Recent Trusts Cases

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IN LAST YEAR'S ANNUAL REVIEW of Manitoba trust cases[1] we considered two cases which arose by operation of law rather than by express creation of the parties. One involved a resulting trust[2] and the other a constructive trust[3]. The latter arose out of a situation involving distribution of property following a lengthy period of cohabitation and where the Supreme Court of Canada has used the constructive trust in recent years to achieve equity between the parties.[4]

A leading trust case in Manitoba this year also involves a constructive trust, but this time one of the more traditional kinds, where the Court is asked to impose a trust either on an existing trustee who makes a profit out of his trusteeship, as in the famous case of *Keech v. Sandford* going back to 1726,[5] or where a person, though not appointed as a trustee, intermeddles in a trust.

In the case of *Canadian Imperial Bank of Commerce v. Valley Credit Union Ltd.*[6] the plaintiff bank was seeking a declaration that all monies deposited by its customer M.S. Sales & Equipment Ltd. in an account with the defendant credit union were trust monies to be held for its benefit. The trial judge found the credit union liable to the bank as a constructive trustee, but this was overturned by the Court of Appeal.

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[1] C.H.C. Edwards, "Recent Trust Cases" (1990) 19(1) Man. L.J. 215.

[2] *Carter Estate v. Johnson Estate* (1989), 55 Man. R. (2d) 158 (Man. Q.B.).

[3] *Pirie v. Lesliey* (1988), 52 Man. R. (2d) 241 (Q.B.).

[4] See *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

[5] (1762), 2 Eq. Ca Abr. 741, 22 E.R. 628 (Ch.).

[6] (1989), 63 D.L.R. (4th) 632 (Man. C.A.).

The facts, as found by the Court, were that M.S. Sales operated a business selling and repairing farm equipment and had been a customer of the plaintiff's local branch for a number of years. It had a line of credit with the bank secured by a general security agreement and by a general assignment of accounts, both registered in the Personal Property Security Register. On October 25th, 1984, M.S. Sales opened an account with the credit union and made deposits of proceeds from its sales and service. They also wrote cheques against the account in settlement of accounts payable.

Shortly before June 24, 1985, the bank discovered the existence of the credit union account and the manager of the local branch of the bank wrote to the credit union informing them of the bank's general security agreement and requesting that they not accept any future deposits from M.S. Sales. On June 25th, the credit union replied saying in effect that it felt able to operate the account in question until such time as the bank exercised its remedies under the security agreement and the credit union also asked for copies of the security documentation. The bank did not reply to the letter. On August 9th, 1985, the bank called its loans and requested the credit union to forward any funds held in the name of M.S. Sales. In the present action the bank was claiming that the credit union was a constructive trustee of all monies deposited with it by M.S. Sales.

In his judgment, Mr. Justice Philp referred to the classic statement by Lord Selborne L.C. in *Barnes v. Addy*[7] which recognized that three elements should be present to establish such a constructive trust namely (1) assistance by a stranger (here the credit union), (2) with knowledge and (3) in a dishonest and fraudulent design on the part of the trustee (here M.S. Sales). The learned judge had no hesitation in agreeing with the finding of the trial judge that the first and third elements were present in this case. However, he felt the real question to be decided was whether the credit union had actual or constructive knowledge of the fraudulent design on the part of M.S. Sales.

This whole question of what is constructive knowledge has been debated in a series of English Chancery cases without any real agreement as to what is the final test. In Canada, Mr. Justice Philp pointed out that the reasonable man test of constructive knowledge has been adopted and applied in a number of decisions. In short this test would impute knowledge and therefore constructive trusteeship where there was knowledge of circumstances that would indicate the

[7] (1874), 9 Ch. App. 244 at pp. 251-52 (Ch.).

facts to an honest and reasonable man or put him on inquiry. He did not feel that it had been authoritatively decided in Canada that carelessness or negligence was sufficient to impute constructive knowledge to a stranger. In this particular case the credit union had received information from the bank in its letter of June 24th as to the possible status of monies M.S. Sales had deposited to its account; it was put on inquiry, it immediately made that inquiry to the bank but its inquiry went unanswered and it received no benefit as a result of the alleged breach of trust.

In all the above circumstances the learned judge had no hesitation in coming to the conclusion that the credit union did all that it was bound to do and thus was not chargeable with notice of breach of trust.

In his concurring judgment, Mr. Justice Huband emphasized that whatever the carelessness of the credit union in making the inquiry, there was even greater fault on the part of the bank in failing to respond to the credit union's letter asking for a copy of the security agreement.

