlement. Accordingly, there was no maintainable reason for introducing into the statutory power of *614 advancement a qualification that would exclude its exercise in the manner proposed by the trustees (post, pp. 636, 640). Lowther v. Bentinck (1874) L.R. 19 Eq. 166 ; In re Joicey [1915] 2 Ch. 115, C.A. ; In re Halsted's Will Trusts [1937] 2 All E.R. 570 ; In re Ropner's Settlement Trusts [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332 ; and In re Collard's Will Trusts [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 considered .

(2) But that the exercise of the statutory power of advancement which took the form of a settlement was a special power akin to a special power of appointment and, as such, must be exercised within the period permitted by the rule against remoteness, and its exercise must, for the purpose of the rule, be written into the instrument creating, the power, and that since the new settlement was only effected lay the operation of a fiduciary power which itself "belonged" to the old settlement, the trusts of the settlement proposed by the trustees must be treated as if they had been made by the testator's will, ailed so treated they infringed the rule (post, pp. 641-642).

Decision of the Court of Appeal [1961] Ch. 466; [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330, C.A. reversed .

APPEAL from the Court of Appeal (Lord Evershed M.R., Upjohn and Pearson L.JJ. [2] .

This was an appeal from an order of the Court of Appeal dated March 24, 1961, discharging (save so far as it related to costs) an order of the Chancery Division of the High Court of Justice (Danckwerts J.) dated May 14, 1959. The said orders were made in a cause or matter commenced by originating summons wherein the respondents, Guy Reginald Pilkington, Leonard Norman Winder, David Frost Pilkington and Clifford Pearson, trustees of the will of William Norman Pilkington, were the plaintiffs; and the appellants, Richard Godfrey Pilkington and Penelope Margaret Pilkington, were originally the only defendants, the respondents the Commissioners of Inland Revenue being added as defendants by order of the Court of Appeal dated July 18, 1960.

The question at issue in this appeal was whether the trustees could lawfully exercise the powers conferred on them by the will of William Norman Pilkington (hereinafter called "the testator") and section 32 of the Trustee Act, 1925, by making part of the expectant interest of the appellant Penelope Margaret Pilkington in the testator's residuary trust fund subject to the trusts, powers and provisions of a new settlement to be executed by the respondent, Guy Reginald Pilkington.

By his will dated December 14, 1934, the testator, William *615 Norman Pilkington, directed his trustees to invest his residuary estate and to hold the fund upon trust in equal shares for all his nephews and nieces, therein defined as "the beneficiaries," being children of his brothers Lionel Edward Pilkington, Charles Raymond Pilkington and Guy Reginald Pilkington, living at his death who should attain the age of 21 years or being female marry under that age. The share of each beneficiary was, so far as is here material, settled upon express protective trusts for the benefit of the beneficiary during his or her life, with a provision that his or her consent to any exercise of any applicable power of advancement should not cause a forfeiture of the interest. After the death of a beneficiary the capital and future income of the share of such beneficiary was to be held in trust for the children or remoter issue of such beneficiary as he should appoint with a trust in default of appointment for the beneficiary's children on attaining the age of 21 years or marriage. If the trusts

of the share of a beneficiary should fail then it was to accrue to the other shares in the trust fund. The will contained no provision replacing or excluding the power of advancement conferred upon trustees by section 32 of the Trustee Act, 1925 . The testator died on February 8, 1935, and his will was duly proved by his executors.

The first appellant, Richard Godfrey Pilkington, a son of Guy Reginald Pilkington, was married with three children. His father, who was also a trustee of the will, was desirous of making a settlement in favour of the second appellant, Penelope Margaret Pilkington, the second child of Richard Godfrey Pilkington, who was born on December 29, 1956, and he proposed to his co-trustees that he should execute a settlement for the benefit of Penelope and that the trustees of the will should then exercise the power given by section 32 of the Trustee Act, 1925 , by applying part of Penelope's expectant share in the testator's trust fund by adding it to the fund subject to the trusts of the proposed new settlement. Accordingly he paid £10 in cash to the trustees of the proposed settlement under which the trustees were directed to hold this sum, together with any further moneys (the intended total sum being £7,600) which were to be paid to them upon the following trusts: Until Penelope attained 21 years, or died under that age, the trustees were to have power at their discretion to apply the whole or any part of the income of the trust fund for the maintenance, education or benefit of Penelope as they thought fit and were to accumulate the residue of income as an addition to the capital of the trust fund, with power to apply all or part of the accumulations as if they were income of the current year; if she *616 should attain 21 years then until she attained 30 years, or died under that age, the trustees were to pay the income of the trust fund to her. The capital of the fund to be held upon trust for her upon attaining 30 years absolutely; if Penelope died under the age of 30 leaving children or a child living at her death the trustees were to hold the fund and the income thereof in trust for all or any her children or child who should attain the age of 21 years, if more than one in equal shares, and in such event the trusts applicable until Penelope attained 21 were to apply to the children and the income of their expectant shares of the fund. Subject to these provisions the trustees were to hold the fund in trust for all or any the children or child of Richard Godfrey Pilkington (other than Penelope) who being male attained 21 years or being female attained that age or married if more than one in equal shares. In the event of the failure of the trusts the fund was to be held upon the trusts of the will of the testator applicable to the share of Richard Godfrey Pilkington as though he had died without being married. The power of advancement contained in section 32 of the Trustee Act, 1925 , was expressly made applicable.

The trustees of the will took out a summons to determine whether they could lawfully exercise the powers conferred upon them by section 32 of the Trustee Act, 1925 , in relation to Penelope's expectant interest in the testator's trust fund by applying (with the consent of Richard Godfrey Pilkington) up to one moiety of the capital of such interest so as to make it subject to the new proposed settlement, or whether such an application of the capital would be improper and unauthorised because: (a) Penelope's interest under the proposed settlement would vest at a date later than the date on which she attained a vested interest in her expectant share under the will of the testator; or (b) the trusts of the new settlement, if contained in the will of the testator, would be void for perpetuity.

Danckwerts J. held that the power of advancement might be legitimately exercised by paying some part of the capital of Penelope's share (not exceeding one moiety) to the trustees of the proposed settlement and so as to make it subject to the trusts, powers and provisions of such settlement and, since the power of advancement took the property advanced out of the original settlement, the relevant period for the purposes of the rule against perpetuities was to be determined by reference to the proposed settlement and the power could accordingly be exercised in the manner proposed.

On July 18, 1960, the Court of Appeal, on the motion of the *617 respondent trustees, ordered that the Commissioners of Inland Revenue might be added as parties and further that (not withstanding that the time for appealing had expired) the trustees or the commissioners might be at liberty to appeal from the order of Danckwerts J.

The Commissioners of Inland Revenue appealed. The grounds of their appeal were that the order was wrong in law:

(1) Because the proposed transaction was nothing less than a resettlement of the capital over which it extended upon trusts and with and subject to powers and discretions not contained in or contemplated by the testator's will and not authorised by the power of advancement contained in section 32 and because it was irrelevant that the trustees thought that it was for the benefit of Penelope that it should be so resettled.

(2) Because to resettle any part of the capital of the share of a beneficiary was not within the meaning of the phrase "to pay or apply any capital money" subject to a trust.

(3) Because upon the true construction of the section the power of advancement thereby conferred upon trustees to pay or apply any capital money subject to a trust for the advancement or benefit of any person entitled to the capital of the trust property or of any share therein did not extend to enable such trustees to deprive such person of the interest in property conferred upon him by the trust instrument or to declare new or other trusts affecting such capital or share or to do any act or thing in relation to the trust property which would operate to deprive such person of such interest or to subject such capital or share to such new or other trusts.

(4) Because the power of advancement might only be exercised to accelerate and, if necessary, enlarge the interest of the person sought to be advanced and not to postpone or reduce it.

(5) Because the effect of the proposed transaction would be to deprive Penelope of her existing contingent interest in the capital sought to be subjected to the trusts of the proposed new settlement and to subject such capital to trusts which differed from those declared by the will and to postpone and reduce Penelope's interest in such capital.

(6) Because In re Fox [3] and In re Joicey [4] are authority for the proposition that a power of advancement did not enable the trustees to alter the devaluation of the estate or to destroy the contingent interest of the person sought to be advanced.
*618

(7) Because the authorities upon which Danckwerts J. relied, properly understood, did not decide the contrary or, if they did, were wrongly decided.

(8) Because, if contrary to the contention of the Commissioners of Inland Revenue the said power of advancement extended to enable the trustees to subject the capital to new or other trusts, and thereby to postpone or reduce the interest of Penelope, the validity or otherwise of any such new or other trusts in relation to the rule against perpetuities fell to be tested by considering whether they would have been within the rule if they had been declared by the testator's will.

(9) Because the trusts in favour of Penelope and her children declared by the proposed new settlement would have been void for remoteness if contained in the testator's will.

(10) Because the subjection of any part of the capital of the expectant share of Penelope to the trusts, powers and provisions of the proposed new settlement would be an unlawful delegation of the trusts, powers and provisions of the will.

(11) Because under the trusts of the proposed new settlement persons who were not objects of the power of advancement (and in particular Penelope's children) were beneficiaries, and the proposed transaction was accordingly a transaction in excess of the said power.

The Court of Appeal allowed the appeal.

Sir Milner Holland Q.C. and *Eric Griffith* for the appellants. The trustees of the testator's will take the view that it is for the benefit of Penelope that part of her contingent reversionary interest in the testator's residuary trust fund should be raised now and made subject to the trusts, powers and provisions of a new settlement to be executed by the respondent Guy Reginald Pilkington. This raises the questions (1) whether the trustees have power to do this under section 32 of the Trustee Act, 1925 , if in their absolute discretion they consider that it is for the benefit of the infant Penelope. (2) The subsidiary question whether the terms of the proposed settlement would infringe the rule against remoteness of vesting.

(1) There is no express reference in the will to a power of advancement, and, accordingly, the trustees have the powers of advancement conferred on them by section 32 of the Trustee Act, 1925 . It is not disputed that the trustees' proposed exercise of the power is bona fide. The proposed exercise of the *619 power can only be ineffective in law if in any circumstances it cannot be for Penelope's benefit. The only view to the contrary Which would appear to have cogency is that held by the Court of Appeal, namely, that the proposed exercise is not within the purview of section 32 at all.

Attention is drawn to the very wide language of section 32. The words are "advancement or benefit." The words "or benefit" are not a mere trifling addition but cover any application of money for the benefit of the object of the power which may not be advancement as such. In Roper-Curzon v. Roper-Curzon [5] it was held that even a bare power of advancement justified the payment of money into the trusts of a post-nuptial settlement of the person for whose benefit the power was exercised. As to "benefit": see Lowther v. Bentinck [6] and In re Kershaw's Trusts. [7] "Benefit" is not to be construed in this context ejusdem generis with "advancement" but is a word of very wide import: see In re Halsted's Will Trusts, [8] where Farwell J. adopted the observations of Jessel M.R. in Lowther v. Bentinck [9] and held that a power to benefit A included power to benefit other persons for whom A was under some obligation.

In the Court of Appeal [10] it was pointed out that in Roper-Curzon [11] and Halsted [12] the power was exercised for the benefit of an adult beneficiary. It is to be observed (a) that in both cases the payments were in fact made to the trustees of a new settlement; (b) if it is not within a power of this kind to pay money to the trusts of an existing settlement it could not be a proper exercise of the power to pay it to an adult to apply it to the trusts of a new settlement, for that would amount to a fraud on the power.

