FRAUD ON A POWER: JUDICIAL CONTROL OF APPOINTMENTS BY DISCRETIONARY TRUSTEES

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PART ONE: AN OVERVIEW OF THE PROBLEM

The "fraud on a power" doctrine is misnamed. It operates as a device for the judicial control of appointments by trustees of discretionary trusts and donees of powers of appointment to ensure that they act within the authorising terms of the trust instrument. It is therefore more accurately described as an "ultra vires appointments" doctrine.[1]

The rules controlling ultra vires appointments are of considerable day-to-day practical importance to trustees administering the typically wide discretions granted in the modern discretionary trust. As discretionary trusts increasingly fill the shoes of the old-fashioned fixed trust, the rules become the bread and butter of trust law. In stark contrast, much of the writing and classification in the area is based on concepts developed a century ago, before the modern discretionary trust, the rise of the pension fund and modern tax avoidance techniques. Excessively formalistic concepts have led to practical difficulties in predicting when courts will interfere with appointments, or, in other words, to state the law. These concepts have also caused errors which are more fundamental in the area of non-exhaustive discretionary trusts and powers of revocation. Because this area has been so neglected, much of this article is devoted to developing a more functional set of predictive tests. But it must be appreciated that such an analysis is merely a start and raises as many questions as it answers.

The significant conceptual advances in the recent crop of decisions on certainty of objects[2] and objects' rights[3] have thrown light into this over-

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1 There is an obvious analogy with the position of company shareholders in relation to the directors but the analogy should not be extended too far. On top of the more obvious difference between the role of directors and trustees, the directors of a company can still be controlled, ultimately, by the votes of shareholders whereas the objects have no such sanction. For the analogous company authorities see *Introductions Ltd* v. *National Provincial Bank Ltd* [1970] Ch. 199 (C.A.); *Bell Houses Ltd* v. *City Wall Properties Ltd* [1966] 2 Q.B. 656 (C.A.).

2 *Whishaw* v. *Stephens (Gulbenkian)* [1970] A.C. 508 for non-exhaustive discretionary trusts. A non-exhaustive discretionary trust is a mere power of appointment

grown area and permit an integrated perspective of the whole law of powers. It is now accepted law that a settlor of a discretionary trust need only define the limits of a class of objects sufficiently for a court to be able to determine whether any candidate presented for appointment is part of the class. It is a definitional or conceptual certainty rule rather than one requiring certainty about the physical existence of the objects themselves or, correlatively, a complete list of those objects.[4] This so called "certainty of objects" rule, as this author has argued elsewhere,[5] is more accurately described as merely part of a more general rule. This general rule requires that there be sufficient clarity in any instrument delegating proprietary rights to another person. The formula defining the conditions for membership of the class of objects must be clear enough to enable a court to find out precisely what has been delegated. That rule is merely an initial pronouncement on the validity of a trust instrument, based on the prediction that when the time comes to test the validity of particular appointments, the formula provided by the settlor in the trust instrument will be adequate to enable the court to fulfil that task justiciably. So the two rules overlap substantially. By building a bridge between them it is possible to develop an integrated strategy for judicial control over discretionary trusts.

In construing the widely drafted words of discretionary trusts, or entering into the more difficult exercise of testing appointments against some bench-mark of purpose, purportedly construed from the authorising instrument, courts can use the ultra vires appointments doctrine as a policy tool to control the more flamboyant excesses of trustees. Unfortunately, the authorities have not been very active in developing the potentials of the rule in this area. In the future the courts may use it more actively as a social control tool to actively police the width of discretion which it permits a settlor to delegate to a fiduciary, or the degree to which it permits the incidents of proprietary control to be split from incidents of enjoyment.

This in turn foreshadows a more critical policy choice which will dominate the future debate. Although trust lawyers have never really adjusted their perspective or their concepts to accommodate the fact, tax avoidance is still the dominant objective of most discretionary trusts. Reconstructions to avoid tax account for many of the cases in this area. But to state that discretionary trusts are used to avoid tax is one of those

exercisable by a trustee by virtue of his office. Extended (with one important reservation) to exhaustive discretionary trusts by *McPhail* v. *Doulton* [1971] A.C. 424. An exhaustive discretionary is a trust power exercisable by a trustee by virtue of his office.

[3] *Gartside* v. *I.R.C.* [1968] A.C. 553, *Sainsbury* v. *I.R.C.* [1970] Ch. 712.

[4] Grbich, *Certainty of Objects: The Rule that Never Was* (1973) 5 N.Z.U.L.R. 348, 349.

[5] Grbich, op. cit. 351.

ubiquitous truisms which is so obvious that it is usually ignored in most serious debates. The problem is compounded by the regrettable tendency in writing and teaching to fractionate tax law and trust law. Tax is one means by which public control is asserted over transactions by private individuals. To look at the incidents of private property, and particularly the rules about a tax avoidance device like the discretionary trust, without feeding into the model the reality of a tax system which skims off half or more of the proceeds, is a very distorted frame of reference from which to commence analysis .

The discretionary trust is primarily a tax avoidance tool. Effective tax avoidance necessitates the ability to with-hold proprietary rights in the trust fund from the objects of discretionary trusts so that there is no property to be taxed in their hands.[6] In so far as a court does give objects rights against the trustee, it also increases the objects' control and the likelihood that the later court will hold that they do in fact have property in the trust fund.[7] This trade-off between the object's control and the erosion of the tax avoidance objective is a background to the more obvious policy questions about the way in which power ought to be allocated as between a trustee and an object. Abuses by trustees of unfettered powers will, no doubt, soon force the judiciary to impose duties on trustees and create correlative rights in objects. In all probability only the difficulties of getting enough information and the costs and delays of litigation have prevented a number of such applications already. But whatever the catalyst is, judicially created norms will have tax distribution implications.

Classification and Nomenclature

Classification in the whole area of appointments under discretionary trusts and powers of appointment has fallen into disrepair. Terminological hang-overs often lead to substantive confusion and duplication. The discretionary trust problems have much in common with trusts and can be usefully organised into the following analogous categories:

1. The appointment is ultra vires the instrument creating the powers because:
   (a) it is invalid on its face, either because it appoints to non-objects or imposes conditions not authorised by the instrument; or
   (b) it does appoint to objects but it is exercised for purposes not expressly or impliedly authorised by the instrument.

[6] Withholding beneficial rights from objects and putting them into suspension is the main avoidance technique for income tax, death duty and other taxes. See the operation of the device in *Gartside* v. *I.R.C.* [1968] A.C. 553 (extended to exhaustive discretionary trusts in *Sainsbury* v. *I.R.C.* [1970] Ch. 712).

[7] The Hohfeldian analysis indicates that a duty creates a correlative right in the object.

The term "fraud on a power" is traditionally used for this category.[8] The term "ultra vires appointments", which is less misleading, will be used wherever possible in this article.

2. The execution is void as an invalid delegation of the power to another person. This category can more helpfully be treated as part of the question of failure to exercise the discretion.
3. The execution is void because the formalities of execution do not comply with the requirements of the authorising instrument: "defective execution".
4. The appointment is void because it contravenes rules of law or public policy: "illegal appointments".

This article will deal only with the first of these categories but it should not be forgotten that the categories are merely a convenience which sever particular issues for intensive examination. They must not become a prison. The mere fact that illegal appointments are in a separate category, for example, should not exclude the development of the obvious potential of the ultra vires doctrine as a device to achieve wider public policy objectives by the courts.

The two parts of ultra vires test

The ultra vires appointments test has two separate parts. The primary, objective part of the test is designed to control appointments to persons who are *ex facie* not objects of the discretionary trust. That is a matter of construing the discretionary trust instrument to see whom the settlor named as objects and causes few conceptual problems which have not already been discussed in the certainty of objects authorities. In applying the first part of the test, according to the authorities, there is only one relevant enquiry: on an objective consideration of the trustee's actions, is the appointment authorised on a proper construction of the instrument creating the discretionary trust? The accepted view is that the trustee's purposes are not relevant to this question. The first condition is not satisfied if the trustee appointed the property to a person who was not an object of the discretionary trust[9] even if he did so to benefit an object.

[8] Farwell, *Concise Treatise on Powers* (3rd ed., London, Stevens & Sons, 1916), 324 distinguishes an excessive execution from a fraud on a power. He defines excessive execution as transgression either of the rules of law or the scope of the power. The distinction no longer appears useful and the consequences of the two are the same: an invalid appointment. Farwell reasons that severability is not possible with excessive executions but classification is a poor way of deciding such substantive questions. Both involve, in part, the objective element of transgressing the scope of the power, as laid down in the authorising instrument. Both an excessive execution and a fraud of the power can be committed by way of conditions imposed, or limitations added, or by delegation of the power. The earlier cases are not very careful in distinguishing the two doctrines. It is suggested that these two doctrines overlap and the distinctions merely confuse the law.

[9] *Sadler* v. *Pratt* (1833) 5 Sim 632, 58 E.R. 476.

Again, it is not satisfied if he appointed to a person who was an object, but imposed conditions which would benefit persons who were not objects.

The purpose becomes relevant if, and only if, the appointment passes the first test. If it does, the court must still ask whether the exercise of the discretionary trust was moved by a proper purpose. At this point it might be relevant to adduce extrinsic evidence to decide whether there were collusive arrangements, or to look at the conduct of a trustee to establish his motives and intentions. These will be relevant to the question: what was his purpose in exercising the appointment? Was this purpose authorised by the instrument?

