What's past is prologue, or is it? Re the Representation of BB and its consequences

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Abstract

Developing the debate raised in Francis Tregear QC's recent piece Putting it right (T & T 2013, 19(1), 23–30), Advocate Bruce Lincoln and Dakis Hagen examine the preparedness of courts to validate wished-for events, in trust administration, which legally did not happen. In so doing, they contrast the eagerness of judges to set aside unwanted transactions, with courts' and legislatures' more miserly attitude to claimants, when a desired transaction is invalid. Their survey dwells particularly on the controversial Jersey decision *Re BB's Representation* (2011) 15 ITELR 51, in which both advised the same respondent, and on which they now cast a critical eye. They also examine retrospective powers of amendment, courts of equity's powers (if any) to alter the past and conclude by positing possible legislative reform for jurisdictions such as Jersey.

'I think we all agree, the past is over'[1]—so said the 43rd President of the USA, in one of his famous intellectual gaffes back in the year 2000. Clearly, for Bush II, the obvious was not nearly obvious enough ('[T]he best way to find these terrorists who hide in holes is to get people coming forth to describe the location of the hole...' was another one—thanks for that, Dubya). But perhaps, in his own words, we have 'misunderestimated' Bush. Because, in the law of trusts at least, the past is not necessarily always over.

Airbrushed from history

Most court interference with past events in trust law is destructive rather than constructive: rubbing things out rather than bringing them to life.

So, it is trite that equity can set aside a voluntary transaction (when appropriate) for mistake, fraud, undue influence or duress. Beneficiaries can, similarly, elect to avoid transactions made in breach of trust or fiduciary duty when the facts warrant it. And Parliament has recognized the need to reverse past transactions affecting trusts whose purpose is unjust. These include the statutory powers for attacking dealings designed to defeat the interests of creditors[2] and spouses.[3] By way of example, the Family Division last year in *AC v DC & Ors*[4] gave judgment in its biggest ever reported set aside of a disposition into trust (clawing back from a Manx 'EBT' a transfer of shares worth more than £54 million). There, Mostyn J made an order whose effect was that the initial disposition and a subsequent course of dealing with the shares was 'void ab initio', such that any unwanted tax consequences of the transactions themselves were also avoided.[5]

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1. *Dallas Morning News* (Dallas, 10 May 2000).
2. S 423 Insolvency Act 1986.
3. S 37 Matrimonial Causes Act 1973.
4. [2012] EWHC 2032 (Fam).
5. This was highly relevant from a CGT perspective.

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Born again transactions

Equity and Parliament have, in contrast, been miserly when it comes to the desire to treat wished-for events, which never happened, as having taken place. So when lawyers still talked about the (it seems, illusory[6]) 'rule' in *Re Hastings-Bass*, one High Court judge said this[7]:

> So far as the present case is concerned, the most important point about the Hastings-Bass principle is that it has been developed and explained as a principle whereby the courts will hold to have been ineffective something which the trustees have in fact done. In this case, by way of contrast, Mr Warren's argument would involve the court imposing on the trustees, or at least on the trust fund, something which the trustees did not do, but which Mr Warren says that they would have done if they had taken all proper considerations into account. Mr Warren recognises that what he contends for is not an application of the Hastings-Bass principle, but would be a new principle....
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> In my judgment, however, there is a very big difference between, on the one hand, the courts declaring something which the trustees have done to be void, and, on the other hand, the courts holding that a trust takes effect as if the trustees had done something which they never did at all. It is a big step from Hastings-Bass, not a small one, and I am not willing to take it...'

You are not perfect, but...

Despite such dicta, equity is not entirely without clemency when a desirable transaction has failed for want of formal validity.

There are the familiar, recognized cases where the court will perfect defective execution (when by reason of mistake or accident there is a formal defect in the execution of a power[8]). These categories have been explained helpfully and expanded in the Jersey case of *Re Shinorvic Trust.*[9] Relief may be granted in favour of certain individuals who are regarded as having given good consideration (including on a moral basis), a class which now includes, after *Shinorvic*, a non-married romantic partner for whom the disponer had a moral duty to provide.