In In re Ropner's Settlement Trusts [13] Harman J. considered that it had been rightly conceded in argument that it was a proper exercise of the power of advancement there for the trustees of the original settlement to hand money to the

trustees of a new settlement provided that they were satisfied after a proper consideration of all the circumstances that such exercise was for the benefit of the objects of the power.

As to the judgment of Lord Evershed M.R., [14] it is conceded *620 that if the trustees are concerned only with the advancement in life of a beneficiary then any advancement must relate to the personal circumstances or personal needs of that beneficiary, but under section 32 one is considering not only the payment of money for advancement but also the application of capital moneys "subject to a trust, for the advancement or benefit,... of any person entitled to the capital of the trust property." These words cannot be confined here to the personal needs of Penelope. Further, it is not disputed that the trustees must consider the circumstances at the time they exercise the power, but the exercise of the power conferred by section 32 cannot be limited to those circumstances which the situation of the object of the power demand to be done.

As to the ambit of a power of advancement "for benefit and advancement": see In re Brittlebank [15] which shows that the effect of the insertion of the word "benefit" is to enlarge the power and give it a wider extension than "advancement" alone would give, and that in the absence of mala fides on the part of the trustees, once they have reached the conclusion that a given exercise of the power is for the benefit of the object of the power the court will not interfere with the exercise of it.

The fact that the Court of Appeal have held that the power of advancement contemplated in section 32 is one to be exercised in special circumstances, for example, setting up the object of the power in a profession, or making some provision on marriage, is inconsistent with the view that the avoidance of death duties justifies trustees in exercising this power, for that is not a special circumstance but an ever present situation; nevertheless, the court approved In re Collard's Will Trusts [16] where the sole purpose for exercising the power was to avoid death duties.

The Court of Appeal placed reliance on In re Joicey, [17] but the power in question there was an arbitrary power and not a power of advancement under which the trustees have to consider whether in the circumstances its proposed exercise is for the benefit of the beneficiary.

A limitation on the scope of this power cannot properly be derived from the cross-heading "Maintenance, Advancement and Protective Trusts" which precedes section 31 of the Trustee Act, 1925 . It by no means follows that because an advancement *621 requires special circumstances therefore the object of the power can only receive a benefit under section 32 in special circumstances. Further, where trustees have exercised the power bona fide it is not within the province of the court to overrule them.

(2) If the rule against perpetuities as contended for by the Crown is applicable then the relevant date for the purposes of the rule is the death of the testator in library, 1938. It is submitted, however, that the exercise by the trustees of the power of advancement takes the sum in question out of the will entirely. Accordingly, it is irrelevant to consider whether interests created by Guy Reginald Pilkington's settlement vest within 21 years after lives in being under interests created by the will of the testator. For the purposes of the rule, therefore, the relevant interests are those contained in the proposed settlement. If this view be wrong it is surprising that it was not adverted to in Roper-Curzon v. Roper-Curzon [18] since it follows from the Crown's contention that what the court authorised there plainly offended the rule.

In re Gosset's Settlement, [19] Lawrie v. Buncos [20] and In re Fox [21] show that once trustees decide to exercise a power of advancement the sum advanced is taken right out of the settlement for all purposes and thus any trust created in respect of such sum is not read back into the original instrument.

Upjohn L.J. [22] described the power here as a special power, but there is no such interest known to the law as a *special* power of *advancement.* The addition of the word "special" adds nothing to the concept of a power of advancement. Those authorities, therefore, such as In re Fane, [23] which lay down that for the purposes of the rule against perpetuities all limitations made in pursuance of a special power shall be such only as would have been valid if inserted in the original will or settlement, are inapplicable.

[Reference was also made to Morris and Leach, The Rule Against Perpetuities, 1st. ed., p. 50 and to In re Legh's Settlement Trusts. [24]]

B. L. Bathurst Q.C. (Viscount Bledisloe) and *James Cunliffe* for the trustees. The argument on behalf of the appellants is *622 adopted. For the following reasons the trustees consider that their proposed exercise of the power of advancement conferred on them by section 32 of the Trustee Act, 1925 , is a proper exercise thereof: (i) Penelope's advanced share could not thereafter be divested by the subsequent exercise of her father's special power of appointment over his share of the trust fund. (ii) If her father survived the advance for more than two years, estate duty would be reduced and after five years no estate duty would be payable in respect of it on his death. (iii) The income from the advanced share would be used wholly for Penelope's maintenance, or, accumulated. (iv) That income would be (a) free from surtax and (b) qualify for personal allowances for Penelope. (v) On attaining 21, Penelope would be absolutely entitled to the income. (vi) Penelope's children would be provided for if she died between the ages of 21 and 30. (vii) Penelope obtains the capital on attaining 30. (viii) Penelope would be protected from extravagance on attaining 21.

The Court of Appeal have held in allowing the Crown's appeal (1) that the proposed settlement is nothing more than a resettlement; (2) that an advancement must relate to some special circumstance arising.

As to (1), advancements by way of settlement have a long history: see Roper-Curzon v. Roper-Curzon. [25] If an advancement by way of a settlement of this kind can be said in certain circumstances to be a benefit for an adult it would be very surprising if such a benefit were to be denied to an infant.

As to (2), whether there must exist a particular need, the language of section 32 could hardly be wider, and it has nowhere been suggested that there is anything improper in what the trustees propose to do. In re Moxon's Will Trusts [26] is an example of the court refusing to interfere with a bona fide and reasonable exercise by trustees of a discretion vested in them.

As regards the perpetuity question, the short answer is that when a power of advancement is exercised the fund advanced is taken right out of the original settlement: see *per* Danckwerts J, [27] To call this a special power is meaningless. The word "special" in relation to powers has always been linked with powers of appointment and it is only in relation to a limited or special power of appointment that the power must be read back for this purpose *623 into the original will

or settlement. Thus, in relation to a power of advancement once the fund is taken out there is no vested interest left under the original settlement.

Peter Foster Q.C. and *E. B. Stamp* for the Commissioners of Inland Revenue. Reliance is placed on the following propositions: (1) The statutory power contained in section 32 of the Trustee Act, 1925 , can only be used to enlarge or accelerate the beneficiary's interest and not to postpone or reduce it. (2) The proposed exercise of the power in this case will offend the rule delegates non potest delegare. That doctrine applies to all powers and applies to section 32. (3) The proposed exercise of the power is void as being an excessive execution since non-objects are included. (4) The proposed exercise is nothing less than a resettlement and cannot come within section 32 however wide a meaning is given to the words "pay or apply." (5) The proposed exercise of the power will offend the rule against perpetuities in any event.

1. The position under the will is that Penelope has a vested interest at 21 or earlier marriage. Under the proposed settlement she is given a contingent interest until she attains 30. The effect of the exercise of the power is not to advance her interest but to postpone its vesting from 21 to 30. This power does not enable trustees to alter the devaluation of or destroy the contingent interest of the beneficiary advanced. There must be an out and out payment and there cannot be a settlement without the advancee so asks and it is then the advancee who is the settler. The power of advancement given by section 32 follows the old form of advancement used by convincers and is similar to that to be found in the precedent books for many years before 1925. Reliance is placed on the definition of advancement propounded by Cotton L.J. in In re Aldridge [28] : "it is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy, before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled."

If a power of advancement were as wide as has been contended for by the appellants In re Morris's Settlement Trusts [29] would have been decided differently. "A power of advancement is a purely ancillary power, enabling the trustees to anticipate by means of an advance under it the date of actual enjoyment *624 by a beneficiary selected by the appoint or of the interest appointed to him or her, and it can only affect the destination of the fund indirectly in the event of the person advanced failing to attain a vested interest": *per* Jenkins L.J. [30]

The purpose of exercising a power of advancement is to accelerate the vesting in interest of capital and not to postpone such vesting. The power of advancement contained in section 32 is a very limited power in that it is limited to the payment of an application of capital and capital moneys to a person interested in capital and to no one else. It is emphasised that although the language of section 32 may appear quite wide the nature of the power is such as to accelerate and not to vary, reduce or postpone the nature of the interest. Ex hypothesi it does not enable a resettlement which alters, varies and postpones the interest in question.

The House is invited to consider the cross-heading which precedes section 31 as an aid to the construction of section 32: Qualter, Hall & Co. v. Board of Trade. [31] It is "Maintenance, Advancement and Protective Trust." There are only three sections under this heading. Section 32 is the second of them and therefore it must refer to advancement. Powers of advancement are used to advance capital to a particular person for a particular purpose, for example, the purchase of a commission. The word "benefit" extends the purposes for which the payment may be made, such as, for example, the payment of debts. "Apply" is limited to the expending of money on behalf of the beneficiary for his benefit in contradistinction to a payment to the beneficiary direct. "Benefit" is anything which accrues to the beneficiary as a result of the immediate spending of money by the trustees. "Apply" in the context of section 31 (1) and (2) and section

33 (1) (ii) clearly means "expend" and it is plain that an application of income under section 31 (1) cannot be by way of a resettlement for section 31 as a whole is concerned with maintenance during the beneficiary's minority.

The power of advancement conferred by section 32 admits of a payment but not of a settlement. The cases show that the power of advancement has never been exercised so as to enable *the trustees* to resettle the sum advanced; it is the person *625 advanced who effects the settlement: In re Gosset's Settlement [32] ; Roper-Curzon v. Roper-Curzon [33] ; In re Halsted's Will Trusts. [34] Ex concessis this cannot be done by an infant.

The following authorities show very clearly what has hitherto been considered to be the true nature of a power of advancement: In re Joicey [35] shows that an advancement is an acceleration of the beneficiary's interest. If the appellants' contention be correct then that case should have been decided differently, as also should In re Mewburn's Settlement. [36] for there the power of advancement contained in the power of appointment would have been a delegation of the power and the exercise of the power of appointment would have been bad as an excessive execution. Similar observations apply to In re May's Settlement. [37]

The rule of construction is that the words of section 32 are to be assumed to bear their technical meaning as hitherto understood by convincers and are not to be given a wider meaning: see Craies on Statute Law, 5th ed., p. 158; Mason v. Bolton's Library Ltd., *per* Farwell L.J. [38]

2. Delegates non potest delegare. The proposed exercise of the power offends this rule. In the resettlement there is a power of advancement. This amounts to a pure delegation. If the proposed settlement is made the power contained in the will by virtue of section 32 Will be exercised by another set of trustees, that is, those of the settlement and that plainly infringes the rule.

Every settlement confers powers of management, the proposed settlement, however, includes the wide power of investment allowed by the Trustee Investments Act, 1961 , whilst the testator's will contains a much more restricted power of investment, the power of advancement is therefore being used to widen the powers of investment and that plainly offends the rule against delegation. It is pertinent to observe, moreover, that it would be strange to find in a power of advancement power to delegate powers of management to other persons. further, under this power of advancement it would be possible for Penelope to circumvent the prohibition against a Roman Catholic taking a benefit under the will and that would appear also to be a very strange result to flow from a power of advancement.

3. The proposed exercise of the power will bring in non-objects, *626 for under the will Penelope's children are only objects under the power of appointment and have no interest until that power is exercised in their favour, but under the proposed settlement her children take vested interests at 21 in the event of Penelope dying before the age of 30. The proposed exercise of the power of advancement is therefore void as being an excessive execution of the power.