Flaws in a rigorous two part dichotomy

Tidy though such classification may be, there are limits on the rigour with which it is profitable to separate the primary objective test from purpose. Is an appointment which bestows any benefit at all on a non-object a fraud on the power? Obviously all such appointments cannot be void.[10] If this were so, to give an extreme illustration, an appointment of real property out of a trust fund would be void if any non-object visited and enjoyed the appointee's property. A de minimis rule will not cure the problem because the benefits enjoyed by a non-object may be quite substantial. Stamp J. in *Re Brook's Settlement, Brook* v. *Brook*[11] reasoned

> "the exercise of a fiduciary power of appointment does not become a fraud on the power because in fact it confers a benefit upon a person who is not an object of the power, but because the purpose, or one of the purposes, of the appointment is not to benefit the appointee who is an object of the power but is an ulterior purpose."

An appointment which benefits non-objects is valid so long as the benefit given to non-objects is merely incidental to the appointment in favour of the objects of the power.[12] To give an example, an appointment made on condition that property is settled on trusts for an infant during his minority or on a statutory spendthrift (protective trust) clause, in a case where there are reasonable grounds for suspecting that such protection is required, may be valid. Similarly the appointment of a house, from a capital discretionary fund, to a male object of a discretionary trust may be valid though his non-object wife and family will benefit materially from living in the house. On the other hand, an appointment imposing a condition that the property appointed should be resettled on issue, who are not objects of the power, would be invalid according to the accepted view. It introduces appointees who are not named as objects in the discretionary trust instrument.

[10] Baggall J.A. in *Roach* v. *Trood* (1876) 3 Ch.D. 429, 440.
[11] [1968] 1 W.L.R. 1661, 1666.
[12] Romilly M.R. in *Re Huish's Charity* (1870) L.R. 10 Eq. 5, 9 (C.A.).

But what happens if the purpose of appointing to non-objects is to benefit objects? Is it pedantic to insist on the strict formality that the object directly gets the appointed property? Does this suggest that a rigorous application of the primary test *should* be secondary to the purpose test? We will come to this important question and criticize the accepted view after examining the main elements of the purpose test.

PART TWO: THE PURPOSE TEST

The purpose test defined

An appointment to an object for the purposes of benefiting a non-object is void. This is a judicial extension of the primary, objective part of the ultra vires appointments doctrine to cover a very obvious means of circumventing it. The earlier books distinguished several categories of improper purpose.[13] It is more useful to treat these together as part of a single test.

Another problem arises in analysing the existing authorities. There has been a tendency to downplay active judicial control by purporting to base ultra vires decisions on the objective intentions of the settlor. By manipulating the empirical referants to the words of trust deeds, which by their nature contain a range of ambiguity,[14] the courts can retain a degree of policy flexibility and thereby control appointments without being forced to admit the value choices made and thus undermine their legitimacy. But it also makes it difficult for an analyst to unscramble the egg. The test should be stated in this way

> An appointment is ultra vires and void if made for a purpose not expressly or impliedly authorised by the instrument creating the power or if a court wishing to control the trustee's power for some other policy reason is able to construe it ultra vires.

Compare this test with what Judges say. Lord St. Leonards in *Portland* v. *Topman*[15] propounded the best known test

> "A party having a power like this must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot

[13] Farwell's careful analysis distinguishes a number of different heads by which powers can be attacked because they were exercised for the wrong purposes:
— executions made for corrupt purposes,
— executions in pursuance of an antecedent agreement,
— appointment and contemporaneous settlement on a child where the appointment was made in pursuance of contract inducing appointment,
— appointment for purposes foreign to power, op. cit. 471 ff.

[14] For a detailed analysis of the problem see D. J. Gifford, "Decisions, Decisional Referants and Administrative Justice" (1972) 37 *Law and Contemp. Problems* 3; and L. Wittgenstein's celebrated *Philosophical Investigations* (Oxford, O.U.P. 1953) which argues that meaning is preserved only in linguistic practices, which in themselves embody common agreement about a set of rules. This influential view is now widely accepted.

[15] (1864) 11 H.L. Cas. 32, 55-56; 11 E.R. 1242, 1251.

> carry into execution any indirect object, or acquire any benefit for himself, directly or indirectly. It may be subject to limitations and directions, but it must be a pure, straight forward, honest dedication of the property, as property, to the person to whom he affects, or attempts, to give it in that character."

By an "ulterior object" Lord St. Leonards meant any object not authorised by the instrument creating the power. He appears to mean, by reference to the execution of any indirect object, that this should actually move the appointment and not be merely an expected but incidental consequence of it. Evershed M.R., in *Re Greaves, Public Trustee* v. *Ash*,[16] used a test based on that of Lord St. Leonards, but one refined by a century of authority

> "it is useful to discover and to state what is the essential quality of the vice which constitutes a fraud on a power. In our judgment the essential characteristic is that the appointor, having assumed the burden of making the appointment, . . . then proceeds to decide the matter, not with the single view of conferring benefits among the designated class, but with . . . benefit by some person not among the designated class, and to that extent defeating or departing from the intention of the donor . . ."

The purpose test was applied on a clear set of facts by the High Court of Australia in *Redman* v. *Permanent Trustee Co. Ltd.*[17]

It should be borne in mind that the doctrine extends beyond direct benefits to non-objects. If the appointment is made with the purpose of relieving the settlor from an obligation for which he might otherwise be liable,[18] for example the maintenance of his own child, this might be enough to invalidate the appointment.

Re Crawshay *on improper purpose*

Re Crawshay, Hore-Ruthven v. *Public Trustee*[19] is the leading authority defining improper purpose. In this case, Rose Crawshay was entitled to a life interest in trusts created under her father's will and was donee of a power to appoint, after her death, to a class of objects which consisted of her issue. In default of appointment, the property went equally to such of Rose's children as attained 21 (or being females married earlier with their parent's consent) and if no child or children satisfied this condition the property went to such of Rose's nephews and nieces as she should appoint and, in default, equally between them. The residuary legatees of the father's will were Rose's three brothers. This orderly scheme of wealth transmission was thrown into disarray when Rose became engaged

[16] [1954] Ch. 434, 445 (C.A.).
[17] (1916) 22 C.L.R. 84.
[18] *Cochrane* v. *Cochrane* [1922] 2 Ch. 230 (in this case the benefit was donee's freedom: he appointed to his wife as part of a settlement for divorce).
[19] [1948] Ch. 123 (C.A.).

to a gentleman called Williams. In order to stop their marriage, the father expressly excluded the issue of that marriage from any interest under his will. Having executed a codicil to this effect, the father duly died and disobedient Rose duly married Williams.

Rose's brothers, who were entitled to the residue under the will, disagreed with their father's vindictive action and assigned all interests to which they might be entitled from the father, to trustees for Rose's children. But since Rose's marriage to Williams was her only marriage, the persons most likely to take were the nephews and nieces, the sons and daughters of her brothers and sister. Rose appointed the whole fund to one 12-year old nephew, Jack, who apparently did not even realise that an appointment had been made to him. At the insistence of one of Rose's brothers, Jack assigned the appointed property in trust for Rose's children.

Cohen L.J. delivered the judgment of the Court of Appeal. He looked at all the circumstances and held that the appointment by Rose was made with the intention of benefiting her children, who were not objects of the power, and was therefore void.

Are belief and hope usefully distinguished?

Cohen L.J. distinguished two situations.[20] First, where the donee appoints *hoping* that the appointee will dispose of the appointed property so as to benefit a non-object, but intending to benefit the object. In such a case the appointment will be valid. Second, where the donee appoints *believing* that there will be strong moral pursuasion to benefit a non-object and that the object will be unable to resist this persuasion. In such a case the appointment will be void.

But is this the substantive distinction? Clearly, the mere hope that an appointee will deal with property in a particular way, or the knowledge that he *may* do so, is no ground for invalidating an appointment. But, equally, is it any stronger ground that the donee *believes* the object will use it in that way? A belief, if properly established, may be sufficient basis for a court to infer a motive on the donee's part to appoint to a non-object, but this does not mean the motive moved the appointment. It does not mean that the appointment was necessarily made for a purpose not authorised by the instrument.

Take, as an illustration, a power to appoint between a class of objects A, B and C. Having private means, none of the three objects are in need of the appointed property, but A has by far the most deserving claim, being (as his past conduct has shown) generous and concerned about his fellow beings. B and C are the proverbial selfish and lazy ugly brothers. If the donee appoints to A with the *hope* that A will benefit a charity this

[20] Ibid. 135.

is admittedly a valid appointment. Is it any less valid because the donee *believes* that A will spend the money in this way? Turner L.J. recognised the distinction between motive and intention in *Topham* v. *Duke of Portland*.[21] He drew a distinction between, on the one hand, appointing property to one object intending to deny it to another; this was a fraud on the power. On the other hand, appointing with the intention to benefit the appointees, even though his motive was anger with the other object, was a valid appointment.

Intention and purpose distinguished

Continuing with the illustration, is it even conclusive if A *intends* some or all of the money to go to charity so long as the dominant *purpose* for making the appointment is to give the money to A, the most deserving of the three applicants? There is no reason why a donee cannot intend a result though he would have appointed even in the absence of this factor. What this distinction really means, therefore, is that an intention becomes a purpose only if it is instrumental in moving the trustee to appoint in the way he did. And the appointment is void only if the purpose is unauthorised.