This jurisdiction, or something akin to it, was taken to its absolute limits (perhaps beyond them), in England, by Vos J in *HR Trustees Ltd v Wembley Plc & Anr.*[10] There a deed of amendment in a pension scheme that should have been executed by five trustees had only been executed by four. So the trustees as a body had not executed the power at all. The court treated as done that which ought to have been done and held that it was valid. Vos J found at [66] that the Trustees:

> were obliged... to make an appropriate declaration in a particular form. They could have been compelled on behalf of the members, who are not volunteers, to specifically perform their exercise of the power. Not to make a valid declaration was a breach of the terms of the definitive deed. Thus, in my judgment, this is a classic case in which the maxim of equity can and should properly be applied.... It may be that there has never been before a case on all fours with the present, but law and equity would be made to look ridiculous if it were powerless to correct what has been an obvious administrative error like the one made in this case.

Imputed—that is, made up—intention

Related are those cases where courts have turned intellectual somersaults to find that desirable events

6. Subject of course to what the Supreme Court will say following the *Pitt* and *Futter* appeals in March 2013.
7. *Breadner & Others v Granville-Grossman & Others* [2000] EWHC Ch 224 at [63] and [64].
8. We do not include rectification here, but rather examine those cases where the document cannot be saved by that remedy, say, because it was not signed by one of the relevant parties.
9. [2012] JRC 081.
10. [2011] EWHC 2974.

have happened, when it is merely arguable that they did so.

So, in the oft-cited *Davis v Richards and Wallington Industries Limited*,[11] an interim deed creating a pension fund was intended to be replaced later by a definitive deed. The interim deed had a power for the company to remove trustees. Before the definitive deed had been entered into, one of the three original trustees purported to retire by letter. Later, the definitive scheme was executed by the company but only the two remaining trustees signed it (the third believing himself to have retired). The court held the definitive deed to be valid: first, on its true construction, the interim deed conferred by implication the necessary power on a trustee to resign which the third trustee had done; secondly, although the removal of the third original trustee was not in fact intended by anyone at the time, the court imputed an intention to the company to exercise its power to remove the trustee and treat that power as having been exercised by the company's execution of the definitive deed. The court will, it seems, impute such an intention when it is clear that the desire to bring about a particular result or effect could only be achieved by means of an exercise of a power (even if no-one realized he was exercising it).

Another line of cases, referred to and followed most recently again by *Shinorvic*,[12] establishes that when an erroneous recital by the donee of a power in a later document indicates that the power in question was properly exercised, the recital can be sufficient for the court to find that the power was exercised in the later document if the later document otherwise complies with the formalities of the power.

But what if it is all bad?

The above cases show that the court will contort itself as far as it can to find validity when honest mistakes—which risk the effectiveness of a bona fide transaction—have been made. But what if, twisting and turning as much as possible, no validity can be found? Does the court have an inherent jurisdiction simply to cure the invalid act retrospectively?

The Jersey case of *Re BB's Representation*[13] would seem to suggest that the court can do just that.

The relevant facts were as follows. D, a UK company, established a pension trust. The first trustee was G. In or around 1996, the two directors of G, who were the only beneficiaries, placed D into liquidation. D had the power to appoint new trustees under the trust; by virtue of a provision of the Trusts (Jersey) Law 1984 ('the Trust Law') G could exercise the power if D ceased to exist. On 3rd November 1997, D, G, and A entered into an instrument of appointment and retirement of trustees by which G retired as trustee and A was appointed as trustee. The instrument had been sent to D in England and was returned with the seal of D affixed in the presence of two signatories. In 2009, A's purported successor trustees came to discover that, unbeknownst to them and G, D had in fact been dissolved in 1996 before appointment of A was entered into. The court held that the initial appointment of A was thus invalid,[14] since D

11. [1990] 1 WLR 1511.

12. At [72]; the passages, strictly speaking, were obiter.

13. (2011) 15 ITELR 51; [2011] JLR 672.