4. However wide a meaning be given to the language of section 32 it cannot embrace a resettlement. A resettlement cannot come within the words "pay or apply." This argument depends on the width to be given to the word "apply." In In re Peel [39] it was held that under a trust to apply an annuity for the maintenance, education, or benefit of an infant,

the trustees had no power to accumulate any part of the income for the benefit of the infant until he should attain 21. In other words, the trustees could not retain the income but must apply it, that is, expend it. The "application" in the present case is not an expending of the capital moneys in question but is a retention of it in the proposed settlement. [Reference was made to In re Vestey's Settlement, [40]]

5. The proposed exercise of the power plainly offends the rule against perpetuities. The object of the power being an infant the trustees can only justify the making of a settlement provided it is within the powers conferred on them by section 32. That cannot be a general power but it is a special power and as such it must be read back into the testator's will: In re Churston Settled Estates. [41]

In conclusion, it is submitted that In re Ropner's Settlement Trusts [42] was wrongly decided. [Reference was also made to Lowther v. Bentinck [43] ; In re Kershaw's Trusts. [44]]

E. B. Stamp following. The House may derive some assistance by considering what is the result sought to be achieved by the trustees and the nature of the legal steps or process by which it is proposed to achieve it. The intended result is to force the property over which the power of advancement extends from the trusts of the testator's will and subject it to the trusts of a new settlement. There is no difficulty under *627 section 32 ofthe Trustee Act, 1925 in freeing the property by paying or applying it for the benefit of Penelope, but there is nothing in section 32 which enables trustees to subject property to the trusts of another settlement.

Leaving on one side section 32, it is submitted that (1) If trustees of a settlement transfer the money or interests which they hold thereunder to trustees of another settlement the effect of that transfer on the beneficial interests is nil. The only effect of such a transfer is simply to make the new trustees hold the property on the trusts of the old settlement. The transferors could only interfere with the beneficial interests if they were empowered so to do by the beneficiaries or if the old settlement contained a power to create new trusts. (2) To describe trustees as settling or resettling trust property is a misnomer. The only persons who can settle or resettle the trust property are the beneficiaries, the persons entitled to it. Trustees can therefore only settle or resettle by authority of the beneficiaries.

The question is, by what process in the present case is it proposed that the property over which the power of advancement extends is to be made subject to the trusts of the new settlement? If the trustees were the beneficial owners of the trust property they could transfer it directly to the trustees of the new settlement to hold it on the trusts of that settlement. The only other way whereby the trustees could achieve that object would be if the testator's will contained a power to create new or other trusts in respect of the property over which the power of advancement extends. This is in effect what the trustees wish to do but they have no power to do so.

It is necessary to ascertain whether the proposed transaction is effected by one or two steps. The power in so far as it enables trustees to terminate a settlement made in favour of a beneficiary can be done over the head of the beneficiary, but trustees have no power to *resettle* property over the head of the beneficiary.

The argument for the appellants inevitably depends on construing the power of advancement as a power of appointing new or other trusts. But nothing resembling such a power is to be filmed in section 32. Indeed, in the view of the

Variation of Trusts Act, 1958 , it would be most extraordinary if in 1962 it were to be found that the Trustee Act, 1925 , contained a power enabling trustees to appoint new or other trusts. [Reference was made to Wolstenholme and Cherry's Conveyancing Statutes, 12th ed.. Vol. 2, p. 1320, side note "Maintenance."] Under the *628 power of advancement trustees can make an infant owner of trust property but they cannot set up new trusts in favour of a person absolutely apart from the infant beneficiary.

Sir Milner Holland Q.C. in reply. What the trustees propose to do was not challenged on the ground that it is not for Penelope's benefit but on the ground that some limitation must be placed on the ambit of section 32. But where is that limitation to be found, for what is proposed is plainly an application of capital moneys. In In re Halsted's Will Trusts [45] Farwell J. expressly decided that half the trust fund could be raised and settled for the benefit of the plaintiff, his wife and children. If it be said that there is no trace in the reports of an application of this kind for the benefit of an infant it is to be remembered that the reason for such an application is of recent origin. In re Ropner's Settlement Trusts [46] supports the appellants' contention. As to In re Aldridge, [47] it is to be observed that the infants whom it was proposed to advance never had an interest in capital under the trusts of the will.

As regards perpetuity, the present question is not covered by authority. If this is a proper exercise of the power of advancement, the fund advanced is taken right out of the trusts and the trusts of the proposed settlement have not to be read back into the will. This is a power given by statute and not by the testator's will.

Their Lordships took time for consideration.

1962. October 8.

LORD REID.

My Lords, I have had the advantage of reading the speech about to be delivered by my noble and learned friend Viscount Radcliffe. I entirely agree with what he says about the application of the rule against perpetuities; but I am only reluctantly persuaded by his reasoning to agree that section 32 of the Trustee Act, 1925 , can be applied to the present case. I do not think that it is disputed that the main purpose of the appellants' scheme and its main benefit to the infant Penelope is avoidance of death duties and surtax. This is to be achieved by taking funds out of the testator's estate and resettling them on Penelope and any family she may have by means of a new trust with trust purposes different from those provided by the testator. *629 It may be that one is driven step by step to hold that the power conferred by section 32 to "pay or apply any capital money subject to a trust, for the advancement or benefit ... of any person entitled to the capital of the trust property or of any share thereof whether absolutely or contingently ..." must be interpreted as including power to resettle such money on an infant in such a way as will probably confer considerable financial benefit on her many years hence if she survives. But that certainly seems to me far removed from the apparent purpose of the section and considerably beyond anything which it has hitherto been held to cover.

Nevertheless I am compelled to recognise that there is no logical stopping place short of that result. You cannot say that financial benefit from avoidance of taxation is not a benefit within the meaning of the section. Nor can you say that the section only authorises payments for some particular or immediate purpose or that the benefit must be immediate and

certain and not future or problematical. and again you cannot say that the beneficiary must consent to the course which the trustees have decided is for his benefit for that would rule out all payments where the beneficiary is under age.

I have more difficulty about the resettlement. My difficulty does not arise from the rule delegates non potest delegare for if the section authorises the creation of a new trust it must do so by writing into the testator's will authority to his trustees to do this: and new trust purposes almost inevitably mean that in certain events certain persons will take benefit who were not beneficiaries under the testator's will. But I think that the cases show that it is too late now to say that this power can never authorise trustees to convey funds to new trustees to hold for new trust purposes: to say that might endanger past transactions done on the faith of these authorities.

If that be so, then I must hold that, if trustees genuinely and reasonably believe that it is for the benefit of a beneficiary contingently entitled to a share of capital to resettle a sum not exceeding half of his prospective share, they are empowered to do so in ways which do not infringe the rule against perpetuities. To draw a line between one class of case and another would be legislating and not proceeding on an interpretation of the existing statutory power.

I realise that this case opens a wide door and that many other trustees may seek to take advantage of it. But if it is thought that the power which Parliament has conferred is likely to be used *630 in ways of which Parliament does not approve then it is for Parliament to devise appropriate restrictions of the power.

I agree that this appeal must be allowed.

LORD HODSON.

My Lords, the opinion which I am about to read is that of my noble and learned friend Viscount Radcliffe who is unable to be present today.

VISCOUNT RADCLIFFE.

My Lords, this is a difficult case, and at first impression I would not have expected to find it so hard to return a certain answer to a question concerned with the time-honoured and much used power of advancement, long inserted in settlements of personality and now applied to all such settlements made since 1925 by virtue of section 32 of the Trustee Act of that year.

Fortunately, the facts themselves are of contrasting simplicity. Here we have one of the two appellants, Miss Penelope Pilkington, spinster and an infant still only of some 5½ years of age, who belongs evidently to a family of some substance and is entitled to a contingent reversionary interest in a trust fund set up by the will of her father's uncle, William Norman Pilkington. Her father, Richard Godfrey Pilkington, the other appellant, is entitled during his life to the income of a share of that trust fund (the share is said to be worth some £90,000) and after his death, subject to the possible exercise of certain powers to which I will refer in a moment, his share is to be held in trust for his children attaining 21 or, if female, marrying under that age and, if more than one, in equal shares. The father is, I believe, now about 43 years of

age and is married, and Miss Penelope has at present a small sister and a small brother, both presumptively entitled to a portion of his share when it falls into possession and, of course, other children may come into existence to add to the number of possible inheritors.

It is obvious, I think, that as things stand today and are likely to stand for some time to come, Miss Penelope is very far from having any certain or assured rights to any part of this trust fund. If she were to die under 21 unmarried she would take nothing, except in the contingency of her father having previously exercised his special power of appointment in her favour. On the other hand, since this power of appointment extends to all the children or issue of his marriage, an exercise of it by him at any time might exclude her from any interest in his share of the fund or alternatively might reduce her interest to any extent. *631 Powers of appointment apart, her presumptive one-third of his share is variable according to the number of her brothers and sisters, existing or born hereafter, who may ultimately become entitled to divide her father's share with her. There is a separate contingency that this share may never descend to his children at all, because under a special clause of the testator's will (clause 13 (J)) his trustees have power to revoke the trusts affecting the share and transfer it outright to the father for his own absolute use. This would cut out Miss Penelope altogether. Her title to any capital in the trust fund is therefore both contingent and diffusible. So far as concerns rights to derive any income from it, nothing can come to her so long as her father is alive (unless he forfeits his interest and so brings into operation a discretionary trust, under which she might receive some payments) and even after his death her right to income may be further deferred if he appoints a life interest, as he has power to do, to a surviving wife.

Now what the trustees of the testator's will, the second respondents, are proposing to do, if they lawfully can, is to take a sum of about £7,600 or investments of equivalent value out of Miss Penelope's expectant share (I do not think that it can make any difference whether they actually realise the sum or merely appropriate existing investments) and set it apart for her upon the trusts of a new settlement for her benefit which is to be brought into existence for the purpose by her great-uncle, the respondent Guy Reginald Pilkington. The first trustees of this proposed new settlement are intended to be the same persons as the will trustees, but again I do not think that anything turns on this, nor has anyone suggested that it does. What matters is that there are new trusts, not that there are old trustees.

The trusts of the new settlement can be sufficiently stated as follows. Until Miss Penelope is 21, the trustees are to apply the income of her trust fund for her maintenance, education or benefit and to accumulate any unexpended balance. When she attains 21, the income is to be held on protective trusts for her until she is 30, and if she attains 30 the capital and income are to be hers absolutely. If she dies before that age leaving children surviving her, those children take her share: but if she does not leave any such children, her share is to go over to such of her brothers and sisters as attain 21 or being female marry, with an ultimate gift over back to the testator's residuary trust fund. Under this new settlement, therefore, Miss Penelope could not take a capital share unless and until she attained the age of 30.
*632

The trustees are satisfied that if money were thus raised out of her expectant share and settled on these trusts its disposition would be for her benefit. They are able to analyse under various heads the ways in which her situation in life would be improved by having part of her prospective share withdrawn from the shadow of the contingencies or defeasances that might defeat it and secured as provision for herself and, it may be, her children. When one compares her situation under the proposed arrangement with her existing situation it is very natural to conclude that the give and take results to her advantage: but, apart from the actual variation of interests, the trustees have also to take into account the incidence of death duties, a very present matter of consideration for all who have interests in settled property. If she must wait to come into her share until it passes on her father's death, it will be reduced by the payment of duty on its capital value and, under our eccentric system of determining the rate on separate funds by aggregating the values of all properties passing on death in any form, that rate may well be a heavy one. On the other hand, if this settlement is made,

her fund will, it is thought, become free from duty on her father's death if he survives the making by five years. There are, too, more sophisticated calculations, derived from tax experts, which show that the net income resulting from the investments that are to form her fund will be considerably larger if it accrues to her trustees on her behalf than if it came to her father and he had to maintain her.