Admittedly, the finding that a belief and an intention was held by the trustee that the proceeds of the appointment would be used in that particular way (e.g. to benefit a charity) would raise an evidential presumption, and often a very strong presumption, that this was the purpose of the appointment and was significant in moving the appointment. This would place an evidential burden of rebuttal on the party arguing that the appointment is valid; it would make it necessary for him to adduce evidence that there were legitimate purposes for which the appointment might have been made. But having adduced such evidence and supplied, by inference from admissible evidence, a feasible hypothesis sufficient to rebut the evidential presumption, the final burden of persuading the court still rests on the person seeking to upset the appointment. He must then persuade the court that the intention to benefit the non-object, the charity, actually did move the donee to appoint. This argument receives some support from the dicta of Evershed M.R. in *Re Dick, Knight* v. *Dick*[22] when he said

> "I should not wish to be thought to lay down that whenever there is any intention, however secreted in the bosom of the appointer, to benefit some non-object in some measure, that therefore the exercise of the power is bad."

[21] (1863) 1 De G.J. & S. 517, 567 ff; 46 E.R. 205, 225 ff. And see reasoning to the same effect in *Whelan* v. *Palmer* (1888) 39 Ch.D. 648, 658.

[22] [1953] Ch. 343, 360; see also *Re Merton* [1953] 1 W.L.R. 1096 (full discussion on p. 226).

But the decision in *Dick* and the preponderance of authority have not yet given this compelling argument the seal of judicial approval.

In *Dick*, the donee was given a power of appointment in favour of class consisting of her brothers, sisters and their issue. There was a gift in default of appointment to the brothers and sisters equally. The donee made an appointment by medium of her will to a particular sister. There was a memorandum accompanying the will, in which the donee said she hoped that the sister would provide an annuity for a named non-object. It was held, as an inference from the facts, that the donee attempted by all means at her disposal to benefit a non-object and therefore the appointment was ultra vires.

Clearly, the decision made by the Court was fully open to it on the facts. But the Court should have considered more closely the possibility of treating the condition, which was after all of no binding effect on the donee, as being something less than the purpose for making the appointment. The court could have instructed the object to ignore that precatory condition, severed it, and allowed the appointment to stand.[23] In the circumstances, the sister was the natural person to whom the donee would have appointed in any event. The sister was not bound to comply with the donee's request. Is that not strong evidence that the dominant purpose was to provide for the donee personally?

In *Re Simpson, Chadderton* v. *Simpson*[24] Vaisey J. said that the benefiting of the object had to be the "entire and single" intention of the trustee in making the appointment. In *Re Greaves, Public Trustee* v. *Ash*[25] Evershed M.R. said that the appointment had to be made with the single view of conferring benefits on the objects. But he does contrast this with an appointment whose "purpose" is procuring receipt of a *material* benefit by a non-object. These dicta do not stand up to the cold light of the decisions which hold that an appointment may be valid, even though conditions are imposed which benefit non-objects, so long as the conditions can be severed.[26] Judges often talk of a "single" or "exclusive" intention out of context when the findings on the facts belie such a test.[27] These terms are often used interchangeably with "dominant purpose".

How is wrong purpose established?

Jessell M.R. in *Henty* v. *Wrey*[28] laid a clear burden of proof on the person asserting an ultra vires appointment. Wynn-Parry J. in *Re Merton,*

[23] See discussion of severance at p. 233.
[24] [1952] Ch. 412.
[25] [1954] Ch. 434, 447; the other members of the Court of Appeal concurred.
[26] See infra p. 231.
[27] See dicta in *Re Merton* [1953] 1 W.L.R. 1096, 1110.
[28] (1882) 21 Ch.D. 332 (C.A.), also *Re Brittlebank* (1831) 30 W.R. 99. See the criticism of the burden of proof at p. 235.

Public Trustee v. *Wilson*[29] held that the court would not infer an ultra vires appointment from the mere fact that a trustee, and this could be extended to any other non-object, was found in possession of appointed property at some later date, after appointment.

The relevant enquiry is whether it can be shown that the appointment is moved by a purpose which is not authorised by the instrument creating the discretionary trust. That is a far different thing from establishing that a wrongful intention is one of the ingredients present at the time of the act of appointment. The subjective elements are relevant only in answering the question whether the appointment was actually moved by a desire to benefit a non-object.[30] For example, the trustee may appoint cash to an object so that the object can buy a house, fully intending that the wife and children of the appointee-object, themselves non-objects, should benefit from the appointed property. But the dominant purpose is still very likely to be to benefit the object by giving him a house.

There will always be difficulties in establishing dominant purpose in marginal cases because of the inherent difficulties in subjective enquiries. More about that in a moment. Frequently the trustee has not formed any clear reasons for his own action or, alternatively, conflicting reasons influence his decision to appoint. In the illustration of the ugly brothers given earlier, even assuming the court could accurately evaluate this subjective data realistically, (and that, in itself, is asking a great deal) it might be found that the donee decided to appoint to A first, because A seemed a pleasant individual and deserved the appointed property (weight 40%) second, because A was likely to give the property to charity (weight 20%) and last because the donee did not feel like giving it to B or C (weight 40%).

Reservations about the purpose concept

However unsatisfactory such an analysis based on onus may be it will have to serve lawyers until a great deal more work is done on the intractible problems of psychological cause and human actions. The most promising current advances are in the field of structuralism. A structuralist would reject the whole idea of a useful *causal* explanation to explain the transformation of inner thought patterns into actions.[31] He would view the causal explanation as an unproductive generalization and see causal criteria as mere conventional generalizations about empirical

[29] [1953] 1 W.L.R. 1096, 1110. And see *Re Crawshay* [1948] Ch. 123, 137 (where corrupt intention was entertained at earlier date). *Re Wright* [1920] 1 Ch. 108.

[30] This distinction is commonplace in authorities on s. 260 *Income Tax and Social Services Contribution Assessment Act* 1936-1975 (Australia), cf. s. 108 *Land and Income Tax Act* 1954 (New Zealand). Dispositions are void insofar as they are made for the purposes of avoiding taxation. See Grbich, *Section 260 Re-Examined* (1976) 1 *U.N.S.W.L.J.* 211.

[31] See the excellent summary in D. H. J. Hermann, "A Structuralist Approach to Legal Reasoning" (1975) 48 *Southern Cal. L.R.* 1131; particularly at 1154.

experience. This forces one directly back to objective evidence and experience of human behaviour in order to frame a plausible hypothesis inductively. The causal theory merely clouds the question. Ironically enough the structuralist argument elevates into high theory that famous Holmes aphorism, often used by practioners to pour scorn on academics, that the life of the common law has been experience rather than logic. But that still does not explain why certain factors are *subjectively* seen as relevant either by the trustee or a court superimposing its own control devices. Much current work is being done on the problem, using psycholinguistics, the psychology of childhood learning and general cybernetic insights. Social psychologists are concentrating increasingly on meaning as an individual construct. The work has very nearly gone far enough to critically affect legal analysis, but in my opinion the time is not yet ripe to apply it in Australia.[32]

One general point can, however be made about causality as applied to the purpose of appointments. Any attempt to develop a general theory about the factors which moved the trustee to appoint, immediately runs into the problem that any causal chain has main links.[33] The links one emphasises depend on what one wants to explain. What one wants to explain turns largely on the theory or premises with which one begins. In causal analysis, according to Blalock,[34] it is possible to insert a very large number of additional variables between any two supposedly directly related factors. It is necessary to stop somewhere and consider the theoretical system closed. Practically, one can stop at the point where additional variables are too expensive or difficult to measure. A relationship which is direct in one theoretical system may be indirect, or even spurious, in another.

The most notable example goes right to the core of psychology itself. Psychologists divide between the behaviourists who see human behaviour as a direct stimulus response relation, maintained by reinforcement, and later schools who see this "causal" explanation as simplistic and hold action is governed by complex transformation structures in the mind. So there is a great deal of tautology in the whole analysis. The initial theory the court uses turns on the attitudes and theoretical orientation of the human judge and all the institutional factors which determine his (usually unarticulated) decisional referants. There is no escaping the conclusion

[32] The literature is voluminous but for a taste of the writing see the following essays (plus bibliographies) in N. Armistead, *Reconstructing Social Psychology* (Penguin, 1974): G. Murdock, *Mass Communication and the Construction of Meaning*, in Armistead op. cit. 205 and R. Harre, *Blueprint for a New Science*, in Armistead op. cit. 240 and the later writing of Fromm or Goffman. See also the work of Piaget and Chomsky cited in Hermann, op. cit. note 31.

[33] Acknowledgement to R. A. Dahl.

[34] H. M. Blalock, *Causal Inferences in Non-experimental Research* (U.N. Carolina Press, 1964), and see Piaget, *To Understand is to Invent* (Viking for UNESCO, 1972), 28.

that a judge must often superimpose his own theoretical system, to *some* extent modified by his shared perceptions with other lawyers, for that of the trustee. Even if it were open for one man (the judge) to know what went on in the mind of another (the trustee), according to the trustee's own theoretical orientation, is he *really* interested? Let us rush back from the brink of heresy to the law.

Evidence of trustee's state of mind

The Court of Appeal in *Crawshay*[35] said that a court could look at contemporaneous statements of the donee (or trustee) to establish the state of his mind in making the appointment. Turner L.J.[36] denied the relevance of "motives which lead to that purpose". This is ambiguous, but it does appear to deny the relevance of all purely subjective elements which are not instrumental in moving the appointment.

There are dicta in *Re Burton's Settlements, Scott* v. *National Provincial Bank Ltd*[37] which are liable to confuse if taken out of context. Upjohn J. said

> "In my judgment, 'the purpose and intention' of the appointer is to be ascertained as a matter of substance and not solely by analysing the effect of the appointment, though, of course, that is important. One must try to discover his genuine intention."