14. In an article called 'Nothing Up My Sleeve' (2011) 15(3) JGLR 357–65, Professor Paul Matthews has suggested that 'the elephant in the room' (his words not ours) in *Re BB* was the imputed intention doctrine recognized in *Davis v Richards and Wallington Industries* referred to above; *Re BB* should have been decided on that basis, he suggested, with no question of ratification arising. The professor's reasoning was that G signed the original deed, purportedly with D, and it did not matter that G did not appreciate that it had the power to appoint fresh trustees, because it did have that power. What mattered, Prof Matthews argued, was that there was no intention on G's part not to exercise the power. But is that right? In *Re BB*, all relevant parties did in fact acknowledge and address their minds to the existence of the power but everybody got it wrong. G believed that someone else, D, was exercising the power at the time. If person X believes that person Y is exercising a power at a particular time (instead of person X), is that not sufficient for a finding that person X intended not to exercise the power? Further the court in *Re BB* expressly found in para 28 that:

> whilst it might be said [on the facts of another similar cited case] because of the knowledge that can reasonably be **imputed** to the retiring trustee, it had the intention of appointing a new trustee, in this case **it is difficult to say that it was G's true intention to do anything other than to retire.**

Accordingly, on the facts of the case, the authors take the view that the arguments based on imputed intention would not have succeeded (emphasis added). It is noted, in this connection, that Re BB is distinguishable from the recent case Re Representation of H1 Trust Company Limited [2013] JRC 039. In that case, continuing and retiring trustees had power to appoint a successor to the retiring trustee, there being no protector. The deed recited the fact that that those trustees wished to make the appointment but the main body of the deed contained an elementary mistake in that it referred to a non-existent protector making the

did not exist (as were subsequent appointments, including that of the current trustee de son tort, the applicant in the proceedings). Refusing to rectify the deed of appointment and retirement, the court appointed the applicant as trustee of the settlement *de novo*, acknowledging that hitherto it had only been a trustee de son tort, and went on to consider whether there was anything it could do about the devastating consequences arising from the observations of the English court in *Jasmine Trustees v Wells & Hind*[15]:

> [42] ... The trustee de son tort will be obliged to hold the property for, and to account to, the beneficiaries, but on the other side of the coin will not have the powers of the trustee conferred by the settlement ... It would be contrary to principle to allow such a person to arrogate powers to himself by virtue of his 'intermeddling', even if that intermeddling is innocent.
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> ...
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> [54] ... the trustees who purported to appoint the trust property were themselves invalidly appointed. They acted in the trust, and became trustees de son tort, but nevertheless were invalidly appointed. As such trustees, they might be liable for breach of trust in the same manner as a trustee validly appointed, but that is a question of liability, not powers ....

Thus any discretionary act conducted by the trustees de son tort would have been invalid. The applicant nevertheless asked that the court 'ratify' everything done by them, including appointments and distributions of capital and income to the beneficiaries.

The court found as follows at para 44:

> The general principle guiding the Court in the exercise of its jurisdiction under Article 51 [which enshrines in Jersey the court's inherent jurisdiction to supervise trusts] and of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. Where, as here, a trustee de son tort has acted in good faith, unaware that he has not been duly appointed to office, then applying that general principle, it seems to us that we should save the Trust from the havoc that may ensue from any attempt to unscramble what was purportedly done by the trustee de son tort by confirming and approving those actions (i.e. to ratify them), whilst at the same time preserving any claims the beneficiaries may have against the trustee de son tort for breach of trust assuming he had been validly appointed.

What did these words mean 'confirming and approving'? At first blush, one might rationalize the case by assuming that the court simply wished to absolve the applicant of personal liability. But that cannot be right: the court went on elsewhere in its judgment to relieve the original trustee (G) from liability under Article 45 of the Trust Law, the Jersey equivalent of section 61 of the Trustee Act 1925. Ratification, if it only related to personal liability, would add nothing to such an order. Indeed an order under Article 45 (section 61) would not have aided the court's desire to 'save the Trust from ... havoc' as the invalidity of the applicant's acts would have remained such. The only reasonable conclusion is that the court was making the previously void, real. But as a famous Greek once said, 'not even the gods can change the past.' So what did the judge think he was doing?

The past is another country

The Royal Court's analysis was essentially that its inherent jurisdiction or the statutory encapsulation of that jurisdiction under Article 51 of the Trust Law must have been sufficient to permit ratification:

> That article [51] makes no express reference to ratification of past acts of trustees but if there is any doubt

appointment. There, unlike Re BB, the trustees who wished to make the appointment did not believe someone else was making it – they knew there was no protector – and intended to make it themselves. The doctrine of imputed intention was properly applied (indeed there was no need really to impute the intention). In Re BB the position was different.

15. [2008] Ch 194.