I am not sure how much independent weight I should give to the last consideration, but that does not matter, because the fact is that from beginning to end of these proceedings it has not been in dispute that the proposed arrangement can properly be described as being for the benefit of Miss Penelope or, more accurately, since the trustees have not surrendered their discretion to the court but merely wish to know whether they have power to exercise it in the way outlined, that it is open to them honestly to entertain this view. What she herself thinks about it all is, of course, at present unascertainable, since she has other concerns with which to occupy herself, but it is at any rate permissible to expect that, when she brings her mind to bear on these matters in more mature years, she will regard the provision now being planned for her and her possible offspring as having been on the whole to her advantage and will be grateful for the forethought that has established her so early in life as a lady of independent means.

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Why, then, would it not be lawful for the trustees to exercise their statutory power of advancement in the manner proposed? Danckwerts J., who heard their originating summons in the High Court, seems to have felt no doubt that they had the necessary authority. The first respondents, the Commissioners of Inland Revenue, refused however to accept that his conclusion was correct and, with their consent, they were made parties to the proceedings for the purposes of an appeal. The Court of Appeal unanimously upheld their objection and reversed the order of Danckwerts J. I must notice later the reason for the Court of Appeal's decision: but it does not, I think, coincide with the general position adopted by the commissioners on the legal question, nor was any active attempt made to support it in argument before this House.

The commissioners' main propositions (there is a subsidiary point about the application of the rule against perpetuities which I will deal with later) centre round the construction which, they say, must be given to the words of section 32 of the Trustee Act, 1925 . In fact, to me it seems that their several propositions are little more than different ways of illustrating the inherent limitation which they find in or extract from the words of the section. It is necessary, therefore, to begin by saying something about the form and nature of what is known as the power of advancement.

No one doubts that such a power was frequently conferred upon trustees under settlements of personality and that its general purpose was to enable them in a proper case to anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit. By so doing they released it from the trusts of the settlement and accelerated the enjoyment of his interest (though normally only with the consent of a prior tenant for life); and, where the contingency upon which the vesting of the beneficiary's title depended failed to mature or there was a later diffuseness or, in some cases, a great shrinkage in the value of the remaining trust funds, the trusts as declared by the settlement were materially varied through the operation of the power of advancement. This possibility was recognised and accepted as an incidental risk attendant upon the exercise of such a power, whose presence was felt on the whole to be advantageous in a system in which the possession of property interests was often deferred long beyond adult years.

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No one disputes either that, when section 32 was framed and inserted in the Trustee Act of 1925 as a general enabling provision applying to trusts coming into existence after that date, it was expressed in terms that corresponded closely with the previous common form recommended in books of convincing precedents and adopted in practice. I do not see

any particular importance in this circumstance apart from the fact that it makes it the more natural to refer to what had been said in earlier reported decisions that bear upon the meaning and range of a power of advancement.

The word "advancement" itself meant in this context the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment. Thus it was found in such phrases as "preferment or advancement" (Lowther v. Bentinck [48] , "business, profession, or employment or ... advancement or preferment in the world" (Roper-Curzon v. Roper-Curzon [49] and "placing out or advancement in life" (In re Breeds' Will [50] . Typical instances of expenditure for such purposes under the social conditions of the nineteenth century were an apprenticeship or the purchase of a commission in the army or of an interest in business. In the case of a girl there could be advancement on marriage (Lloyd v. Cocker [51] . Advancement had, however, to some extent a limited range of meaning, since it was thought to convey the idea of some step in life of permanent significance, and accordingly, to prevent uncertainties about the permitted range of objects for which moneys could be raised and made available, such words as "or otherwise for his or her benefit" were often added to the word "advancement." It was always recognised that these added words were "large words" (see Jessel M.R. in In re Breeds' Will [52] and indeed in another case (Lowther v. Bentinck [53] the same judge spoke of preferment and advancement as being "both large words" but of "benefit" as being the "largest of all." So, too, Kay J. in In re Brittlebank. [54] Recent judges have spoken in the same terms - see Farwell J. in In re Halsted's Will Trusts [55] and Danckwerts J. in In re Moxon's Will Trusts. [56] This wide construction of the range of the power, which evidently did not stand upon niceties of distinction provided that the proposed application could fairly be regarded as for the benefit *635 of the beneficiary who was the object of the power, must have been carried into the statutory power created by section 32, since it adopts without qualification the accustomed wording "for the advancement or benefit in such manner as they may in their absolute discretion think fit."

So much for "advancement," which I now use for brevity to cover the combined phrase "advancement or benefit." It means any use of the money which will improve the material situation of the beneficiary. It is important, however, not to confuse the idea of "advancement" with the idea of advancing the money out of the beneficiary's expectant interest. The two things have only a casual connection with each other. The one refers to the operation of finding money by way of anticipation of an interest not yet absolutely vested in possession or, if so vested, belonging to an infant: the other refers to the status of the beneficiary and the improvement of his situation. The power to carry out the operation of anticipating an interest is not conferred by the word "advancement" but by those other words of the section which expressly authorise the payment or application of capital money for the benefit of a person entitled "whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion," etc.

I think, with all respect to the commissioners, a good deal of their argument is infected with some of this confusion. To say, for instance, that there cannot be a valid exercise of a power of advancement that results in a deferment of the vesting of the beneficiary's absolute title (Miss Penelope, it will be remembered, is to take at 30 under the proposed settlement instead of at 21 under the will) is in my opinion to play upon words. The element of anticipation consists in the raising of money for her now before she has any right to receive anything under the existing trusts: the advancement consists in the application of that money to form a trust fund, the provisions of which are thought to be for her benefit. I have not forgotten, of course, the references to powers of advancement which are found in such cases as In re Ioicey. [57] In re May's Settlement [58] and In re Mewburn's Settlement, [59] to which our attention was called, or the answer supplied *636 by Cotton L.J. in In re Aldridge [60] to his own question "What is advancement?"; but I think that it will be apparent from what I have already said that the description that he gives (it cannot be a definition) is confined entirely to the

aspect of anticipation or acceleration which renders the money available and not to any description or limitation of the purposes for which it can then be applied.

I have not been able to find in the words of section 32, to which I have now referred, anything which in terms or by implication restricts the width of the manner or purpose of advancement. It is true that, if this settlement is made, Miss Penelope's children, who are not objects of the power, are given a possible interest in the event of her dying under 30 leaving surviving issue. But if the disposition itself, by which I mean the whole provision made, is for her benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise. Thus a man's creditors may in certain cases get the most immediate advantage from an advancement made for the purpose of paying them off, as in Lowther v. Bentinck [61] ; and a power to raise money for the advancement of a wife may cover a payment made direct to her husband in order to set him up in business (In re Kershaw's Trusts [62] , The exercise will not be bad therefore on this ground.

Nor in my opinion will it be bad merely because the moneys are to be tied up in the proposed settlement. If it could be said that the payment or application permitted by section 32 cannot take the form of a settlement in any form but must somehow pass direct into or through the hands of the object of the power, I could appreciate the principle upon which the commissioners' objection was founded. But can that principle be asserted? Anyone can see, I think, that there can be circumstances in which, while it is very desirable that some money should be raised at once for the benefit of an owner of an expectant or contingent interest, it would be very undesirable that the money should not be secured to him under some arrangement that will prevent him having the absolute disposition of it. I find it very difficult to think that there is something at the back of section 32 which makes such an advancement impossible. Certainly neither *637 Danckwerts J. nor the members of the Court of Appeal in this case took that view. Both Lord Evershed M.R. and Upjohn L.J. [63] explicitly accept the possibility of a settlement being made in exercise of a power of advancement. Farwell J. authorised one in In re Halsted's Will Trusts, [64] a case in which the trustees had left their discretion to the court. The trustees should raise the money and "have" it "settled," he said. So too, Harman J. in In re Ropner's Settlement Trusts [65] authorised the settlement of an advance provided for an infant, saying that the child could not "consent or request the trustees to make the advance, but the transfer of a part of his contingent share to the trustees of a settlement for him must advance his interest and thus be for his benefit ..." All this must be wrong in principle if a power of advancement cannot cover an application of the moneys by way of settlement.

The truth is, I think, that the propriety of requiring a Settlement of moneys found for advancement was recognised as long ago as 1871 in Roper-Curzon v. Roper-Curzon [66] and, so far as I know, it has not been impugned since. Lord Romilly M.R.'s decision passed into the textbooks and it must have formed the basis of a good deal of subsequent practice. True enough, as counsel for the commissioners has reminded us, the beneficiary in that case was an adult who was offering to execute the post-nuptial settlement required: but I find it impossible to read Lord Romilly's words as amounting to anything less than a decision that he would permit an advancement under the power only on the terms that the money was to be secured by settlement. That was what the case was about. If, then, it is a proper exercise of a power of advancement for trustees to stipulate that the money shall be settled, I cannot see any difference between having it settled that way and having it settled by themselves paying it to trustees of a settlement which is in the desired form.

It is not as if anyone were contending for a principle that a power of advancement cannot be exercised "over the head" of a beneficiary, that is, unless he actually asks for the money to be raised and consents to its application. From some points of view that might be a satisfactory limitation, and no doubt it is the way in which an advancement takes place in the great majority of cases. But, if application and consent were necessary requisites of advancement, that would cut out the

possibility of making *638 any advancement for the benefit of a person under age, at any rate without the institution of court proceedings and formal representation of the infant: and it would mean, moreover, that the trustees of an adult could not in any Circumstances insist on raising money to pay his debts, however much the operation might be to his benefit, unless he agreed to that course. Counsel for the commissioners did not contend before us that the power of advancement was inherently limited in this way: and I do not think that such a limitation would accord with the general understanding. Indeed its "paternal" nature is well shown by the fact that it is often treated as being peculiarly for the assistance of an infant.

The commissioners' objections seem to be concentrated upon such propositions as that the proposed transaction is "nothing less than a resettlement" and that a power of advancement cannot be used so as to alter or vary the trusts created by the settlement from which it is derived. Such a transaction, they say, amounts to using the power of advancement as a way of appointing or declaring new trusts different from those of the settlement. The reason why I do not find that these propositions have any compulsive effect upon my mind is that they seem to me merely vivid ways of describing the substantial effect of that which is proposed to be done and they do not in themselves amount to convincing arguments against doing it. Of course, whenever money is raised for advancement on terms that it is to be settled on the beneficiary, the money only passes from one settlement to be caught up in the other. It is therefore the same thing as a resettlement. But, unless one is to say that such moneys can never be applied by way of settlement, an argument which, as I have shown, has few supporters and is contrary to authority, it merely describes the inevitable effect of such an advancement to say that it is nothing less than a resettlement. Similarly, if it is part of the trusts and powers created by one settlement that the trustees of it should have power to raise money and make it available for a beneficiary upon new trusts approved by them, then they are in substance given power to free the money from one trust and to subject it to another. So be it: but, unless they cannot require a settlement of it at all, the transaction they carry out is the same thing in effect as an appointment of new trusts.

In the same way I am unconvinced by the argument that the trustees would be improperly delegating their trust by allowing the money raised to pass over to new trustees under a settlement *639 conferring new powers on the latter. In fact I think that the whole issue of delegation is here beside the mark. The law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises. If, on the other hand, their power of advancement is read so as to exclude settled advances, cadit quaestio.