The intention is that of the trustee when he made the appointment. But the inference from the dicta, taken literally, is that evidence of the trustee's intention and purpose supplied by evidence of objective factors, is apt to be misleading. But that is not what Upjohn J. was talking about, He was referring to the case where appointed property, and properly appointed property, happens to end up in the hands of a non-object. His dicta merely support his obvious proposition that the mere fact that appointed property happens to find its way into the hands of a non-object is not strong evidence of an ultra vires appointment. If the appointment is made to an object with the proper purpose, what the object does with the property is not relevant. After all, it is his property and the ultra vires doctrine is not designed to put a clog on it. In practice, reliable evidence of the state of mind of the trustee will not be readily available and the court will have to rely on objective evidence. If properly used, this is the most reliable evidence available.

The conclusion is that reliable evidence of state of mind of the trustee should be admissible but in practice such evidence will not be as important in attributing purpose as inferences drawn from the conduct of the trustee, from what he actually did. This has been the experience in

[35] [1948] Ch. 123.
[36] *Topham* v. *Portland* (1863) 1 De G.J. & S. 517, 571, 46 E.R. 205, 227 (affirmed by the House of Lords (1864) 11 H.L.C. 32).
[37] [1955] Ch. 82, 100.

applying similar tests to taxation anti-avoidance legislation.[38] From all the evidence, the court must be satisfied that some improper purpose was significant in moving the trustee to appoint as he did.

Wrong purpose: the test

Lord Parker's test in *Vatcher* v. *Paull*,[39] is whether the trustee would have appointed but for the factor in question. If he would not have, then that factor would form a moving purpose for the appointment. This test will be useful in the vast majority of cases. It will not give a clear answer in the difficult cases with conflicting intentions, such as the example used earlier.[40] In these difficult cases the issue may well be settled in the normal case, as Lord Parker implied, on practical evidential questions; the person seeking to upset the appointment will have to satisfy the court that the donee was significantly moved by factors which were not authorised by the authorising instrument, or, put the other way, he must persuade the court that the dominant purpose or moving force which made the trustee appoint the way he did was *not* the intention to personally benefit an object of the discretionary trust.

However unsatisfactory this may be, the authorities purport to search for that subjective factor which was the moving force behind the trustee's decision to appoint. If some purpose, other than the wish to benefit the object personally, was significant in moving the appointment (as a purely arbitrary figure, without any authority, say, more than 20%-30% responsible for it) then the appointment will be void as an ultra vires appointment. But, that simple statement we shall see on more careful examination, masks as many problems as it uncovers.

How directly must the object benefit?

It is easy to create general rules requiring an appointment to be made directly to an object with the purpose of benefiting him. There have been few reported authorities in which the courts have been forced to make hard decisions about validity where an appointment was made with the immediate intention of benefiting a non-object but with the ultimate purpose of benefiting an object. It is only by this litmus that vague obiter statements about ultra vires can be tested. Such questions usually arise in cases of resettlements or variations of trust where the appointment is made as part of a total scheme to reorganise trusts. Rather than taking a commonsense wider perspective and asking whether the purpose of the whole transaction was for the benefit of the objects in all the circumstances, the courts have adopted a more mechanical causal test of the

[38] See the analysis in *Newton* v. *F.C.T.* (1958) 98 C.L.R. 1, 8-10 (J.C.) and the analysis in Grbich op. cit. note 30.
[39] [1915] A.C. 372, 380 (J.C.).
[40] At p. 217 ff.

trustee's purposes to see if the formal act of appointment was made to benefit the object.

Brook: *Unseverable later benefit to non-object*

In preparation for a variation of trust application, the trustee will often make appointments or release some or all of his powers. This will have the effect of arming the parties with absolute interests when they ask for a variation and avoid the problems which arise in getting the consent of token objects. In particular, it will help where some objects are unborn or not *sui juris*. In exercising the discretion to give a variation, the courts have considered whether the appointments were made for the proper purpose.[41] They have not given explicit consideration to the tax avoidance objectives of the whole scheme in deciding on the question of validity.

In *Re Brook's Settlement, Brook* v. *Brook*[42] the donee enjoyed a life interest in a trust fund and, subject to this interest, he had a power to appoint among his children or any later issue. There was a gift in default of appointment to the children in equal shares on attaining 21. The parties sought a variation of the trusts under the *Variation of the Trusts Act* 1958 in order to give the donee an absolute interest in the discretionary fund. In exchange for this absolute interest, the donee was to release his life interest in favour of the remaindermen. Before the matter came to court the donee purported to appoint the fund, subject to his life interest, to his two existing children. The court had to decide whether this was an ultra vires appointment.

An important finding by Stamp J.[43] was that he "could not find, that the appointment here was a transaction separate and distinct from the division of the trust fund . . .". He held that there was an ultra vires appointment and the appointment was void. It follows that, once it was found that the transactions were not severable, it was a directly correlative conclusion that the appointment was ultra vires. Stamp J. held that if the purpose of the appointment was to give any part of the appointed fund to the donee (or any other non-object), no matter how small, there was an ultra vires appointment. He decided that the primary criterion for validity was "the purpose and object of the appointments".[44] The argument might be open, on the basis of later decisions,[45] that, as a matter of fact, the primary purpose was to benefit the objects, even though there was an intention to ask for a variation by the Court. It can be argued,

[41] For how hard a court will look see Bicknell, "Fraud on a Power" (1968) 118 *New L.J.* 655; generally J. W. Harris, "Ten Years of Variation of Trusts" (1969) 33 *Conv.* (N.S.) 113, 183.
[42] [1968] 1 W.L.R. 1661; Cretney, "Frauds, Powers and Trust Breaking" (1969) 32 *M.L.R.* 317.
[43] Ibid. 1667C.
[44] Ibid. 1668.
[45] Infra p. 228.

that the income and surtax advantages were merely incidental. Further, evidence could have been adduced to show that the later variation was an independent transaction. The appointee objects were free, if they wished, to disagree to a variation at a later stage. The primary object and purpose was therefore more likely to be the desire to personally and directly benefit them. Therefore the fact that the transactions were severable does not itself establish the validity of the appointment. The fact that they were severable is one argument in favour of the view that the real purpose was to benefit the appointee and not to bring about the later transaction.

In coming to his decision, Stamp J. distinguished an earlier line of authority, culminating in *Re Wallace's Settlements, Fane* v. *Wallace*,[46] which found that appointments similar to those in *Brook* were valid. He refused to draw a general rule from these cases. He said that they could go no further than establishing that, where there was an appointment made in contemplation of the division of the fund by the court under the *Variation of Trusts Act*, the appointment was not void in cases where the donee of the power would personally receive no more of the appointed fund, as a sum result of the whole transaction, than the value of his life interest. In other words, he found that *Wallace* was a narrow, and perhaps anomalous, exception to the general rule.

Severable transactions as evidence of purpose

According to the accepted view, if the giving of property to a non-object was part of the same transaction as the appointment, the appointment is ultra vires. But the converse is not necessarily true. The mere fact that the appointment and resettlement are carried out in separate steps is not conclusive that the appointment was made for the proper purpose.

It is trite law that, once property is appointed to an object, his subsequent actions cannot affect the validity of that appointment. Such freedom of disposition forms a normal incident of ownership. But if the trustee appoints with the purpose of enabling the later transaction to take place, even if two transactions are severable, that is an ultra vires appointment. Therefore, evidence of that later transaction, with other supporting evidence, may be relevant to establish this purpose. If the appointment was made as a severable transaction, without depending on the later disposition, this would show that the real purpose moving the appointment was the intention to give the property to an object rather than the intention to obtain its subsequent acquisition by a non-object. It will often be difficult to determine whether the trustees knew of the possibility of the later disposition and, if so, whether it formed a significant purpose in

[46] [1968] 1 W.L.R. 711.

moving the trustees to appoint in the way they did. In many cases, the existence of the resettlement will raise a suspicion that the appointment was made for an unauthorised purpose.

In *Birley* v. *Birley*[47] an appointment was made and 12 months later the property was settled on non-objects. Romilly M.R. held the appointment void as an ultra vires appointment because the appointing deed poll recited that it was "understood" that the appointees should consider themselves possessed of the residue for the offending trusts. Romilly M.R.[48] said the test was whether the appointee object took the property absolutely, in which case he might do as he pleased, and the appointment would be valid, or the appointment was made to effect "that which it was not within the authority of the donee to effect under the terms of the power . . ." in which case it would be void.

As the law stands, the purpose question must ultimately be a question of fact, and the fact that the division of the fund is later than and separate from the appointment, though a factor tending to show that the purpose was not authorised by the instrument creating the discretionary trust, is only one factor in the balance.

Re Merton: *benefit to non-object intended but object benefits immediately*

Re Merton, Public Trustee v. *Wilson*[49] dealt with a situation where an appointment was made to an object with the clear intention of allowing some of the appointed property to ultimately find its way into the hands of a non-object (in *Merton*, the donee) even though the transaction viewed as a whole was for the benefit of the appointee object. The appointment was held valid.

