

1972

Trusts Inter Vivos – Duty to Convert Under-Productive Property – The Even-Hand Rule

Maurice C. Cullity
Osgoode Hall Law School of York University

Source Publication:

Canadian Bar Review. Volume 50, Number 1 (1972), p. 116-121.

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Recommended Citation

Cullity, Maurice C. "Trusts Inter Vivos – Duty to Convert Under-Productive Property – The Even-Hand Rule." *Canadian Bar Review* 50.1 (1972): 116-121.

This Commentary is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

TRUSTS INTER VIVOS—DUTY TO CONVERT UNDER-PRODUCTIVE PROPERTY—THE EVEN-HAND RULE.—Where under-productive property is settled by deed on trust for persons in succession, does the trustee owe a duty to the life tenant to convert the property into securities producing a higher rate of return? An answer to this question can, of course, be found in any of the standard English works on the law of trusts. Unless an intention to the contrary can be gathered from the terms of the trust instrument there is no such duty.¹ The same rule applies to specific bequests of property on trust for persons in succession² and even to residuary devises of real estate on such trusts.³ It is only with respect to residuary bequests of personalty that equity has imposed upon the trustees a duty to convert under-productive, wasting or reversionary property into authorized investments.⁴ The distinction between

²⁹ *Supra*, footnote 1.

³⁰ *Supra*, footnote 17.

³¹ *Pais v. Pais*, [1970] 3 All E.R. 491.

* John Sopinka, of the Ontario Bar, Toronto.

¹ See, e.g., Snell's Principles of Equity (26th ed., 1966), p. 236; Underhill's Law of Trusts and Trustees (11th ed., 1959), p. 291; Hanbury's Modern Equity (9th ed., 1969), pp. 328-329; Halsbury's Laws of England (3rd ed., 1962), Vol. 38, p. 880. See also, S. J. Bailey, (1942-43), 7 Conv. (N.S.) 128, at pp. 128-129; *Re Van Straubenzee*, [1901] 2 Ch. 779.

² *Pickering v. Pickering* (1839), 4 My. and Cr. 289, at p. 298; *Re Van Straubenzee*, *ibid.*, at p. 782.

³ *Re Searle*, [1900] 2 Ch. 829; *Re Darnley*, [1907] 1 Ch. 159; *Re Oliver*, [1908] 2 Ch. 74.

⁴ *Howe v. Lord Dartmouth* (1802), 7 Ves. 137; *Re Lennox*, [1949] S.C.R. 446, and many other cases.

residuary bequests of personalty on the one hand and other testamentary settlements and settlements *inter vivos* on the other is, presumably, based on the principle that equity should not impose a duty to convert where the property has been specifically selected and appropriated to the trust by the settlor.⁵

These principles are well established and until recently there was every reason to believe that they qualified the equally well established principle that trustees are under a duty to hold an even hand between the persons interested under the trust. Where the trustees were expressly authorized to retain or convert under-productive or wasting property the position was no different. Thus in *Gray v. Siggers*,⁶ short leaseholds were settled on the testator's widow for life with remainders over. The trustees, one of whom was the widow, were given power to retain or convert all or any part of the property as, in their absolute discretion, they might think fit. It was argued for the remaindermen that the leaseholds should be sold and that the life tenant should receive the annual income from the proceeds. Notwithstanding the possibility that the leaseholds might expire in the widow's lifetime, the court refused to interfere.⁷ The approach has been similar in cases where the trustees have been given a duty to convert with a power to postpone at their discretion. In one such case, Middleton J.A. said:⁸

[The delay of the trustees] is in my view entirely without blame for the testator gave all his property to his widow and the Trust Company to be held and disposed of by them as directed by his will, and he authorizes his trustees "to sell and dispose of all or any part of his real estate . . . as they see fit", leaving the re-investment of the same entirely to their judgment and discretion. I think this gives to the executors an uncontrollable discretion which they may exercise, not only in such manner but at such time as in their judgment they deem proper, and in the absence of any suggestion that the power has not been exercised honestly and in good faith, the executor cannot be said to have been guilty of any breach of trust.

In none of these situations was it suggested that the even-hand rule might either impose upon trustees a duty to convert under-productive or wasting property or limit the effect of an express power to retain. The one exception was the special case of a will which settled residuary personalty and which contained neither an express power to retain the property in its original state nor any other implication that the life tenant was intended to enjoy the property in specie. In cases other than that just mentioned the even-

⁵ Underhill, *op. cit.*, footnote 1, p. 291.

⁶ (1880), 15 Ch. D. 74. See also, *In re Nicholson*, [1909] 2 Ch. 111; *Re Courtier* (1887), 34 Ch. D. 136; *Re Sheldon* (1888), 39 Ch. D. 50.