I ought to note for the record (1) that the transaction envisaged does not actually involve the raising of money, since the trustees propose to appropriate a block of shares in the family's private limited company as the trust investment, and (2) there will not be any actual transfer, since the trustees of the proposed settlement and the will trustees are the same persons. As I have already said, I do not attach any importance to these factors nor, I think, do the commissioners. To transfer or appropriate outright is only to do by short cut what could be done in a more roundabout way by selling the shares to a consenting party, paying the money over to the new settlement with appropriate instructions and arranging for it to be used in buying back the shares as the trust investment. It cannot make any difference to follow the course taken in In re Collard's Will Trusts [67] and deal with the property direct. On the other point, so long as there are separate trusts, the property effectually passes out of the old settlement into the new one, and it is of no relevance that, at any rate for the time being, the persons administering the new trust are the same individuals.

I have not yet referred to the ground which was taken by the Court of Appeal as their reason for saying that the proposed settlement was not permissible. To put it shortly, they held that the statutory power of advancement could not be

exercised unless the benefit to be conferred hays "personal to the person concerned, in the sense of being related to his or her own real or personal needs." [68] Or, to use other words of the learned Master of the Rolls, [69] the exercise of the power "must be an exercise done to meet the circumstances as they present themselves in regard to a person within the scope of the section, whose circumstances *640 call for that to be done which the trustees think fit to do." Upjohn L.J. [70] expressed himself in virtually the same terms.

My Lords, I differ with reluctance from the views of judges so learned and experienced in matters of this sort: but I do not find it possible to import such restrictions into the words of the statutory power which itself does not contain them. First, the suggested qualification, that the considerations or circumstances must be "personal" to the beneficiary, seems to me uncontrollably vague as a guide to general administration. What distinguishes a personal need from any other need to which the trustees in their discretion think it right to attend in the beneficiary's interest? And, if the advantage of preserving the funds of a beneficiary from the incidence of death duty is not an advantage personal to that beneficiary, I do not see what is. Death duty is a present risk that attaches to the settled property in which Miss Penelope has her expectant interest, and even accepting the validity of the supposed limitation, I would not have supposed that there was anything either impersonal or unduly remote in the advantage to be conferred upon her of some exemption from that risk. I do not think, therefore, that I can support the interpretation of the power of advancement that has commended itself to the Court of Appeal, and, with great respect, I think that the judgments really amount to little more than a decision that in the opinion of the members of that court this was not a case in which there was any occasion to exercise the power. That would be a proper answer from a court to which trustees had referred their discretion with a request for its directions; but it does not really solve any question where, as here, they retain their discretion and merely ask whether it is impossible for them to exercise it.

To conclude, therefore, on this issue, I am of opinion that there is no maintainable reason for introducing into the statutory power of advancement a qualification that would exclude the exercise in the case now before us. It would not be candid to omit to say that, though I think that that is what the law requires, I am uneasy at some of the possible applications of this liberty, when advancements are made for the purposes of settlement or on terms that there is to be a settlement. It is quite true, as the *641 commissioners have pointed out, that you might have really extravagant cases of resettlements being forced on beneficiaries in the name of advancement, even a few months before an absolute vesting in possession would have destroyed the power. I have tried to give due weight to such possibilities, but when all is said I do not think that they ought to compel us to introduce a limitation of which no one, with all respect, can produce a satisfactory definition. First, I do not believe that it is wise to try to cut down an admittedly wide and discretionary power, enacted for general use, through fear of its being abused in certain hypothetical instances. and moreover, as regards this fear, I think that it must be remembered that we are speaking of a power intended to be in the hands of trustees chosen by a settler because of his confidence in their discretion and good sense and subject to the external check that no exercise can take place without the consent of a prior life-tenant; and that there does remain at all times a residual power in the court to restrain or correct any purported exercise than can be shown to be merely wanton or capricious and not to be attributable to a geunine discretion. I think, therefore, that, although extravagant possibilities exist, they may be more menacing in argument than in real life.

The other issue on which this case depends, that relating to the application of the rule against perpetuities, does not seem to me to present much difficulty. It is not in dispute that, if the limitations of the proposed settlement are to be treated as if they had been made by the testator's will and as coming into operation at the date of his death, there are trusts in it which would be void ab initio as violating the perpetuity rule. They postpone final vesting by too long a date. It is also a familiar rule of law in this field that, whereas appointments made under a general power of appointment conferred by will or deed are read as taking effect from the date of the exercise of the power, trusts declared by a special power of appointment, the distinguishing feature of which is that it can allocate property among a limited class of persons only,

are treated as coming into operation at the date of the instrument that creates the power. The question therefore resolves itself into asking whether the exercise of a power of advancement which takes the form of a settlement should be looked upon as more closely analogous to a general or to a special power of appointment.

On this issue I am in full agreement with the views of Upjohn *642 L.J. in the Court of Appeal. [71] Indeed, much of the reasoning that has led me to my conclusion on the first issue that I have been considering leads me to think that for this purpose there is an effective analogy between powers of advancement and special powers of appointment. When one asks what person can be regarded as the settler of Miss Penelope's proposed settlement, I do not see how it is possible to say that she is herself or that the trustees are. She is the passive recipient of the benefit extracted for her from the original trusts; the trustees are merely exercising a fiduciary power in arranging for the desired limitations. It is not their property that constitutes the funds of Miss Penelope's settlement; it is the property subjected to trusts by the will of the testator and passed over into the new settlement through the instrumentality of a power which by statute is made append ant to those trusts. I do not think, therefore, that it is important to this issue that money raised under a power of advancement passes entirely out of the reach of the existing trusts and makes, as it were, a new start under fresh limitations, the kind of thing that happened under the old form of family resettlement when the tenant in tail in remainder barred the entail with the consent of the protector of the settlement. I think that the important point for the purpose of the rule against perpetuities is that the new settlement is only effected by the operation of a fiduciary power which itself "belongs" to the old settlement.

In the conclusion, therefore, there are legal objections to the proposed settlement which the trustees have placed before the court. Again I agree with Upjohn L.J. that these objections go to the root of what is proposed and I do not think that it would be satisfactory that the court should try to frame a qualified answer to the question that they have propounded, which would express the general view that the power to advance by way of a settlement of this sort does exist and the special view that the power to make this particular settlement does not. Norm I think, is such a course desired either by the appellants or the trustees. They will, I hope, know where they stand for the future, and so will the commissioners, and that is enough.

LORD HODSON.

My Lords, my noble and learned friends who are also unable to be present today, Lord Jenkins and Lord *643 Devlin, are in full agreement with the opinion which I have just read and I am also in the same agreement.

Representation
Solicitors: Alsop, Stevens, Beck & Co. ; Solicitor of Inland Revenue .

Order of the Court of Appeal in part complained of discharged except as to costs. Declared that the application of the capital proposed by the respondents, the trustees of the will of William Norman Pilkington, deceased, would be improper and unauthorised because the trusts of the new settlement if contained in the said will would be void for perpetuity. Further ordered that the respondents the Commissioners of Inland Revenue do pay, or cause to be paid, to the appellants the costs incurred by them in respect of the said appeal to this House, such costs to be taxed as between solicitor and client. Further ordered that the costs incurred by the respondents [the trustees of the will] in respect of the said appeal to this House be paid out of the estate of the said testator William Norman Pilkington, deceased, such costs to be taxed as between solicitor and client. (J. A. G.)

Footnotes

1 Trustee Act, 1925, s. 32: "(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property ... Provided that - (a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property ..."

2 [1961] Ch. 466; [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330 , C.A.

3 [1904] 1 Ch. 480 .

4 [1915] 2 Ch. 115, C.A.

5 (1871) L.R. 11 Eq. 452 .

6 (1874) L.R. 19 Eq. 166 .

7 (1868) L.R. 6 Eq. 322 .

8 [1937] 2 All E.R. 570 .

9 L.R. 19 Eq. 166 .

10 [1961] Ch. 466 , 486.

11 L.R. 11 Eq. 452 .

12 [1937] 2 All E.R. 570 .

13 [1956] 1 W.L.R. 902, 904, 905; [1956] 3 All E.R. 332 .

14 [1961] Ch. 466 , 480, 481, 484.

15 (1881) 30 W.R. 99 .

16 [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 .

17 [1915] 2 Ch. 115 , C.A.

18 L.R. 11 Eq. 452 .

19 (1854) 19 Beav. 529 , 534, 535.

20 (1858) 4 K. & J. 142 .

21 [1904] 1 Ch. 480 .

22 [1961] Ch. 466 , 488, 489.

23 [1913] 1 Ch. 404, 413; 29 T.L.R. 306, C.A.

24 [1938] Ch. 39; 53 T.L.R. 1036; [1937] 3 All E.R. 823 , C.A.

25 L.R. 11 Eq. 452 .

26 [1958] 1 W.L.R. 165; [1958] 1 All E.R. 386 .

27 [1959] Ch. 699 , 705, 706.

28 (1886) 55 L.T. 554, 556, C.A.

29 [1951] 2 All E.R. 528 , C.A.

30 [1951] 2 All E.R. 528 , 532.

31 [1962] Ch. 273, 275, 287; [1961] 3 W.L.R. 825; [1961] 3 All E.R. 389, C.A.

32 19 Beav. 529 , 535, 536.

33 11 Eq. 452.

34 [1937] 2 All E.R. 570 .

35 [1915] 2 Ch. 115, 120, C.A.

36 [1934] Ch. 112 .

37 [1926] Ch. 136 .

38 [1913] 1 K.B. 83, 90, C.A.

39 [1936] Ch. 161 .

40 [1951] Ch. 209; [1950] 2 All E.R. 891 , C.A.

41 [1954] Ch. 334, 340, 341; [1954] 2 W.L.R. 386; [1954] 1 All E.R. 725 .

42 [1956] 1 W.L.R. 902 .

43 L.R. 19 Eq. 166 .

44 L.R. 6 Eq. 322 .

45 [1937] 2 All E.R. 570 , 572.

46 [1956] 1 W.L.R. 902 .

47 55 L.T. 554 .

48 (1874) L.R. 19 Eq. 166 .

49 (1871) L.R. 11 Eq. 452 .

50 (1875) 1 Ch.D. 226 .

51 (1860) 27 Beav. 645 .
52 1 Ch.D. 226 , 228.
53 L.R. 19 Eq. 166 , 169.
54 (1881) 30 W.R. 99 , 100.
55 [1937] 2 All E.R. 570 , 671.
56 [1958] 1 W.L.R. 165, 168; [1958] 1 All E.R. 386 .
57 [1915] 2 Ch. 115, C.A.
58 [1926] Ch. 136 .
59 [1934] Ch. 112 .
60 (1886) 55 L.T. 554, 556, C.A. : "It is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy, before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled."
61 L.R. 19 Eq. 166 .
62 (1868) L.R. 6 Eq. 322 .
63 [1961] Ch. 466 , 481, 486.
64 [1937] 2 All E.R. 570 , 572.
65 [1956] 1 W.L.R. 902 , 906.
66 L.R. 11 Eq. 452 .
67 [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 .
68 [1961] Ch 466 , 481.
69 Ibid. 484.
70 [1961] Ch 466 , 487.
71 [1961] Ch. 466 , 488 et seq.