In *Merton*, property was settled on trusts under which the donee was given a life interest and a mere power, on her death, to appoint the capital to a class of objects which consisted of the donee's two daughters and her mentally disabled son. There was a gift, in default of appointment, to the donee's children in equal shares. In 1940, the donee executed a will appointing the discretionary fund to the two daughters. Wynn-Parry J. found that she had already made generous provision for the son in other ways. But in 1952, to avoid the possibility of a passing of property on the termination of her life interest at her death and a consequent charge of estate duty, the donee executed a deed appointing the reversion arising after her life interest to the two daughters. She thus pre-empted the terms of the will which had not yet taken effect. The donee then bought the reversion back from the daughters for a price which exceeded its market value.

The crux of the matter was the acceptance by Wynn-Parry J. that the donee made it clear to the daughters that neither of them were under

[47] (1858) 25 Beav. 299; 53 E.R. 651.
[48] Ibid. 308.
[49] [1953] 1 W.L.R. 1096.

any obligation to sell her the appointed property. And by the earlier will, she had shown that she would have appointed to them in any event. The "intention" of the donee, Wynn-Parry J. said,[50] "was exclusively to benefit the two daughters" and the two daughters stood to be "considerably benefited" as a result of the appointment. He held that there was not an ultra vires appointment and that the appointment was valid.

It is clear from the facts, however, that the donee must, in all the circumstances, have believed and intended that the appointee objects would sell the appointed property and, therefore, the appointment was made with the intention that a non-object would benefit. So the decision confirms and applies the principle that it is the purpose moving the appointment which is the relevant test and not the intention, belief or motive of the donee.[51] Because the donee was moved to appoint by the genuine long-term needs of the object and because the benefit to a non-object, though intended, was completely incidental to that dominant purpose, the appointment did not fail as an ultra vires appointment. Wynn-Parry J. said that Lord Parker's test in *Vatcher* v. *Paull*[52]

> "is a clear direction to the court, in each case, to inquire what is the purpose and intention of the appointor; and if, *and only if*, it appears from the evidence that the *object* was to secure a benefit for [the donee] himself or for some other person not an object of the power is the transaction to be held to be invalid."[53]

Here he uses "object" as if it were synonymous with "purpose". He therefore would accept the proposition that the test of validity of an appointment is the purpose test. He also inferentially rejects an inflexible rule such as that laid down in *Wallace*.[54]

If the dicta are read literally, they might be extended to support the proposition that an appointment made to objects, with the purpose of achieving an end which might benefit non-objects, is good so long as the long-term results are likely to benefit the objects. Such a view receives some support from that leading dictum of Romilly M.R. in *Re Huish's Charity*[55]

> "if the appointor, either directly or indirectly, obtains an exclusive advantage to himself, and that to obtain that advantage is the object and the reason of its being made then that appointment is bad; but if the whole transaction taken together shows no such object, but only shows an intention to improve the whole subject matter of the appointment for the benefit of all the objects of the power, then the exercise of the power is not fraudulent or void, although by circumstances such

50 Ibid. 1099.
51 At pp. 217-218.
52 [1915] A.C. 372, 378.
53 [1953] 1 W.L.R. 1096, 1100; emphasis added.
54 [1968] 1 W.L.R. 711.
55 (1870) L.R. 10 Eq. 5, 9-10; see p. 214.

> improvements cannot be bestowed on the property which is the subject of the appointment without the appointor to some extent participating therein."

Let us be quite clear about the extension involved. It is one thing to make an appointment with the purpose of benefiting an object, intending to do so in such a way that tax savings are made. The total fund would then be increased to the benefit of all possible beneficiaries, including the objects. It is a clear extension to say that because an object will benefit in the long run as a result of a fund being undiminished by taxation, the donee or trustee may appoint to an object for the dominant purpose of preserving the fund from taxation. If the purpose of the appointment is the furtherance of a scheme to increase the fund to the benefit of all potential beneficiaries, including non-objects, is this a mere incidental intention? It is no less so because it is for the long term benefit of the object.

Burton *and* Simpson: *Is it enough that transaction is for object's benefit?*

These decisions deal with a very narrow point which competent estate planning should have avoided, but the decisions are of much wider significance. In his will, the donee of a power appoints to the objects. Under the same will, he gives the residue of his own free property to the objects of the power but subject to the condition that they will not receive the *free property* unless they resettle the property they receive under the power, on a class, which includes non-objects of that power. Does that condition imposing the election make the appointment ultra vires? Here there is a clear purpose to give the *appointed property* to a non-object with no intention that the appointed property will find its way to the object but the object still benefits from the whole transaction. That pointedly tests the commitment of the courts to the mechanical requirement that the trust property itself goes to the object. The courts have not been unanimous in their answer.

In *Re Simpson, Chadderton* v. *Simpson*[56] it was held that such a condition was ultra vires. *Simpson* was not followed in *Re Burton's Settlements, Scott* v. *National Provincial Bank Ltd*,[57] a case with almost identical material facts, and doubt was expressed as to the correctness of the *Simpson* reasoning. In *Burton* it was held[58]

> "the mere imposition of a condition intended to benefit non-objects of the power has never [sic] by itself been held to vitiate the appointment as being fraudulent."

In *Burton* a settlement was made after marriage in the usual form, giving the donee and his wife interests for their joint lives with a power to

[56] [1952] Ch. 412.
[57] [1955] Ch. 82.
[58] Ibid. 97; he accepts argument ibid. 101.

appoint capital by deed or will to the issue of the marriage. In fact, the settlor appointed by a codicil to his will to the daughters of the marriage. By the same codicil, there was a gift of the residue of the settlor's estate to the same daughters but on condition that each daughter resettled any *appointed* fund she received on new settlements for her issue on named terms. The issue were not objects of the power. This amounted to an election by the daughters whether they received, on the one hand, the residue and resettled the appointed property to non-objects and, on the other, received the appointed property but forfeited the residue.

Upjohn J. made the significant finding in *Burton* that[59]

> "No one, I think, can doubt that those appointments were intended to give real benefits to his [the donee's] children respectively."

The codicil was, of course, operative as from the settlor's death and therefore this was the date at which the appointment was effectively made. It follows that, at the time the appointment was made, the settlor was aware of the condition and undoubtedly intended the appointees to elect and thereby benefit non-objects. But the objects did not have to elect and would not part with the appointed property unless they thought it was personally advantageous. Having regard to the finding of Upjohn J. that the donee intended to ultimately benefit the children when he made the appointment, the situation comes down to a transaction made with the *purpose* of personally benefiting the objects and one which clearly satisfied the primary objective requirement but in which the purpose was manifestly not to give the appointed property to the objects. The appointment was made to the objects and they did receive the property free from any restrictive conditions. The election, it could be argued, merely amounted to a simultaneous offer which the objects were free to accept or refuse.

An analogy would be the situation where a father sent a gift of $100 to his son and at the same time gave him a tip on a good investment for the money or offered to sell the son some of his personal investments. Obviously, the subject-matter of the gift would be the $100 and not the investments when the son bought them; a fortiori, the recipient of the gift is the son and not the vendor of the shares who ultimately receives the $100. But this cannot be used to negate the inconvenient inference that the $100 was given with the intention that the son should buy shares.

In supporting the proposition that the mere imposition of a condition to benefit non-objects does not render an appointment void as an ultra vires appointment, Upjohn J. was not saying that the imposing of an election on objects could never be ultra vires. He was merely saying that, in asking whether a particular appointment was void, the court must focus its attention on the purpose for which the appointment itself was

[59] Ibid. 96.

made. He reasoned that it was not enough that there was an intention to benefit a non-object as a result of the whole transaction or even that the purpose of imposing the election was to benefit a non-object. The only relevant question is whether the dominant purpose of the appointment itself is to personally benefit the objects of the power. So he is taking a much broader contextual view of the purpose to benefit objects than the cases cited earlier. A condition imposed on property, other than the property subject to the power, is only relevant in that it may provide contemporaneous evidence of the donee's state of mind when he made the appointment.

Simpson was criticised in *Burton* for construing too literally the requirement that a power must be exercised with the sole object of benefiting the objects. Its facts, if anything, were further from indicating that the appointment was an ultra vires appointment than those in *Burton*. In *Burton*, the codicil used strong language. It deemed daughters of the donee not to be "daughters", for the purpose of the instrument, if they did not fulfil the resettling condition, while in *Simpson* there was simply a proviso that they did not take in this event. Yet, in *Simpson*, *the* condition was held to render the whole appointment void. In *Simpson*, the court concentrated on the question of whether, on the assumption that the condition was void, it was severable from the remainder of the appointment. The case is therefore not very strong authority. The judgment of Vaisey J. indicates that, if he had focused on the questions as set out in *Burton*, he probably would have found the appointment was made for the wrong purpose. The appointment, he would have found, was made for the purpose of furthering the scheme to get the appointed property resettled rather than to benefit the objects personally. These are matters of fact for the court to decide in each particular case and a resolution of the conflict between the two decisions is not vital. But it is submitted, that the finding of Upjohn J. in *Burton* to the effect that the donee meant to benefit the objects and that this was the dominant purpose of the appointment, was the better view.

To sum up, the case threw considerable doubt on the more simplistic view that an appointment which is intended to give appointed property to a non-object is, for that reason alone, void. They support the proposition that when testing the purpose of an appointment for ultra vires a court will look at the transaction as a whole and ask whether the purpose was to benefit the objects. This contradicts the accepted view.