⁷ "I cannot look at the question whether the leaseholds are for long or short terms, because, whether long or short, the widow was to have the property in specie if the trustees thought fit to retain it": *ibid.*, at p.77.

⁸ *Re Rutherford*, [1933] O.R. 707, at pp. 725-726.

hand rule's main application as between successive beneficiaries was to act as a brake on any purported exercise by the trustees of a power to convert and to re-invest.⁹ The court would not enforce the exercise of the power against the wishes of the trustees but it would prevent them from exercising the power in order to favour unduly one beneficiary against another.

The principles which have been stated may, of course, be over-ridden if a beneficiary can establish that the trustees were guilty of an abuse of discretion in deciding not to sell. An allegation of this kind may be hard to substantiate if the trustees rely on their undoubted right to refuse to give reasons for their decision.¹⁰ If it can be substantiated there is no doubt that the court has power to intervene even, in appropriate circumstances, to the extent of removing the trustees.¹¹

Consider the following cases: (a) the trustees' refusal to convert is actuated by bad faith; (b) the trustees erroneously believe that they have no power to convert; (c) the trustees erroneously believe that, under the terms of the trust instrument, they are authorized to favour the life tenant over the remainderman or *vice versa*. In the first two cases the main difficulties which would have to be overcome by a beneficiary who seeks the court's intervention would normally be evidential. In the third case, there might also be a very real difficulty in establishing that the trustees' belief was erroneous in law. If specific under-productive property is settled on persons in succession and the trustees are given a power to retain the property, there seems to be a clear implication that to that extent the even-hand rule has been waived and that the fact that the remaindermen may be favoured to the prejudice of the life tenant does not in itself impose upon the trustees any duty to convert. If this were not so, the cases which have been referred to at the beginning of this comment would be inexplicable and the rule which applies to residuary bequests of personalty would extend to all settlements whether *inter vivos* or testamentary. Indeed it is implicit in those cases, that the absence of an express power to retain does not affect the matter. As long as the settlement does not arise by virtue of a residuary bequest of personalty, equity imposes no duty to convert.

The principles which have been outlined have governed the practice of lawyers drafting trust documents and trustees administering estates in England and in other parts of the Common-

⁹ As e.g., in *Raby v. Ridehalgh* (1855), 7 De G. M. and G. 104; *Stuart v. Stuart* (1841), 3 Beav. 430; *Re Armstrong* (1924), 55 O.L.R. 639.

¹⁰ *Re Beloved Wilkes's Charity* (1851), 3 Mac. and G. 440; *Re Londonderry's Settlement*, [1965] Ch. 918.

¹¹ For general comments on the inherent power of the court to remove a trustee see *Letterstedt v. Broers* (1884), 9 App. Cas. 371; *Re Wrightson*, [1908] 1 Ch. 789.

wealth for a considerable time. For that reason, and quite apart from the fact that it is not everyday that a trust company is removed from a trust, the implications of the reasoning in the judgments delivered by Keith J. at first instance and Arnup J.A. in the Court of Appeal of Ontario in *Re Smith*¹² are more than a little disturbing.

In March 1966 the settlor transferred shares of Imperial Oil Limited to the trust company on trust to pay the income to his mother for life with remainder to the survivor of his mother and himself. The trustee was expressly authorized in its sole discretion (a) to "Retain the Trust Fund in its present form, whether producing income or not" and (b) to "convert into money and bonds, stocks, shares . . . from time to time in its hands and from time to time invest the proceeds thereof" in various classes of investments described in the trust instrument. From March 1966 until August 1969 the trustee paid the annual income from the shares to the life tenant. This income was considerably below that obtainable from other securities in which the trustees were authorized to invest. In August 1969, the life tenant's solicitors requested the trustee to diversify the portfolio in order to produce a greater return for the life tenant. The trust company acknowledged the letter and sought the advice of the settlor through his solicitors. The latter then wrote to the life tenant's solicitors to the effect that they would be consulting the settlor and would report back in the near future. The life tenant's solicitors received no further communication for some nine months and ultimately applied to the court. The court was asked to determine (a) whether the trustee was "in breach of its duty to maintain an even-hand between the life-tenant and the remainderman by refusing to exercise its power to invest in securities which would produce a reasonable return" to the life tenant, (b) whether the trustee was "in breach of its duty to exercise prudence and reasonable care in the investment of the trust assets by failing to diversify the investments of the trust" and (c) whether the trustee had "properly exercised its discretion with respect to the investment of the trust assets". An application was also made for an order removing the trustee.