[1964] A.C. 612

when the investment managers are not themselves trustees, so that the existence and extent of their personal fiduciary obligation is in question.[76]

The concern of this chapter is the capacity of a person, natural or corporate, to act as a trustee. The effect of the Public Trustee and Trust Companies legislation is that an officer of the provincial or territorial administration is capacitated to act as trustee, and that no other corporate entity than a trust company may act as a trustee. The settlor or testator creating a trust has a choice among private individuals including lawyers and notaries, trust companies, and, where the office has been adopted by the jurisdiction, the Public or Official Trustee or the Official Administrator of Estates. Any one of those persons may be named by the court as a judicial trustee, and any one of them may act as a custodian trustee.[77]

III. BENEFICIARY

What persons are capacitated to receive beneficial interests by way of trusts? The short answer to that question is that every member of Canadian society is entitled to receive property and enjoy it, but that the law has to provide some kind of curatorship for the management of the property of persons who are incapacitated by infancy or mental incompetence. As to adult and mentally capable persons, none of the disabilities of the past remain. In matters of property ownership, the alien is in the same position as a Canadian citizen,[78] and the married woman has the same capacity, save that, though the owner of a property interest, she may still be made subject to a restraint on anticipation or alienation.[79]

The Official Guardian, or other person deputed to exercise an official guardian's duties, may have slightly different duties and be subject to varying procedural obligations according to the jurisdiction, but in the main the Official Guardian is responsible for the management, disposition, and manner of enjoyment of the infant's property interests.[80] He or she may have

members were that trustee's beneficiaries. It was irrelevant that the trustee had limited express duties and was copiously exculpated by the custodian trust instrument for others' wrongdoing. It had a duty of its own to care for its beneficiaries by warning them.

[76] Corporate and institutional "trusteed" pension plans will be operated by a board of trustees, who are themselves advised by investment consultants. The custodian trustee, normally a trust company, will have duties and liabilities expressly restricted to the building and safe-keeping of investment instruments.

[77] Judicial trustees and custodian trustees are particular types of trustees, appointed for a particular purpose. It is merely so that these offices may be understood that they are mentioned at this point.

[78] But see *supra*, note 29 and the accompanying text, for a qualification with respect to ownership of land in Canada by non-resident aliens.

[79] See, e.g., the *Married Women's Property Act*, R.S.N.S. 1989, c. 272, s. 14(2) and (3) (now repealed — see S.N.S. 2012, c. 10, s.7, effective 17 May 2012); and the *Married Women's Act*, R.S.A. 2000, c. M-7, s. 5(2) (now repealed — see S.A. 2018, c. 18, s. 8). The Nova Scotia statute (*ibid.*) authorized the husband to consent to an alienation of property subject to a restraint, if that would be for the benefit of married women (see s. 15). This continues to be the case in Saskatchewan — see *The Equality of Status of Married Persons Act*, S.S. 1984-85-86, c. E-10.3, s. 2(3).

[80] *Infants Act*, R.S.B.C. 1996, c. 223, ss. 1-16 (as amended) (exercised by Public Guardian and Trustee); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 89 (the "Children's Lawyer"); *Public Trustee Act*, R.S.N.W.T. 1988, c. P-19, ss. 3(h), 4; *Children's Law Act*, R.S.Y. 2002, c. 31, s. 61(5). For Nova Scotia see the *Minors' Property Act*, S.A. 2004, c. M-18.1, ss. 9.1 to 15, and the *Public Trustee Act*, S.A. 2004, c. P-44.1, s. 18. In Nova Scotia, the Public Trustee may be appointed as a guardian for the purposes of the *Guardianship Act*, S.N.S. 2002, c. 8. See the *Public Trustee Act*, R.S.N.S. 1989, c. 379, s. 4(1)(a)(i).

[81] No Canadian jurisdiction has legislation validating non-charitable purpose trusts, which are now an established feature of a number of foreign, offshore jurisdictions (e.g., Bermuda, Cayman Islands, Bahamas). Legislation has been enacted in the Yukon Territory that introduces this trust, but the Act has not, to date, been proclaimed. See S.Y. 2001, c. 11, s. 13 that would have added ss. 57-61 to the *Trustee Act* dealing with "purpose trusts".

[82] See chapter 14, Part II.

[83] E.g., the members "for the time being".

jurisdiction where the infant possesses a parental or other appointed guardian; on the other hand he or she may be given a right of consent or refusal to any transaction affecting an infant's proprietary interest, whether or not it involves litigation. Normally, the Official Guardian will either automatically have a right to represent the infant's interest in litigation, or he or she may apply to the court to have him- or herself appointed for that purpose.

As we have seen, a mentally incompetent person will be represented by his or her "committee" or guardian in all property matters. The trend is away from vesting the incompetent's property in the committee or guardian, and towards leaving title in the incompetent but giving extensive powers of management and disposition to the committee or guardian.

Many trust limitations (or interests) are in favour of unborn persons, who may or may not even be conceived when the trust takes effect. Such limitations are valid unless they violate the perpetuity rule, and therefore representation is required. As unborn persons they will not have other guardians, and consequently it is the Official Guardian who acts and whose consent is normally necessary where the property interests of such persons are involved.

Trust beneficiaries are persons, but the objects of a trust may not be persons. They may be purposes. Purposes do not give rise to the question of capacity to receive, but they do give rise to the issue of whether trust objects may take the form of purposes. For instance, a testator may leave money on trust for the upkeep of his or her grave, or for the provision of toys at Christmas for deprived children. There are two problems here, despite the apparent innocence or merit in the purposes chosen. First, how is a trust in favour of a purpose to be enforced? A purpose is inanimate, abstract, and without legal personality. Second, how definite or certain have such purposes to be, even if they are to be accepted as legally possible? It must be possible for a court to determine the confines of the purpose the trustee is to carry out.[81] These are questions that will be pursued later, but in the meantime it should be noted that an unincorporated association, like a golf club or play-reading society, cannot itself be the recipient of a property interest under a trust.[82] Having no legal personality, the unincorporated association has no capacity to receive property. It is only the sum of its members. They are the recipients of the beneficial interest under the trust, and unless it is clear that the trust interest is for the members as persons,[83] the trust for the association will be void. However, if the trust interest is for the members of the association, then the issue is as to the certainty of the class. If the court discovers that the gift is for future as well as present members, then the trust will fail for uncertainty of objects, but this is a different issue from capacity.

III. DUTY TO ACT IMPARTIALLY BETWEEN BENEFICIARIES

A. The Principle of Holding an Even Hand

It is a primary duty upon trustees that in all their dealings with trust affairs they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer upon him or her, or otherwise receives no advantage and suffers no burden which other beneficiaries do not share.[134] In this way the trustees act impartially; they hold an even hand. The settlor or testator may choose to give disproportionate interests to various beneficiaries, and he or she very often does so in practice, but that is his or her privilege. It is still the duty of the trustees to carry out the terms of the trust as they find them and to ensure that in the administration of the trust they do not give advantage or impose burden when that advantage or burden is not to be found in the terms of the trust.

The duty to act impartially is based on the principles of Equity and is a rule of conduct imposed on trustees. It can be referred to as both a principle and a rule. Here the word "principle" is used to refer to the idea, and "rule" to the specific conduct required of trustees.

The duty to act impartially is usually associated in practice with circumstances where the trustees have administrative powers which involve the exercise of discretion. One might take as examples the power to retain original assets, the power of investment, and the power to allocate trust receipts at discretion between the income and capital accounts. It may also exist when the trustees are discharging a duty, such as to make a payment from a fund to each of two or more beneficiaries on the attainment in each case of a certain age. Sometimes the task of the trustees in meeting the requirement that they act with an even hand is relatively simple, as in the case of the division of the fund, but at the other extreme a discretion may be involved where any decision will be met with hostility from some beneficiary. For instance, should the trustees exercise their power to retain a block of shares with considerable growth potential and low yield, or sell at current high market prices and purchase debt securities which yield a steady income? The life tenant says one thing, the remainderman another. But the trustees must decide; it is their discretion.

However, not all duties and powers of trustees involve a distinct duty of impartiality. A discretionary trust may require of trustees, for example, that they determine which of the named beneficiaries shall benefit from the trust property, and in what amount. That duty must be discharged with honesty, objectivity and care, but that is all. Impartiality lies in the presence of an honest and objective evaluation of each named beneficiary's position, and a consequent decision. The same is true when trustees have a power of encroachment over capital in favour of joint life tenants, or even a power of appointment over capital. The duty of impartiality has been breached when

[134] *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273, 2010 SCC 34 (S.C.C.) at para. 85. See now S.N.B. 2015, c. 21, s. 39(a).

...sty, objectivity and care are all present, but the result is one which favours ...ficiary A over beneficiary B without an express or implied authority from ...rust instrument.[135] A discretionary trust, a power of encroachment, and a ...r of appointment contain that authority.

It follows from what has been said that the duty of impartiality may exist ...ther there is one class of beneficiaries, or two or more classes. Let us take a ...lass situation, that is, named beneficiaries or a class of beneficiaries, to ...of whom the trust gives identical interests. How does the even hand ...ple arise? To take again the example of the division of a fund, the trustees ...have to convey "an equal share" to each of four grandchildren as each ...dchild attains the age of twenty-five. When the first attains that age, the ...tees should not merely pay out or transfer one quarter of the trust fund. ...ough a professional valuation of the various elements of the portfolio or ...perty at the time when they propose to make the first payment, they should ...ure that they can later show they had in mind, not only present dollar ...ounts, but possible fluctuations of value over the likely period of ...tribution to the grandchildren. In this way they attempt to make sure, so ...as they can, that each grandchild obtains the same value from the trust.[136]

Perhaps the principal impact of the rule upon trustees, however, is when ...y must administer the trust assets in such a way that they provide fairly for ...eficiaries whose interests in the trust property are successive. This is not a ...difficulty when, for instance, there is a substitutional gift. A is to take ...pital on the death of a life tenant, and there is a gift over to B should A die in ...life tenant's lifetime. If the successive beneficiaries are both exclusively ...erested in income, or exclusively interested in capital, as are A and B in the ...ove example, both are essentially interested in the same thing. It is the ...stinction between income and capital that is so important in the context of ...s rule; here are two classes of beneficiaries, for income and capital ...neficiaries are interested in different things. With regard to the trust fund the ...come beneficiary is looking for the best yield obtainable, while traditionally ...e capital beneficiary is concerned with the safety of the fund. However, high ...eld usually means high risk, and low yield, low risk, and here is the inherent

[135] For comment on whether breach of the duty of loyalty has also occurred, see, *infra*, note 139. ...itigation between trust beneficiaries (or will beneficiaries) is an occasion when trustees demonstrate ...their impartiality by remaining neutral. This is so even if the trustees are concerned on behalf of infant, ...unborn, and remote beneficiaries: *Re Schroder's Will Trusts*, [2004] 1 N.Z.L.R. 695 (New Zealand ...C.). In *Lecavalier v. Sussex (Town)* (2003), (sub nom. *Re Forbes Estate*) 268 N.B.R. (2d) 201, (sub ...nom. *Re Estate of Forbes*) 6 I.T.E.L.R. 819 (N.B. Q.B.), the executor's litigation support of an ...intestate heir's argument that the testamentary gift of residue was invalid invoked the express ...disapproval of the Court.