Goldsmid: *Appointment to a non-object*

In *Goldsmid* v. *Goldsmid*[60] we come full circle. An appointment which was *ex facie* to a non-object was held valid because it was for the ultimate benefit of the object. This was an unusual case and its age throws doubt

[60] (1842) 2 Hare 187, 67 E.R. 78.

on its authority. What appeared to be an exhaustive discretionary trust, was set up after death of A. Goldsmid by private Act of Parliament. It was part of a package compromising a huge debt of £466,700 due to the Crown (it was 1842). The objects were the descendants and widows of A. Goldsmid and his partner. The trustees were the Lords of the Treasury. The trustees appointed half of the fund released from the claims of creditors on further trusts to be declared by a subsequent deed. One of the objects of that original settlement by compromise, Ann Goldsmid, was a trustee of the further trusts. The subsequent deed appointed a life interest to Ann, with a mere power of appointment for Ann to appoint between a class of objects consisting of the four other original objects and also their wives and issue. The deed also contained a gift of the unappointed remainder to the four original objects. Ann appointed the share which would have gone to one of the objects on a further trust for that object, his wife and children. The wife was not an object of the original settlement. Nevertheless, the appointment was held valid by Wigram V.C. He said[61]

> "I have examined the cases on the subject, and I find that they lay down the rule with great clearness, and bear out the proposition that, in equity, a valid appointment may be made to persons who are not objects of the power, with the approbation of the persons who are the objects of the power; and the case is explained in the manner in which it was put in argument, namely, that the deed operates in two ways, first, as an appointment by the donee of the power, and secondly, as settlement by the appointee of the property in question. . . ."

Wigram V.C. stated that the result would have been the same even if the estate to the wife had been inserted in the deed of appointment itself. He therefore regarded the question merely as one of form, since the main purpose was to benefit the object.[62]

This would indicate, if *Goldsmid* is correct, that the dominating test for ultra vires appointments is whether the ultimate purpose is to benefit the objects. The rigid separation between the primary objective test and the secondary test breaks down.

PART THREE: CONSEQUENCES OF INVALIDITY

When can offending conditions be excised?

When part of an appointment is bad can that offending portion be excised? Or is the invalidity infectious, so that the whole of the appointment is held void?[63] In *Re Holland, Holland* v. *Clapton*[64] Sarjant J.

[61] Ibid. 196-197.
[62] The question whether the rule in *Saunders* v. *Vautier* (1841) 9-10 L.J. Ch. 354 applied, was not raised.
[63] Strictly speaking, voidable: *Preston* v. *Preston* (1869) 21 L.T. 346.
[64] [1914] 2 Ch. 595. And *Vatcher* v. *Paull* [1915] A.C. 372, 378.

decided that the question whether offending conditions had the effect of making the whole appointment void was an inference of fact and not of law. He said[65]

> "The law is fairly well settled in principle, and lays down a clear line of demarcation. If on the other hand, there is a genuine appointment to an object of the power, coupled with an attempt to impose on that appointment conditions or trusts in favour of persons who are not objects, then the appointment stands good free from the conditions. If, on the other hand, there is no genuine appointment to an object of the power, but the appointment actually made to that object is made for purposes foreign to that power, then the *whole* appointment fails as being in substance an appointment unwarranted by the power. . . ."

In *Holland*, an annuity valued at about £600-£700 a year was held on trust subject to a power of appointment. The donee appointed the annuity by will, to her husband for his life. She imposed a condition that he should benefit a named non-object to the extent of only £100 a year; this was raised by a codicil to a possible £300 annuity. If he did not comply with the condition, he lost less than £100 annually from another settlement in which he was entitled to an interest. Sargant J. held that the small burden in relation to the appointment was relevant in finding that the "real motive and object" of the appointment was to benefit the husband. The appointment, would still have been made regardless of the condition. The condition was held invalid but severable.[66]

Holland may be compared with *Re Cohen, Brookes* v. *Cohen*[67] where the donee appointed an annuity of £1,200 to his wife, an object of a power granted by his father's will. He also appointed another £500 a year to her for ten years or until his debts should be paid, on condition that she would pay £400 a year in discharging any debts which could not be met from his residuary estate. Joyce J. looked carefully at all the circumstances and held that, though the condition was not a condition precedent, it could not be separated from the appointment and therefore the £500 appointment was wholly void.

A similar result ensued in *Whelan* v. *Palmer*[68] where a £200 annuity was appointed under a power of jointuring (to which the normal rule was held to apply).[69] The object agreed to benefit a stranger to the extent of £60 a year, out of the appointed property of £200 a year. Kekewich J.

[65] Ibid. 601; emphasis added. The same line was taken in Australia by Griffith C.J. and Barton J. in *Redman* v. *Permanent Trustee Co. Ltd* (1916) 22 C.L.R. 84, 93 but Isaacs J. relied on onus of proof. On ability to impose conditions generally see *Kent County Council* v. *Kingsway Investments (Kent) Ltd* [1970] 1 All E.R. 70 (H.L., town planning case).

[66] To same effect see *Ranking* v. *Barnes* (1864) 33 L.J. Ch. 539; particularly at 543; *Re Rigby* [1950] V.L.R. 346.

[67] [1911] 1 Ch. 37.

[68] (1888) 39 Ch.D. 648. And to the same effect *Re Perkins* [1893] 1 Ch. 283, *Agassiz* v. *Squire* (1854) 18 Beav. 431; 52 E.R. 170.

[69] (1888) 39 Ch.D. 648, 656-657.

held that the donee had not the slightest intention of benefiting the object and exercised the power in order to benefit a stranger and would not have given anything to the object unless the stranger would benefit. Kekewich J.[70] clearly recognised that it is possible in suitable cases to sever bad parts of an appointment. He said that the general infectious invalidity dicta of Turner L.J. in *Topham* v. *Portland*[71] applies only when,[72]

> "the evidence does not enable the Court to distinguish what is attributable to authorised from what is attributable to unauthorised purposes."

And he rejected the argument that the appointment of £140 a year was a valid appointment[73]

> "I think the answer to that is, not so much that you cannot make the distinction, but that you can go further on the other side, and say that here the appointment to the authorised purpose would never have existed but for the intention and agreement that there should be an appointment to the unauthorised purpose."

When can offending parts of an appointment be excised?

The same basic rule applied to the excision of offending conditions will apply where the appointment is partly bad as an appointment to non-objects. This is often referred to as an "excessive appointment" but there is no difference in principle between it and an ultra vires appointment. In *Harvey* v. *Stracey*[74] Trask V.C. held that an appointment to objects of the power was valid to the extent that you could point to the part of the fund to go to the objects, even though part of the appointment was bad. In that case there were appointments by a will, in equal shares to a class. Some of the class could have become eligible outside the perpetuity period. It was held that the appointment was good *pro tanto* for objects eligible at the time of distribution.

In *Re Kerr's Trusts*[75] there was a power to appoint among the children of the donee, with a gift in default in equal shares among the children. The donee appointed by will to two named "children", one of whom was illegitimate and therefore did not qualify as a "child", as a matter of construction. The will gave no indication of the shares each appointee took but it was held, again as a matter of construction, that half went to each. Jessel M.R. held that the legitimate child took half, that the appointment of the other half was void and the half went as on default.

[70] Ibid. 659.
[71] (1863) 1 De G.J. & S. 517, 574; 46 E.R. 205.
[72] (1888) 39 Ch.D. 648, 659. Dicta to same effect in *Alexander* v. *Alexander* (1755) 2 Ves. Sen. 640, 644; 28 E.R. 408, which refers to the boundaries between the excess and execution not being distinguishable.
[73] (1888) 39 Ch.D. 648, 659-660.
[74] (1852) 1 Drew 73; 61 E.R. 379; 22 L.J. Ch. 23.
[75] (1877) 4 Ch.D. 600.

Excising conditions or part of an appointment: The test

The following general test can be drawn as a result of this discussion about excising bad parts of an appointment

1. Is the appointment or any part of it, ultra vires its authorising instrument or does any condition attached to the appointment render it ultra vires?
2. Is the condition, as a matter of construction and having regard to the surrounding evidence, sufficient to show that the donee appointed for a purpose not authorised by the instrument creating the power?
3. If the condition or any part of the appointment shows that the appointment was made for a wrong purpose, the whole appointment is void.
4. Where there was no wrong purpose but merely a partially ultra vires appointment or ultra vires condition, any condition subsequent is struck out and so much of the exercise as is severable from the condition will be valid. A similar rule will apply where some of the appointment is to non-objects. Any part of the appointment which cannot be severed will be void.
5. Once a fraud on the power is established, the onus of showing that part of the appointment is severable and good lies on the person propounding that view.[76]

PART FOUR: CONCEPTUAL HANGOVERS

The use of the title "fraud on a power" has more than aesthetic drawbacks. When it has been applied literally it has led to a number of conceptual fallacies. Some of these have been superseded but their ghosts still remain to trap the unwary. Some are still operative. It will clarify future evolution of the doctrine if these fallacies are now firmly laid to rest.

Practical disputes often turn, as the previous analysis indicates, on the trustee's purpose in making an appointment. Evidence of his motives is obviously crucial. An improper motive to profit from an appointment is one important practical situation in which the trustee has a state of mind in which his purpose is not to benefit the objects. Unfortunately, it is a short step from this to assume that the doctrine has the objective of compensating the victims of the trustee's mala fides. This imprecision is compounded because most of the earlier leading authorities did deal with fraud or near fraud situations.

Though all the circumstances will be relevant in establishing the trustee's state of mind at the crucial appointment date, it is misleading

[76] *Re Chadwick's Trusts* [1939] 1 All E.R. 850, 855 D.

when making this enquiry to create a separate category for cases where there was a bargain or in which the appointee object knew of the unauthorised purpose. The most obvious manifestations of the danger is the inaccurate supposition that there is a basis for imposing on a person alleging an ultra vires appointment a standard of proof beyond a mere balance of probabilities. Such a standard was proposed in *Henty* v. *Wrey*.[77] But more pervasive fallacies have also followed.

