Secrets Trusts and Powers of Appointment

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by David M. Smith of Hull & Hull LLP

1. Introduction

The Secret Trust and the Power of Appointment, while distinct and quite separate legal concepts, nonetheless have something in common: they both serve as means by which a testator may, to varying extents, assign or delegate his or her authority respecting the disposition of his or her estate.

At first blush, such concepts appear to fly in the face of statute:

- With respect to Secret Trusts, Part I of the *Succession Law Reform Act*, which provides for the requirements of a valid Will, makes no allowance for the existence of secret trusts;

- With respect to dispositive Powers of Appointment in Wills, many Australian and English cases have dealt with the issue of delegation of testamentary power and suggest that there exists a principle that a person cannot delegate the power to make a Will. In Ontario, *Re Nicholls Estate*[1] , a decision of the Court of Appeal considered in further detail below, has concluded that a General Power of Appointment in a Will is a permissible means to effectively delegate testamentary authority.

The purpose of this paper is to consider these means whereby a testator provides for his beneficiaries. The Secret Trust and the Power of Appointment operate "outside of the box" of the conventional trust structure whereby a trustee simply distributes the estate assets to the beneficiaries.

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[1] (1987), 57 O.R. (2d) 763, 25 E.T.R. 228 (Ont. C.A.).

One more preliminary note: there is a great deal of academic commentary and jurisprudence on these issues. The distinction between trusts and powers is in reality blurred such that there can be a great deal of confusion created when one delves deeply into an analysis of this area. This paper and presentation must therefore be considered, in the most general sense, as a primer to these very complex issues.

2. Secret Trusts

Where a person wishes to make a gift by will but keep the recipient and the nature of the gift itself away from public scrutiny, the testator could leave such a gift to a third party to hold on a secret trust for a beneficiary, the identity of whom is not disclosed in the Will document itself.

The rationale behind the secret trust comes from circumstances where the testator, who wishes to keep secret the ultimate recipient of his or her assets after death, creates a secret arrangement. A trust of this nature, not reduced in writing to constitute a Will, brings with it many difficulties. The most obvious difficulty is where the named trustee uses the trust property for himself or herself and the creator of the trust cannot protect enforcement of the distribution of the assets to the intended beneficiary.

The secret trust concept is intuitively simple. A beneficiary under a Will, who can be shown to have undertook to the testator during her lifetime to hold any bequest in trust for certain specified objects, will be held to that obligation on the death of the testator. The only exception to this principle is that objects which are illegal or contrary to public policy will not be enforced.[2] Somewhat analogous to the components of delivery and acceptance that are key to the proof of a valid gift, a secret trust obligation must be characterized by **communication** of the testator's intention to the named beneficiary under a Will and the **acceptance** by the named beneficiary to hold the trust property **in trust for another or for a purpose**.

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[2] *Day v. Day* (1889), 17 O.A.R. 157 (Ont. C.A.).

Secret trusts are an exception to the strict statutory requirement that the document must be an existing document. No objection can be taken to a secret trust on the basis of the relevant Wills statute because the matter is removed from the provisions of the statute and brought within the law of trusts (and equity) by the reliance of the Testator on the honour of the Trustee to observe the terms of the secret trust.[3]

Evidence of communication of the intent is the most important element in proving the existence of a secret trust. Acceptance may be inferred from the acquiescence of the legatee: human nature being what it is, a legatee who denied the existence of the trust obligation would be expected to complain about losing his inheritance.

Waters points out that: "it is of secondary importance whether the deceased made his will on the strength of the acceptance, left his will unchanged on that basis, or allowed himself to die intestate relying on the fact that his intestate heir had accepted the trust."[4]

3. Fully Secret Trusts

A fully secret trust is characterized by communication of a trust obligation together with a clear identification of the objects of the trust obligation.

A fully secret trust arises where the legatee ostensibly is entitled to the beneficial interest in a legacy. Any trust obligation which the legatee has undertaken is hidden from view, revealed only by extrinsic evidence. In such circumstances, where the Testator has communicated the intention that the legacy should be held in trust for others, where the objects of the trust are known to the legatee, and where the legatee agrees to act as Trustee or acquiesces in that arrangement, the trust would be enforced, and extrinsic evidence is admissible to prove the essential facts.[5]

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[3] MacKenzie, James, Feeney's Canadian Law of Wills, (4th ed.) (Butterworths) (2000) at 6.24.
[4] See Waters' Law of Trusts in Canada, (3rd ed.), Carswell (2005) at 241.
[5] Iankowski v. Pelek Estate, [1996] 2 W.W.R. 457 at para 50 (Man. C.A.).