> as to the Court's power to ratify the past actions of the [Applicant] under Article 51, then in our view, the Court has an inherent jurisdiction to do so,

said the judge at [43]. But the court also cited at [42] the following paragraph from the 18th Edition of *Lewin on Trusts*, which seemed to conflict with the proposition that there exists a universal inherent jurisdiction:

> 42-82 In some trusts, powers may be available to properly constituted trustees such as enables them to confirm the exercise of powers purportedly exercised by the trustee de son tort. While it would not be open to the properly constituted trustees to exercise powers of this character merely so as to save the trustee de son tort from liability, nonetheless the exercise of such powers may be justified so as to save the trust from the havoc that would be caused by any attempt to unscramble what was purportedly done by the trustee de son tort, and would have been properly done had there been no defect in his appointment. In a case where a settlement was de facto administered by the settlor who bought agricultural land in the name of the trustees and granted a tenancy, it was held, upon the purchase being affirmed by the trustees, that the tenancy bound them as well (emphasis added).[16]

That paragraph quoted from Lewin indicates that the power to ratify past acts (which are otherwise invalid) would require authorization in the trust instrument. That makes sense. There is no impediment to a power of amendment being used retrospectively to cure a past breach of trust, if the power is expressed to permit retroactive variation (or if not expressly, then on its true construction or by virtue of an implied term)[17] and it is properly exercised. So in *Re Toray Textiles Europe Pension Scheme*,[18] Lewison J (as he then was) held that a power of amendment in a pension scheme in the following terms did not preclude a retrospective amendment which had the effect of removing a contingent benefit that had accrued in respect of service prior to the date of the amendment:

> the Principal Employer with the consent of the Trustees may by deed . . . cancel, amend or add to all or any of the trusts, powers, and provisions of this Deed with retrospective, immediate or future effect.

In the *BB* case report, however, no such power was referred to. So the relevant question is, can Article 51 in Jersey, or in England the inherent jurisdiction, be used to write into the trust instrument a retrospective power of ratification such as that referred to by Lewin in the quoted paragraph above?

Clearly not, because that would be a variation of trust. It has been trite law since the 1950s that there is no inherent jurisdiction to do any such thing. And as to Article 51, the Royal Court has already considered the point in another case:

> In our judgment the Court has no general jurisdiction to alter the terms of a trust under Article 51 or its general supervisory jurisdiction.[19]

So this is not an area where there is, or was, scope for judge-made extensions of the law.

Conclusions

It will be interesting to see how the English or another Commonwealth court responds to a claim for ratification, supported by citation of *Re BB*. A straw poll

16. The case referred to at the end of this quotation is *Smith v Hobbs* (The Times, November 13 1980). It is not authority for the proposition that invalid acts can be retrospectively validated by trustees (assuming no special power to do so). There was no suggestion in the *Smith* case that if the beneficiaries had wished to complain about the unauthorized purchase of the land (assuming no defence of estoppel or limitation of actions) that the trustees' own ratification could protect those same trustees from suit from the beneficiaries. The case is authority for the narrower proposition that if a trustee elects to affirm an unlawful transaction carried out between a trustee de son tort and a third party, the true trustee, as against the trustee de son tort or the third party, will thereafter be unable to complain about, or repudiate, all the features of the relevant transaction following such affirmation.

17. For a full discussion of this see *Thomas on Powers*, 2nd edn, paras 16.41–16.46.

18. [2007] PLR 129.

19. *Re IMK Family Trust* [2008] JRC 136 at para 65.

taken by one of the present writers at the 2013 Chancery Bar Association Conference in London disclosed that a significant minority (though only a minority) of those attending the offshore trusts session thought that the case was right on the question of ratification.

Doubtless, the jurisdiction to seek ratification is a professional trustee's (or indeed any trustee's) dream. Logically, if *Re BB* is right, the power to ratify should be extended to all past transactions taken honestly and reasonably, which for technical reasons are invalid. If Jersey wants this jurisdiction (and one judge plainly thought it would be useful to have it) perhaps the Island's legislature should consider expanding the power under Article 45 of the Trust Law (the equivalent of section 61 of the Trustee Act 1925) so as to allow substantive validity to past transactions, which for technical reasons only, are invalid, but which were entered into honestly and reasonably. After all, as Napoleon said cynically, what is history but 'a set of lies, agreed upon'.

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