Must there be a victim of a fraud on a power?

It was suggested in *Re Greaves, Public Trustee* v. *Ash*[78] that a fraud on a power is a fraud on those persons entitled in default of appointment. Sheridan[79] treats fraud on a power as if it were a category of "fraud", as that term is usually used. Tiley[80] says the view in *Greaves* is "well established" but cites no authority for the proposition.

Why is it necessary that the fraud be on someone? To assume that, is to mis-state the function of the doctrine and to misunderstand what the granting of a power implies. The action is not based on the claim of someone coming to a court and complaining that his vested interest has been wrongly divested. Rather, it is that some person, either an object, a person entitled in default, remainder, or even on a resulting trust, has received damage to his interest or expectant interest through acts by the trustees which are ultra vires their powers. Of course, as in every case, some person with *locus standi* must bring the matter before the court. But that is not the essential feature of the action. The essential feature is that the appointment has not been authorised.[81] By accepting the power, the donee accepts no obligation to exercise it. But he *does* accept an obligation that, if and when he does exercise the power, he will act in accordance with its terms. That obligation arises by virtue of the fact that he exercises the power and when he does that he stands in a fiduciary relationship to the objects of the power.

The Court of Appeal in *Re Crawshay, Hore-Ruthven* v. *Public Trustee*[82] adopted a number of propositions, conceded by both counsel. Two of these propositions, which can now be taken as settled law, are relevant here:

[77] (1882) 21 Ch.D. 332, 350 (C.A.).
[78] [1954] Ch. 434, 447 (C.A.).
[79] Sheridan, *Fraud in Equity* (London, Pitman, 1957) p. 116 ff.
[80] Tiley, *Casebook on Equity and Succession* (London, Sweet & Maxwell, 1968) p. 320, Kekewich J. in *Whelan* v. *Palmer* (1888) 39 Ch.D. 648, 658-659.
[81] Supported by dicta of P. O. Lawrence J. in *Re Wright* [1920] 1 Ch. 108, 118 and by Evershed M.R. in *Re Dick* [1953] 1 Ch. 343, 360 but more in an attempt to lay down a dominant purpose test than as a separate ground. Scott, *Law of Trusts* (3rd ed., Harvard, Little Brown & Co., 1967) Vol. 3, 1521 takes a similar view in arguing that a trustee, by acting dishonestly or in bad faith, by virtue of that fact alone, commits a fraud on a power.
[82] [1948] Ch. 123.

1. It is not necessary to prove a bargain between the donee and the appointee in order to establish a fraud on the power.[83]
2. It is not necessary that the appointee should be a party to the "corrupt" intention or purpose or that the purpose should in fact take effect.[84]

The trustee may, for example, appoint to an object with the purpose of getting the object to give the trustee a clandestine share in the proceeds of appointment. The appointment goes ahead but the appointee object refuses to carry out his part of the bargain, either deliberately or because the trustee failed to inform him. The appointment would still be void.

The appointee *object's* state of mind and any question of a bargain are not directly relevant in establishing an ultra vires appointment. Only the trustee's purpose is relevant and the court is ultimately concerned with his state of mind at the date of appointment.

Failure to appoint can not be "fraud on the power"

Can the ultra vires appointment doctrine be used to challenge a particular decision not to appoint under a mere power?[85] The main rule is stated by Lord Parker in *Vatcher* v. *Paull*[86] and is now well settled

> "The limitations in default of appointment may be looked upon as embodying the primary intention of the donor of the power. To defeat this intention the power must be bona fide exercised for the purpose for which it was given. A bargain or condition which leads to the fund going in default of appointment can never therefore defeat the donor's primary intention."

This, of course, is a matter of construction but it is hard to accept that a settlor normally looks upon the dispositions in default of appointment as embodying his primary intention. His primary intention is to benefit the objects and a gift in *default* of appointment, as its name suggests, operates only if no appointment is made. The tendency to look for a gift to default beneficiaries may lie in the mistaken assumption that there cannot be a break in the chain of beneficial interests. Clearly there can be a break in "beneficial seisin".[87] But that is not to say Lord Parker's reasoning is wrong. Look at the question from a different angle. The very fact that a *power* is given implies that there is no obligation to allocate. It is

[83] *Vatcher* v. *Paull* [1915] A.C. 372, 378 also supports it.
[84] *Wellesley* v. *Mornington* (1855) 2 K. & J. 143; 69 E.R. 728 (so long, of course, as the appointment itself takes effect).
[85] This discussion cannot effect a trust power or exhaustive discretionary trust since there is an independent obligation to appoint. It will be relevant to non-exhaustive discretionary trust (a mere power exercisable by a trustee by virtue of his office) if the later discussion at p. 239 is correct.
[86] [1915] A.C. 372, 379 (P.C.).
[87] The fallacy that there must be a continuous beneficial interest on a plane of time was exposed by Lord Radcliffe in *C.S.D.* v. *Livingston* [1965] A.C. 694, 712.

purely the donee's business whether he allocates or does not. There is therefore no obligation on him to consider whether or not to *allocate* and nobody who can call into question his reasons for failing to do so. A power is a mere authorisation and cannot itself give rise to any duty to consider.

This view receives support from Chitty J. in *Re Somes, Smith* v. *Somes*.[88] He was, in that case, arguing that the donee of a mere power could release it, but he was basing his argument on "broader grounds". He said[89]

> "There is no duty imposed on the donee of a limited power[90] to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power,[91] and not corruptly for his own personal benefit."

It should not be assumed from this reasoning that if the donee of the power and the trustee are one and the same person, that the fiduciary relationship arising by virtue of his holding of the trust property imposes an obligation to consider whether to appoint. That view will be rejected presently.[92]

Revocable appointment: Re Greaves

The decision in *Re Greaves, Public Trustee* v. *Ash*[93] applies the principle that the trustee has no duty to appoint and extends the principle one step further to apply to the exercise of a power of revocation. In *Greaves*, the donee of a mere power held a life interest and after that a power of appointment among her children and remoter issue, with a gift in default of appointment to the children on reaching 21 (or being female, marrying). In 1938, the donee executed a revocable settlement by deed appointing to those of her children living at her death. In 1950, in order to carry out an estate duty saving scheme, she revoked the settlement and released the appointment. It was held by Evershed M.R., delivering a convincingly argued judgment of the Court of Appeal, that the revocation was not an ultra vires appointment. He held, applying Lord Parker's primary intention test,[94] that a donee is not bound to exercise a power and owes no duty to do so. A power by its very nature implies the

[88] [1896] 1 Ch. 250, 255; see also *Re Ball's Settlement Trusts* [1968] 1 W.L.R. 899, 902 D.; *Re Greaves* [1954] Ch. 434, 446.
[89] [1896] 1 Ch. 250, 255.
[90] A special power of appointment and some hybrid powers (i.e. with properties of general powers) are encompassed in this term.
[91] And he has a duty to consider.
[92] Infra at p. 241.
[93] [1954] Ch. 434 (C.A.).
[94] Quoted at p. 236.

authority to act and the authority to refrain from acting. An ultra vires appointment consists of an appointment made[95]

> "with the purpose of procuring the receipt of a material benefit by some person not among the designated class, and to that extent defeating or departing from the intention of the donor of the power."

Before a donee of a power can owe any duty to the object, it is essential that he should assume the burden of making an appointment. A donee making a revocable appointment owes no duty to anyone if he revokes the appointment.[96] In such a case, the donee has reserved the right to recall the appointment and "wipe the slate clean" and no one can complain if the power has been repudiated in the end. This reasoning can be compared with the attitude of Vaisey J. in the lower court. Vaisey J. reasons that once the donee has assumed the burden of making the appointment, though he clearly has no duty to make an appointment, he has assumed the obligation and is thereafter bound to exercise his discretion in a fiduciary manner.

Evershed M.R. held that the *only* duty the donee owes the persons designated by the donor of the power to take in default, is the duty not to divest them save "strictly to the extent and in the manner prescribed by the donor". The first part of this proposition was criticised earlier.[97] But that does not diminish the force of the rest of the proposition. The actionable damage can equally be caused to expectant interests. It then follows that it is erroneous to argue that there is a "duty" not to revoke except for the benefit of the objects, because such a duty cannot be owed to either the appointees or other objects: the donee never owed any duty to exercise the power for their benefit in the first place.

The duty not to revoke, he reasons, cannot be owed to the person who is entitled in default. It is a contradiction to state that a duty is imposed on behalf of the default beneficiary not to revoke. By revoking that default beneficiary would get property which he might otherwise not have got. To put this in Hohfeldian terms, this would create a right to have the power remain in force and a no-right reposed in the same person, and these are jural opposites. A power of revocation is free of any obligations. It is, so far as the objects are concerned, not so much a power as a right. The doctrine of ultra vires appointments cannot therefore apply to it.

Note the cautionary reservation stressed by the Court of Appeal, to the effect that there may be cases where, as a matter of construction, the power of revocation is so closely akin to a power of reappointment that it should be treated as such. This is really a warning of the possibility that the courts may be willing, in suitable cases, to pierce the veil. But the courts would be very reluctant to do this. There will be such a possibility

[95] Ibid. 445.
[96] Ibid. 447.
[97] At p. 235.

where the whole scheme of the instrument suggests that there is a power of re-appointment but the parties call it a power of revocation. That possibility can be avoided by careful drafting.