[136] See further *Underhill and Hayton* at para. 44.49. The duty is restricted to the property subject to the ...trust. Unless the instrument provides to the contrary (e.g., with a hotchpot clause), the trustees are not ...concerned with gifts the settlor or testator has earlier made to any beneficiary of the trust. If the trust ...instrument contains no trustee power of appropriation, may the trustees at the time of the first ...payment (or on the trust taking effect) divide the trust fund into as many parts as there are ...beneficiaries, and hold separate accounts for those whose interests are to remain in trust? There are ...obvious dangers in this practice, should the later investment experience of each of the accounts differ ...significantly, and it is shown that the complaining beneficiary was incapacitated by minority from ...consenting to the original division. See *Underhill and Hayton* at paras. 44.50-44.53. The better opinion ...would appear to be that it should not be done without consent, and that, if necessary because of ...incapacity, application be made under the variation of trusts jurisdiction.

1992 CarswellOnt 537
Ontario Court of Justice (General Division)

Hunter Estate v. Holton

1992 CarswellOnt 537, 32 A.C.W.S. (3d) 335, 46 E.T.R. 178, 7 O.R. (3d) 372

Re the Estate of DONALD FLEMING HUNTER, late of the City of Toronto, in the Municipality of Metropolitan Toronto, deceased

JOHN MILLER HOLTON, DONALD HOLTON HUNTER and MARY MARGARET McCALLUM (Continuing Executors and Trustees of the Estate of DONALD FLEMING HUNTER, deceased) v. JOHN MILLER HOLTON, DONALD HOLTON HUNTER, MARY MARGARET McCALLUM, D. HOLTON HUNTER, JOHN HUNTER, JOHN EDWARD HUNTER, KATINA MARIE HUNTER, WENDY JEANNE HUNTER, LINDA SCHUR and OFFICIAL GUARDIAN

Steele J.

Heard: February 17-19, 1992
Judgment: March 5, 1992
Docket: Doc. Toronto RE 2282/91

Counsel: *Barbara L. Grossman*, for applicants.
Maurice C. Cullity, Q.C. and *Christina H. Medland*, for Mary Margaret McCallum.
Ronald R. Anger, for Official Guardian.

Subject: Estates and Trusts

Headnote

Estates --- Personal representatives — Duties and powers

Trusts and trustees — Powers and duties of trustees — Will giving trustees power to encroach on entire estate — In circumstances trustees having power to transfer entire estate to new trusts as long as terms of new trusts not alien to testator's intention.

The testator died in 1976. By his will he set up a trust fund (the "fund")which, after his wife's death, which occurred in 1988, was to be held for the benefit of his issue until 2006, when the net income was to be divided among his issue in equal shares per stirpes. The will then stipulated that 20 years after the death of the last survivor of certain named family members, the balance of the fund was to be distributed to the testator's issue in equal shares per stirpes. The will gave the power to the trustees to pay to such issue as they determined "such amounts out of the capital of the said Fund as my trustees in their sole discretion may from time to time determine."

The fund now represented the entire residue of the estate and was of great value. The trustees proposed to enter into certain transactions whereby the assets of the fund were to be settled on two new trusts, which were to have substantially the same terms and conditions as the will, except that the primary beneficiaries of one of the new trusts were to be the testator's daughter and her issue and those of the other new trust were to be the testator's son and his issue. The purpose of the new arrangement was to separate the interests of the two families so that decisions could be made having regard to the separate circumstances of each family.

The trustees applied under s. 60 of the *Trustee Act* (Ont.) and r. 14.05(3)(*a*) of the *Rules of Civil Procedure* (Ont.) for advice as to whether they had the power under the will to transfer all the assets of the fund to the new trusts. The Official Guardian opposed the application.

Held:

The trustees had the power to establish the new trusts and to transfer the assets of the estate to them.

new trusts. In my opinion, that case was solely a tax case and no details of the requested advice were set out. I do not consider it to be a deterrent to giving advice in the present case.

12 In construing a will, the court must ascertain the intention of the testator by looking at the whole will, and the court can look to other cases only to the extent that they explain applicable rules of construction and principles of law. In looking at the present will, it is clear that the testator gave the trustees power to encroach on the entire estate which, if done, would make the balance of the will redundant.

13 It was conceded by counsel for the Official Guardian that the clause in the will would allow the trustees to exercise their power of encroachment to pay out all the assets of the Family Fund, one-half to Donald Hunter and one-half to Margaret McCallum, but he contended that there is no power given to the trustees to resettle the assets into the new trusts. *McLean Estate v. Stewart* (June 1, 1988), Doc. RE 822/82, Barr J. (Ont. H.C.) (unreported) is the only similar case for which any reasons were given. The terms of that will are not the same as the present will but I believe that the principle is the same. The reasons are brief and refer to no prior authorities, but include the following statement:

> It would be incongruous if the law were to hold that the trustees might pay to the beneficiaries their shares outright, but might not pay them to trustees to be held in trust for them. Nor need the terms of the new trust be the same as those in the original trust providing they are beneficial.

14 I agree with that statement if it is supported by authority.

15 The leading English authority is *Pilkington v. Inland Revenue Commissioners*, [1964] A.C. 612, [1962] 3 All E.R. 622 (H.L.). In that case, reliance was made upon a provision of the English *Trustee Act, 1925* [15 & 16 Geo. 5, c. 19], which permitted the application of any capital money for the "advancement or benefit" of a beneficiary. The issue before the House was the resettlement of the funds into a new trust and most of the arguments made were the same as have been advanced by the Official Guardian in the present case. At p. 631, Viscount Radcliffe, in effect, stated that it was irrelevant as to who the trustees of the old and new trusts were. He said, "What matters is that there are new trusts, not that there are old trustees." I agree. That case relied on the interpretation of the words of a statute but it was stated, at pp. 634 and 635, that the statute merely adopted the customary common law terminology that is often included in wills. I do not believe that the decision is limited to statutory provisions.

16 I adopt the following statements in *Pilkington* at pp. 638 and 639 as being applicable to the present case:

> The commissioners' objections seem to be concentrated upon such propositions as that the proposed transaction is 'nothing less than a resettlement' and that a power of advancement cannot be used so as to alter or vary the trusts created by the settlement from which it is derived. Such a transaction, they say, amounts to using the power of advancement as a way of appointing or declaring new trusts different from those of the settlement. The reason why I do not find that these propositions have any compulsive effect upon my mind is that they seem to me merely vivid ways of describing the substantial effect of that which is proposed to be done and they do not in themselves amount to convincing arguments against doing it. Of course, whenever money is raised for advancement on terms that it is to be settled on the beneficiary, the money only passes from one settlement to be caught up in the other. It is therefore the same thing as a resettlement. But, unless one is to say that such moneys can never be applied by way of settlement, an argument which, as I have shown, has few supporters and is contrary to authority, it merely describes the inevitable effect of such an advancement to say that it is nothing less than a resettlement. Similarly, if it is part of the trusts and powers created by one settlement that the trustees of it should have power to raise money and make it available for a beneficiary upon new trusts approved by them, then they are in substance given power to free the money from one trust and to subject it to another. So be it: but, unless they cannot require a settlement of it at all, the transaction they carry out is the same thing in effect as an appointment of new trusts.
>
> In the same way I am unconvinced by the argument that the trustees would be improperly delegating their trust by allowing the money raised to pass over to new trustees under a settlement conferring new powers on the latter. In fact I think that the whole issue of delegation is here beside the mark. The law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them

> to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises.

I also adopt the statement at pp. 640-641 as follows:

> That would be a proper answer from a court to which trustees had referred their discretion with a request for its directions; but it does not really solve any question where, as here, they retain their discretion and merely ask whether it is impossible for them to exercise it.
>
> .....
>
> ... First, I do not believe that it is wise to try to cut down an admittedly wide and discretionary power, enacted for general use, through fear of its being abused in certain hypothetical instances. ...

17 I believe that *Re Hampden Settlement Trusts*, [1977] T.R. 177 (Ch. D.), *Re Hastings-Bass*, [1975] Ch. 25, [1974] 2 All E.R. 193 (C.A.) and *Re Ropner's Settlement Trusts*, [1956] 1 W.L.R. 902, [1956] 3 All E.R. 332 (Ch. D.), and other cases, confirm this proposition. Counsel for the Official Guardian frankly conceded that he was not aware of any case anywhere in the Commonwealth that has been decided to the contrary.

18 While "advancement" may have a technical meaning, "benefit" does not. In *Pilkington*, supra, both "advancement" and "benefit" were considered and it was held that the word "benefit" was very wide in its meaning. In the present case, clause III(i)(C) gives an unfettered right to pay "for the benefit" of the testator's issue. In my opinion this includes the settlement of new trusts. I therefore find that the trustees have the power and it is lawful for them to transfer all of the assets of the Family Fund to new trusts.

19 The next question is whether the court should approve the transfer to these specific two trusts. Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluc tant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass*, supra, at p. 41 [Ch.] as being applicable to the court's review of the exercise of such power:

> To sum up the preceding observations, in our judgment, where by the terms of a trust (as under section 32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account. ...

Put in the reverse wording, I also adopt the opinion of Middleton J. in *Dunlop v. Ellis* (1917), 41 O.L.R. 303 (H.C.) at 307:

> Where there is, as here, a trust coupled with a discretionary power, the Court is entitled and bound to interfere when there is no attempt to exercise the discretion for the purpose for which it was given, but an attempt to accomplish a purpose quite alien from the intention of the testatrix, the author of the power.

20 It is not the function of the court to approve the specific words of the proposed new trusts and I do not do so. However, I have reviewed the proposed new trusts to determine whether or not they are alien to the intention of the testator, or would be beyond the scope of the power of the trustees. As I have stated, subject to the approved basic division into two family trusts rather than the one, the new trusts closely mirror the provisions of the will, with certain minor modifications. Basically, they provide the interests to the children, grandchildren and issue of the testator, with the ultimate gift over to the Horace Hunter family and the employees of MacLean Hunter Limited. Counsel for the Official Guardian submits that some of the changed provisions in the new trusts are so great that the court should interfere and refuse approval. I would like to comment upon some, but not all, of these issues.

21 1. Under the will, if only one person shall be acting as an executor, then such trustee is directed to appoint a trust company to act as an additional trustee. Also, no reference is made to trustee's compensation, which presumably would be set in the

normal way by the courts. Under one of the new trusts, Holton, Donald Hunter and R.G.H. McAslin are to be the trustees, and in the other, Holton, Margaret McCallum and Donald Campbell are to be trustees. In the event of a vacancy, the continuing trustees have power to appoint any person to fill the vacancy. In the event of Margaret McCallum ceasing to be a trustee, each of her children who attains the age of 30 years has the right to be appointed a trustee. Decisions shall be made by a majority of trustees and a maximum compensation to be paid to trustees is imposed. There is to be no compensation paid to any child or grandchild of the testator. In view of the size of the estate, the old trustees believe that this compensation is less than would be commonly awarded by a court. I believe that this change is within the discretion of the trustees.

22 2. There is a possibility of a violation of the rule against perpetuities under the terms of the new trusts. However, in view of s. 3 of the *Perpetuities Act*, R.S.O. 1990, c. P.9, I do not believe that this is sufficient ground for the court to say that the trustees have exceeded their discretion.

23 3. In the new trusts there is a new total exculpatory clause in favour of the new trustees for any of their acts. In my opinion this is a detail of the new trust and is within the discretion of the trustees in setting up the new trusts.

24 4. The effect of the new trusts is to divide the Family Fund into two units. Counsel for the Official Guardian submits that this deprives some beneficiaries of future potential gifts over while conceding that it may benefit them under different circumstances. I believe that this is within the general discretion of the trustees in setting up the new trusts.