It should be pointed out that in this case the claim was really a personal and not a proprietary one. The credit union had already paid into Court the sum of $3909.25 which it had on deposit when the plaintiff called its loans to M.S. Sales. The bank was therefore seeking to hold the credit union liable as a constructive trustee for what they had previously held on deposit because it could no longer be reached by the bank. As Professor Oosterhoff has pointed out,[8] the Courts tend to be more lenient in these cases towards the honest stranger and impose a less strict test of constructive notice. If, however, the claim is a proprietary one, in that the plaintiff is seeking a constructive trust upon a property actually still in the hands of the defendant then it does not matter whether the latter was honest or not. He should not be able to claim priority for his legal interest over prior equitable interests of which he ought to have notice.

One final point which did arise in this case was whether the credit union, if it had been liable as a constructive trustee, could have relied on section 81 of the *Trustee Act*,[9] which excuses a trustee (including a constructive trustee) from liability if he has acted honestly,

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[8] A.H. Oosterhoff & E.E. Gillese, *Text, Commentary & Cases on Trusts*, (Toronto: Carswell, 1987) at 480.

[9] *Trustee Act*, R.S.M. 1987, c. T160, s.81.

reasonably and ought fairly to be excused. Since this point became obiter, Mr. Justice Philp made no comment. Mr. Justice Huband, however, felt that the failure of the credit union to make reasonable inquiry concerning M.S. Sales' position with the plaintiff bank would have excluded the application of the section.

Another interesting and helpful decision this past year in a totally different area of the law of trusts is the case of *Keewatin Tribal Council v. City of Thompson.*[10] This involved the difficult question of the validity of non-charitable purpose trusts.

Ever since the judgment of Lord Eldon in *Morice v. Bishop of Durham*[11] it has been understood that the objects of a trust must be persons. This is largely based on the premise that there must be a person, human or legal, who can enforce the trust in question. However, there have always been testators who have wanted to use a trust to carry out certain purposes after their death such as the maintenance of their graves or the care of their animals. Generally the law has refused to lend its support except where the trust was for charitable purpose and in such a case the enforcement would be by the Crown on behalf of the public and generally through the office of the Attorney-General.

During the 19th century English Courts did relent a little and allowed some further exceptions such as the maintenance of a grave or tomb, food and shelter for animals and even the furtherance of fox-hunting! All these were, however, regarded as somewhat anomalous and particularly English with perhaps doubtful application to Canada.

Since the end of the Second World War, the English Courts have taken a fairly negative position regarding these non-charitable purpose trusts. For example, in 1952 in *Re Astor's Settlement Trusts*[12] it was held that a trust for the training of journalists and improvement of newspapers was invalid and in 1957 a trust arising from the will of the late George Bernard Shaw for the purpose of research into the production of a new alphabet was also held invalid.[13]

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[10] (1990), 61 Man. R. (2d) 241 (Q.B.).

[11] (1805), 10 Ves. Jun. 522, 32 E.R. 947 (Ch.).

[12] [1952] Ch. 534, [1952] 1 All E.R. 1067 (Ch. Div).

[13] *Re Shaw*, [1957] 1 W.L.R. 729, [1957] 1 All E.R. 745 (Ch. Div.).

However, a change took place in 1969 in the case of *Re Denley's Trust Deed*[14] where land had been devoted to trustees for a recreation or sports ground for the employees of a certain company. Sport *per se* is not charitable and therefore purely as a non-charitable purpose trust it would have failed. Nevertheless the learned judge (Mr. Justice Goff) was able to save it by drawing a distinction between an "abstract or impersonal" purpose and a purpose which is expressed as a purpose but which directly or indirectly benefits an individual or individuals. Such persons, he said, will have a sufficient interest in the trust to see that it is carried out.

With this background in this rather confusing and unsettled area of the law we can now examine *Keewatin Tribal Council v. City of Thompson*.[15] In that case a group of Indian bands purchased some property to be held in trust to provide housing for students from the various member bands attending high school in Thompson. There were many arguments raised in the case but the key question was whether this trust could be an enforceable purpose trust. Mr. Justice Jewers had no difficulty in finding this to be a purpose trust but then had to decide if and how it could be enforced. He applied the above decision as in *Re Denley's Trust Deed*[16] and pointed out that the ultimate, albeit indirect, beneficiaries of the trust were the individual members of the band and therefore there were any number of persons with standing to enforce it. Accordingly, he concluded that at least in Manitoba (where there is no longer any rule against perpetuities) this type of non-charitable purpose trust was perfectly valid since it did not fail for want of beneficiaries having standing to enforce it.

In summary, it is gratifying to see a Manitoba Court being willing to find a way of enforcing a non-charitable purpose trust and thus really fulfilling what the settlor or trustee generally intended.

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[14] [1969] 1 Ch. 373, [1968] 3 All E.R. 65 (Ch. Div.).

[15] *Supra*, note 10.

[16] *Supra*, note 14.