Purpose test does apply to non-exhaustive discretionary trusts

Can an appointment under a *non-exhaustive* discretionary trust or mere power of appointment fail because the trustee appointed for the wrong purpose? There are obiter dicta in *Re Nicholson's Settlement, Molony* v. *Nicholson*[98] to the effect that a wrongful purpose cannot invalidate an appointment under a non-exhaustive discretionary trust. It is submitted that those dicta should not be followed.

In *Nicholson*, the donee of the power, a spinster over 80 years old, had a life interest in a fund and a mere power to appoint a life interest in the income to her husband. The donee had discussed with her relations, who were entitled in default of appointment, the possibility of her releasing the power in exchange for half of the capital, so that the donee could benefit some friends with whom she was living. Two years before dying the donee married a near relation of the friends with whom she was living and appointed to him.

Clauson L.J., delivering the judgment of the Court of Appeal, held that the appointment was valid. But the decision does not support the proposition that a wrongful purpose cannot vitiate a mere power. The decision was made on the basis that there was not a wrong purpose on the facts of that case. It was held that there was no reason in principle and no authority upholding the attack on the appointment,[99]

> "being an honest appointment unfettered by any bargain, arrangement or understanding, is vitiated merely because the appointor had a hope or an expectation that the appointee would use his increased income for the benefit of his near relations, whose welfare was admittedly a matter of concern to the appointor."

The Court was therefore distinguishing the purpose of the appointment from the mere hope that the property would devolve in a certain way. It was fully open for the Court to make that distinction on the facts, although it could be argued that it was a rather generous interpretation to adopt in the circumstances. Perhaps the Court of Appeal took the wordly view that a woman who was so desperate to make an appointment that she would marry a gentleman should not be thwarted! The finding of fact, however, was as far as the Court had to go.

The Court of Appeal, however, to add extra measure, did go on to confirm the view of Farwell J. that the cases on trust powers (and, a fortiori, exhaustive discretionary trusts) could be distinguished. Clauson L.J. reasoned that in all the reported cases where powers were held

[98] [1939] Ch. 11 (C.A.).
[99] Ibid. 21.

invalid, they were held invalid because a purpose foreign to the power (that is, unauthorised by the power) was sought to be achieved. He distinguishes these cases from those where there was an arrangement or where the appointee knew of the offending purpose. He said that, so long as a mere power was exercised in favour of an object and that object benefited as the donor of the power intended, it was not relevant or appropriate to inquire into the donee's "ultimate objective". On the other hand, in the case of a trust power, a wrongful purpose would diminish the interest of the other "beneficiaries".

All those obiter dicta, to the effect that the "ultimate objective" is irrelevant, no longer state the law accurately. *Nicholson* was decided well before the review of the law in *Re Crawshay, Hore-Ruthven* v. *Public Trustee*,[100] where it was held that an arrangement was not necessary and it was shown earlier the *appointee's* knowledge is irrelevant.

Be that as it may, this states no distinction between a mere power and trust power. That distinction depends on the view of Clauson L.J., which has already been rejected,[101] that an ultra vires appointment, in the case of a trust power or exhaustive discretionary trust, must be a "fraud" on the persons entitled in default or the other "beneficiaries" with vested interests. To cap it all off, the modern exhaustive discretionary trust is the one power in which there cannot be a gift in default[102] to objects or otherwise, because the very definition of such a discretionary trust requires an obligation to exhaust the whole fund.

The most damning criticism of the view expressed in *Nicholson*, that the purpose of the appointment is not relevant to its validity, is the practical consequences which would follow if it were the law. So long as the trustee of a non-exhaustive discretionary trust appointed to an object, his purposes for doing so could not be called into question. It would follow that, in exercising the power of selection, the trustee has no obligation to act in a fiduciary or judicial manner. If he complies with the minimal requirement of putting the discretionary fund into the hands of an object or objects, he has fulfilled all that is required of him. In turn, it would follow that he has no obligation when allocating to consider the merits of the claims of all the objects who present themselves and they in turn have no enforceable right or claim to be considered. Such a claim could be met by the plea that the trustee had appointed to *an* object. In fact, this is precisely the conclusion at which Harris[103] arrives. And, to push the argument to a reductio ad absurdum, even if he appointed to a non-object, who would there be to complain of an ultra vires appointment?

100 [1948] Ch. 123 (C.A.).
101 At p. 235.
102 Because there is an obligation to exhaust the fund before the end of the selection period, which the court will enforce: see Grbich, "Baden: Awakening the Conceptually Moribund Trust" [1974] *M.L.R.* 643.
103 Harris, "Trust, Power and Duty" [1971] *L.Q.R.* 31, 65 (last part of proposition 10).

That conclusion cannot be right. By the simple expedient of appointing to an object the trustee can achieve all the consequences which the ultra vires appointment doctrine was designed to control and defeat the settlor's intention. For example, he can appoint to a child object who is about to die, with the purpose of getting the property himself.[104] He can appoint to an object who is under the thumb of someone he wants to benefit[105] or he can appoint with the sole purpose of getting the discretionary fund resettled, and perhaps even lay down conditions that this should be done. That does not even touch on the possibility of the trustee appointing to a non-object. It removes any effective judicial control over the trustee's appointments under non-exhaustive discretionary trusts.

Stand back and look at the two main things we know about mere powers and non-exhaustive discretionary trusts. First, the very fact that there is a power means that the trustee is under no obligation to allocate.[106] Second, it is now well-established in the case of a non-exhaustive discretionary trust that there is no need for the trustee to be able to review the whole range of objects. But he must be able to define the limits of the class of objects.[107] For present purposes, two important consequences follow from that second point. First, the trustee is not required to mentally note the existence of every single object before he makes an appointment.[108] Second, he has got a duty to consider, as a minimum requirement, whether a particular candidate is or is not *an object* of the non-exhaustive discretionary trust. If that were not so, why would the courts demand definitional certainty from the settlor? If the trustee has no obligation to appoint to *an object*, it would be futile on the court's part to demand a definition of the objects.

The mere fact that the trustee is not required to *allocate* cannot in itself mean that he is under no duty to consider each of the applicants before he selects. When he makes the formal decision to allocate this brings into existence a new obligation. He now holds the property he is about to appoint on something akin to a trust. To put an apposite analogy, he is like the executor de son tort, who was not bound to accept office (cf. allocation) but, if he does, is bound to carry out the duties of executor with as much care as if he had been appointed (cf. selection).

But, if the trustee is not bound to even know of the existence of all the objects, how can it be argued that he owes them each a duty to be considered? If he owes nobody a duty to be considered how can they protest if he appoints for the wrong purposes? Or, for that matter, how can they protest if he appoints to a non-object? For the answer we again

104 *Wellesley* v. *Mornington* (1852) 2 K. & J. 143; 69 E.R. 728.
105 *Re Crawshay* [1948] Ch. 123.
106 *Re Greaves* [1954] Ch. 434, 446 (C.A.), *Re Somes* [1896] 1 Ch. 250, 254-255, *Re Radcliffe* [1892] 1 Ch. 227 (C.A.) (the donee can even release a power for his own benefit).
107 *Whishaw* v. *Stephens (Gulbenkian)* [1970] A.C. 508.
108 Grbich op. cit. note 102, at 648.

go back to first principles. Those last two questions hide a fallacy. The trustee cannot appoint to non-objects or for wrong purposes simply because he is not authorised to do so. It is in order to control him that the court demands definitional certainty from the settlor of a non-exhaustive discretionary trust. That puts the first question into perspective. What does it matter then that the trustee does not know of the existence of all the objects? He has a duty to consider all the objects who present themselves and, probably, a duty to make reasonable enquiries to ascertain those who do not. But any object at all can come into a court and protest if the trustee has not exercised his discretion properly and, if he has not in a formalistic sense, considered each of the objects. That is not to say a court would hold an appointment invalid merely because the trustee did not give a hearing to every single object or tick his name off a long list after laborious deliberation. It merely means that, having regard to the amount of cash involved in the allocation and all the circumstances, the trustee must give reasonable consideration to the way in which he selects after he decides to allocate. *That* is the content of the right to be considered. A rule which places practical and workmanlike boundaries on that duty to consider the objects cannot derogate from the basic rule that a trustee has a duty to consider the objects of a non-exhaustive discretionary trust if and when he decides to allocate. That duty gives rise to a correlative right to be considered[109] which in turn gives *every* object the right to come to a court with the locus standi to complain of an ultra vires appointment.

The basis of the *right of action* against an appointment under a non-exhaustive discretionary trust, allegedly a fraud on a power, as distinct from *the right to be heard* by a court, in no way depends on that right to be considered when there is an allocation. That depends solely on the fact that the trustee has acted outside his authority.

To summarise, *every single object* of a non-exhaustive discretionary trust has the *locus standi* to come before a court and complain of any action of the trustee connected with the discretionary fund. That right is based on the right to be considered when there is an allocation and not on any rights, vested or otherwise, in the discretionary fund. A trustee of a non-exhaustive discretionary trust is subject to the full rigours of the ultra vires appointment rules.

[109] And that is an enforceable right with correlative duties in the "relational concept of duty" sense. (Harris's definition: op. cit., 48). It is submitted that Harris (op. cit., 59) does not show that it "does not exist, as a matter of substantive law". He does show that jurisprudentially it *could* be explained in this way. It is easy to read too much into the absence of a factual certainty requirement. A duty to consider can give rise to a Hohfeldian duty to *every* object even though the court draws practical limits on the content of that duty to consider every single object.