25 I believe that the trustees have the power to establish new terms in the new trusts within the parameters of the overall principles that I have set out. I have reviewed the provisions of the new trusts and find that they are substantially for the benefit of the family members within the contemplation of the testator, and find that they do not go beyond the powers of the trustees.

26 For these reasons the answer to the question presented to the court is yes.

27 Costs of all parties on a solicitor-and-client basis are to be paid out of the Family Trust. The costs of the Official Guardian may be agreed upon, but otherwise are to be assessed.

Order accordingly.

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WiddifieldE&T 12.3

Widdifield on Executors and Trustees, 6th Edition

12 — APPLICATION TO THE COURT FOR ADVICE OF THE COURT
Contributing Editor: Mary L. MacGregor; Editor: Carmen S. Thériault

12.3 — LIMITS ON THE USE OF THE SECTION AND RULE

12.3 — LIMITS ON THE USE OF THE SECTION AND RULE

Mary L. MacGregor *

12.3.1 — JUDICIAL CONTROL OF THE EXERCISE OF TRUSTEES' POWERS AND DISCRETIONS

See also chapter 8.5.

The court will not generally assist trustees in exercising the discretions given to them by the trust instruments. See *Collins, Re, supra* and *Reinisch Estate, Re,* 2011 CarswellMan 457 (Man. Master). If they act honestly, in good faith, and in accordance with the standard of care that would be shown by a reasonable and prudent business person managing his or her own affairs, neither the unhappy beneficiary nor the court will have a say as to how those discretions must be exercised. *Boukydis, Re* (1927), 60 O.L.R. 561 (Ont. C.A.); *Mattick, Re* (1967), 60 W.W.R. 503 (B.C. S.C.); *Floyd, Re,* [1961] O.R. 50 (Ont. H.C.).

However, there are many instances where the courts have assisted trustees if the dilemma arises out of legal matters rather than out of business matters. See the recent case *Jones v. McLeod*, 2017 BCSC 1478, 2017 CarswellBC 2285 (B.C. S.C.) in which the court held that an executor or trustee may seek the advice, opinion or directions of the court on a legal question and then act on that advice. Also see *Toigo Estate (Re)*, 2018 BCSC 936, 2018 CarswellBC 1469 (B.C. S.C.) where the court found that it could consider the trustee's application which raised the legal question of whether the trustee's decision to permit a significant encroachment was made lawfully and in conjunction with his duties as a trustee.

The following sections examine instances where the courts have been asked to intervene. Note, however, that it is difficult to reconcile the many cases which do not always proceed on full argument, because the trustees and beneficiaries often do not oppose each other vigorously and are content with submitting their questions to the court.

12.3.2 — HOSTILITY AMONG THE TRUSTEES

In *Davis, Re* (1983), 14 E.T.R. 83 (Ont. C.A.), the court found that, because of hostility between the executor and three beneficiaries, it would no longer be possible for the executor to exercise, in a completely impartial and objective manner, the very wide discretion she was given by the will with respect to payment of income to any one or more of the beneficiaries for living expenses and educational purposes. In consequence, the executor was replaced by a trust company.

12.3.3 — FAILURE TO EXERCISE DISCRETION

Trustees may fail to exercise their discretions for many reasons. They may simply refuse to do so, or are so hopelessly deadlocked on an issue, they cannot exercise their discretion. In *Sayers v. Philip* (1973), 38 D.L.R. (3d) 602 (Sask. C.A.), the trustees'

where the trustee had already determined to make the sale. It appeared that the trustee feared litigation by one of the unhappy beneficiaries and, therefore, sought approval.

In approving the sale, the court said,

> If an executor makes and acts upon his own decision, he is subject to attack by a beneficiary on the grounds of lack of bona fides or unfairness. In my opinion, R. 14.05(3)(f) allows the executor to apply to the Court for approval of his decision before it has been acted upon, so that subsequent litigation may be avoided. Counsel were unable to refer me to any decided case which sets out the principles upon which a Court should act in considering an application under para (f). I see no reason why the considerations should not be the same as those where his decision is attacked after the fact. In other words, the issues to be looked at are: *(1) has the executor the power to make the sale; (2) has he acted in good faith; and (3) has he acted fairly as between the beneficiaries* [emphasis added].

The court should not look at whether or not the sale is the most advantageous sale. If it did so, it would be interjecting its view into the decision-making process. However, the court should look at evidence before it to determine whether the sale is so improper that it infringes on the issue of good faith or fairness. See also *von Hopffgarten Estate v. Rommel*, 2012 BCSC 393, 2012 CarswellBC 679, 77 E.T.R. (3d) 235 (B.C. S.C.); *Jochem v. MacPherson*, 2010 ONSC 6391, 2010 CarswellOnt 8771 (Ont. S.C.J.).

Finally, a Nova Scotia Supreme Court decision is of interest. In *Nathanson, Re* (1971), 18 D.L.R. (3d) 495 (N.S. T.D.), the court authorized sale of an asset where all adult beneficiaries and the trustees wished it sold, although the testator had specifically directed its retention. The court felt it had inherent jurisdiction to authorize such a sale because the asset was becoming a financial burden to the estate.

12.3.6 — TRITE LAW

The courts have held that some legal principles and administrative rules are so clear that a solicitor's opinion is ample protection to the trustee: *Vant, Re* (1958), 27 W.W.R. 429 (Man. Q.B.); *Gordon, Re* (1912), 3 O.W.N. 1458 (Ont. Q.B.); *Kent, Re* (1924), 26 O.W.N. 19; *Collins, Re* (1927), 61 O.L.R. 225. The trustees may be penalized in costs if they bring such applications to deal with such issues: see, for example, *Mathe, Re* (1910), 17 O.W.R. 656 (Ont. C.A.), where an executor's costs on request for the construction of a will were denied by the judge hearing the application because the judge found the application to be unnecessary. This offers little assistance to non-professional trustees in deciding which legal matters are beyond question in this sense and which are not, and leaves them with the responsibility in the matter, particularly if they receive incorrect legal advice: *National Trustees Co. of Australasia Ltd. v. General Finance Co. of Australasia Ltd., supra.*

12.3.7 — ISSUES OF OWNERSHIP BETWEEN THE ESTATE AND THIRD PARTIES

Some cases go so far as to suggest that, in proceedings under the Rules or Acts, the court may not determine "legal rights" and that its jurisdiction is confined to advising "a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties *inter se* . . . Judges generally now consider that it ought not to be done." *Lorenz's Settlement, Re* (1861), 1 Dr. & Sm. 401 (Eng. V.-C.).

This case was cited in *Tecumseh Public Utilities Commission v. MacPhee* (1930), 66 O.L.R. 231 (Ont. C.A.). The judge also referred to *Hooper, Re* (1861), 29 Beav. 656 (Eng. Rolls Ct.), where the case was not allowed to proceed, the court observing that the object of the legislation was to assist trustees in the execution of the trusts, as to "little matters of discretion"; and that this was not a case of that description. See also *Bailey, Re* (1982), 12 E.T.R. 242 (B.C. S.C.), where the administrator *pendente lite* asked the court to determine the class among whom the residue of the estate was to be distributed, and to name the persons in the class, with a view to distributing to them. Taylor J. held that the British Columbia *Trustee Act* was not to be used as

the basis for applications to construe an instrument, or to affect the rights of parties to property. The court would not give its opinion, advice or direction pursuant to the section with respect to the class of persons among whom the residue of the estate was to be distributed, nor would it name the persons falling within that class.

The limitation seems to be that the court on such motions will refuse to decide ownership questions between an estate and a third party who is not a beneficiary. Canadian judges generally take a liberal view. They have adopted the approach of Middleton J. in *Fulford, Re, supra,* where he said, "The advice which the Court is authorized to give . . . is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern." See *Davis, Re, supra; Boukydis, Re, supra,* and *Wright, Re, supra.*

In *Collins, Re* (1927), 61 O.L.R. 225, advice was sought on the question of whether certain bonds had been effectively given away by the testator in his lifetime, or whether they were assets of the estate. The Court reviewed the older cases and concluded that it was beyond the jurisdiction of the court on such a motion to decide whether or not property belongs to an estate. The reasons relied on by the court were, *inter alia,* the very large value of the property, that a finding of fact must be made, and the fact that the issue was complicated and involved much more than the mere construction of documents. Similar reasoning was adopted in *Jeffery, Re, supra.*

In *Mayer, Re,* [1950] 2 W.W.R. 858 (Alta. T.D.), the court came to a similar conclusion. This was a motion to construe a will as to whether the testatrix had left a life estate to her husband or an absolute interest. The court held that questions in respect of the husband's dealings with the assets as executor and as a beneficiary, which arose out of its interpretation of the will, should not be gone into by the court in summary proceedings even if it had the power, because there were important questions of fact and law to be decided, including a question of onus of proof. In *Elliott, Re,* [1949] 2 W.W.R. 188 (Sask. K.B.), the result was similar.

Other cases confirming this general principle are *Elliott, Re,* [1949] 2 W.W.R. 188 (Sask. K.B.); *Ripstein, Re,* [1929] 1 W.W.R. 788 (Man. C.A.); *Turner, Re* (1912), 3 O.W.N. 1428 (Ont. H.C.); *Martin, Re* (1904), 8 O.L.R. 638; and *McDougall, Re* (1904), 8 O.L.R. 640. See also *Fisher v. Fisher Estate*, 2007 SKQB 407, 2007 CarswellSask 763, 37 E.T.R. (3d) 313, 309 Sask. R. 62 (Sask. Q.B.), varied 2008 CarswellSask 856 (Sask. C.A.) where the Testator, AF Sr., owned several parcels of land including mines and minerals occurring thereon. He entered into agreement to sell a certain parcel of land to his son, AF Jr. with the balance of debt to be forgiven in the event AF Sr. died before completion of the agreement. The agreement failed to indicate whether mines and minerals were included. AF Sr. passed away leaving a will appointing AF Jr. as executor and JB as executrix. In the course of the administration of the estate, AF Jr. and JB transferred the minerals connected to said parcel of land to AF Jr. An interested party brought originating notice under R. 452 of the Queen's Bench Rules asking the court for directions as to whether the testator intended to include the mines and minerals when the testator entered into agreement to sell land to AF Jr. AF Jr. brought a motion for order striking or dismissing the notice as frivolous, vexatious or abuse of court process. The motion was struck. The court held that the applicant was seeking to have substantive issues decided under the guise of the determination of a question arising under will or letters probate. Rule 452 did not contemplate or authorize answering questions determining the intentions of a testator when an agreement was entered into. See also *Simonson Estate v. Simonson Estate*, 2011 SKQB 165, 2011 CarswellSask 294, 68 E.T.R. (3d) 264, (*sub nom.* Simonson Estate, Re) 373 Sask. R. 214 (Sask. Q.B.).

Some cases do, however, show a more liberal approach, particularly where the parties do not object to the jurisdiction, where the issues are relatively simple (although not trite law), and where the subject matter is not of very large value. The following cases illustrate this.

Funk, Re, [1940] 1 W.W.R. 491 (Man. C.A.) illustrates a slight variation of the rule in *Collins, Re, supra,* and other like cases. There was a dispute as to whether insurance money was payable to the estate or to the widow. The court held that, if the insurance money had been paid to the estate, there would have been jurisdiction on such a motion, but since it was paid to the widow, there was no jurisdiction.

In *Matheson, Re* (1925), 29 O.W.N. 243, a motion was brought by executor A asking that executor B be compelled to issue a cheque to executor A as beneficiary, despite his contention that he was entitled to withhold the cheque as a set-off against