At first instance Keith J. answered questions (a) and (c)¹³ in the affirmative and granted an order removing the trustee. The learned judge rejected the trust company's argument that the terms of the trust instrument required it to retain the shares of Imperial Oil Limited and found that the trustee had not maintained an even hand as between the beneficiaries. The report then continues:¹⁴

¹² [1971] 1 O.R. 584 (Keith J.); [1971] 2 O.R. 541 (C.A.).

¹³ Question (b) was answered in the negative. No reason for this answer appears in the report.

¹⁴ The learned judge cited as authorities the cases in footnotes 9, *supra*,

Unless there is some provision in the trust agreement which prevents the trustee from doing so, it seems to me inescapable that the trustee is in breach of his well-recognized duty to maintain such an investment.

The order for removing the trustee was made on the ground that the deference which had been shown to the views of the settlor made it impossible to restore confidence in the original trustee with respect to the future administration of the trust.

In a judgment delivered orally by Arnup J.A. the Court of Appeal agreed in substance¹⁵ with the decision and the reasoning of the judge at first instance.

On the facts as found by the learned trial judge the decision that the trustee had failed to exercise its discretion and had thereby been guilty of a breach of trust is in no way in conflict with the principles which were stated earlier in this comment. What is disturbing both in the judgment of Keith J. and that of the Court of Appeal is the treatment of the even-hand rule. It seems to be implicit in both judgments that the fact that the life tenant was receiving a comparatively low rate of return on the investments was sufficient to impose, at least *prima facie*, a duty to convert and re-invest.¹⁶ Moreover the fact that the trust instrument expressly authorized the retention of the entire fund "whether producing income or not" was obviously not regarded as conferring power upon the trustee to hold the scales unevenly to the prejudice of the life tenant.¹⁷ The finding of the Court of Appeal was that the trust company was "in breach of its duty to maintain an even-hand between the life tenant and remainderman by refusing to exercise its power to invest in securities which would produce a reasonable return for the life tenant having regard to her financial circumstances". Although the finding is not altogether free from ambiguity it does appear to represent more than a decision that the trustee had failed to exercise its discretion; it appears rather as a finding that a conversion and re-investment should have been made. The even-hand rule was thus treated as governing the way in which the discretion whether to convert or retain ought to have been exercised.

If this is a correct interpretation of the reasoning of the learned

a passage from Lewin on Trusts (16th ed., 1964), p. 356, which summarizes the effect of those cases and passages from Underhill's Law of Trusts and Trustees, *op. cit.*, footnote 1, art. 45(1), p. 273, and Halsbury, *op. cit.*, footnote 1, p. 972, para. 1683, which contain general statements of the even-hand rule.

¹⁵ The court found that it was unnecessary to answer questions (b) and (c) *supra* and varied the judgment at first instance accordingly.

¹⁶ [1971] 1 O.R. 584, at pp. 588-589 (Keith J.); [1971] 2 O.R. 541, at p. 542 (C.A.).

¹⁷ Neither the judgment at first instance nor that of the Court of Appeal places any significance on the inclusion of these words.

judges the case must have some impact on the practice of drafting and administering trusts, as least in Ontario. The English decisions and the propositions stated in the English texts can no longer be regarded as safe and secure guides to trustees empowered to retain under-productive property.

It is of course, possible that one should confine the decision to its own facts and ignore any implications which the reasoning of the learned judges might appear to have for trustees who recognize the existence of their discretions and make a *bona fide* attempt to exercise them. It is very doubtful whether any trustee could afford to do this and until clarification is obtained much more attention will have to be given to the insertion of clauses which will effectively exclude the even-hand principle.¹⁸ Such attention will be required notwithstanding the fact that the principle is obviously grounded in sound policy. In this area, the over-riding policy is still freedom of disposition and it is submitted that neither justice to dependants nor justice to the beneficiaries of a person's bounty will be served adequately by tinkering with principles which have long governed the interpretation of wills and settlements *inter vivos*. To a large extent the content of those principles is a matter of indifference. What is important is that the principles, whatever their content, should be clearly stated and consistently applied. Despite the judgments which were delivered in *Re Smith*, settlors will still desire in some cases to authorize their trustees to benefit one beneficiary at the expense of another. In situations of the kind discussed in this comment the reasoning in those judgments has complicated unnecessarily the task of the lawyers engaged in drafting settlements and, more important, has created doubts as to the obligations of trustees administering settlements constituted prior to the decision.

MAURICE C. CULLITY*

* * *

¹⁸ For an example of such a clause see p. G-7 of *A More Intelligent Lawyer's Guide to Drafting Ordinary Wills* (1970) (contributed by Mrs. Bertha Wilson Q.C.).

* Maurice C. Cullity, of Osgoode Hall Law School, York University, Toronto.