With respect to a fully secret trust, there must be intention on the part of the testator to create a trust (despite the property passing apparently beneficially to the recipient in the Will or the intestacy rules), communication to the intended recipient of the property and acceptance by the intended recipient. These requirements must be satisfied in the deceased's lifetime.[6] For instance, where a mother left an estate to her daughters, he son unsuccessfully argued the existence of a secret trust: although, after her death, a letter was found from the mother to the daughters implicitly providing an intention to benefit the son, such intention was not **expressly** communicated to the daughters, nor accepted by them, during their mother's lifetime.[7] But consider this interesting variation: under the same scenario, the mother puts instructions respecting the secret trust for the benefit of the son in a sealed envelope, gives the envelope to her daughter during her lifetime to be opened and the instructions followed after her death. Does this act constitute communication and acceptance of the intention to make a secret trust within her lifetime? The cases say yes.[8]

4. Half-Secret Trusts

A Half-Secret Trust may arise where the testator leaves a Will which, on its face, makes the legatee a trustee, but does not set out the objects of the trust. In addition to the requirements set out above with regard to secret trusts, two further requirements exist with half-secret trusts. The communication must conform strictly to the language of the Will and unlike fully secret trusts, **must** be made prior to, or contemporaneously with, the execution of the Will.[9] This latter point has been the subject of considerable academic debate which, will well beyond the ambit make for interesting reading.

In a half-secret trust, property is given by a Will to a trustee with an expressed direction in the Will itself that she is to hold the property upon trust but the particular trust is not disclosed in any testamentary document. As such, where the trustee has accepted the

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[6] Underhill and Hayton, Law Relating to Trusts and Trustees, (15th Edition, London, 1995) p.231.

[7] *Donovan v. Donovan* (1920), 18 O.W.N. 318.

[8] *McDonald v. Moran* (1938), 12 M.P.R. 424 (P.E.I. Ch.).

[9] Re Keen's Estate [1937] Ch 236, [1937] 1All ER 452; See Underhill and Hayton, Law Relating to Trusts and Trustees, (15th Edition, London, 1995) p.232.

obligations of a secret trust, the trust will be fully secret if the Will simply gives property to that trustee, but it is half-secret if the gift is to the trustee on trusts that the testator has already disclosed.[10]

Unlike fully secret trusts, given the fact that there is express language in the Will in regard to the half-secret trust, there is no chance of the trustee committing a fraud by claiming the property for himself.

If the legatee, notwithstanding the language of the Will, has no knowledge of the objects of the trust or claims not to have knowledge of the object of the trust in a bid to keep the legacy, such a tactic will fail. As a trustee, the legatee cannot benefit from the trust property. In such circumstances, the trust property is impressed with a resulting trust for the settlor's estate. Interestingly, if the secret trustee is the testator's residuary legatee (and would therefore benefit from the resulting trust), he holds for the intestate heirs.[11]

5. How is the Existence of a Secret Trust Proved?

Once it has been determined that a secret trust exists and it is valid, the next question is: does it form part of the Will? For example, the beneficiary of the secret trust might have died and the executors have no way of knowing that they were to distribute the assets of the estate according to the terms of the secret trust.

(i) Parole/Extrinsic Evidence

A careful distinction must be made between the admissibility of extrinsic evidence for the purpose of establishing the terms of a Will as opposed to its admissibility with respect to trust arguments raised by the parties.

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[10] See Snell's Equity (13th Edition), 1997, p. 134.
[11] Waters, p. 274.

Evidence of statements of the Testator made before or after the time of the execution of the Will and showing an intention to benefit an individual, which will not be carried out unless the alterations are admitted, is admissible to prove the alterations were made prior to execution, but not statements of the Testator made subsequent to the execution of the Will.[12]

Furthermore, as to subsequent declarations, these, on the general principle stated, would seem to be admissible if tendered merely as original evidence of continuous intent, but not if tendered as hearsay evidence of the facts stated. On these grounds, declarations by a Testator are admissible as original evidence to establish a secret trust not disclosed in the Will; though his assertions that he has communicated it to the party bound, have been rejected as hearsay.[13]

Parole evidence is admissible to determine the objects of an *inter vivos* trust in circumstances where no trust obligation appears on the face of the Will. Such evidence may be either written or oral and must prove communication and acceptance of a trust obligation independent of the Will.[14]

Although parol evidence may not be adduced to contradict a Will, this rule has no application to secret trusts.[15]

In Halsbury's Laws of England[16], it is stated:

> Where a testator makes or leaves unrevoked a devise or bequest on the faith of a promise, whether expressed or tacit, on the donee's part that he will carry out the testator's intentions and the gift is on the face of it absolute, equity will admit evidence as to the testator's intentions and as to the communication of them to, and the acquiescence of, the donee.

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[12] Macdonell, Sheard and Hull, Probate Practice, 4th ed. (Carswell, 1996) at page 79.
[13] Phipson on Evidence, 12th ed., paragraphs 1017 and 1018.
[14] Blackwell v. Blackwell, [1929] A.C. 318 (H. L.), Hayman v. Nicoll, [1944] D.L.R. 551 (S.C.C.).
[15] Underhill's Law of Trusts and Trustees (13 ed.), (1979) page 183. Also, see page 184 where the author suggests that it seems the Court should allow all possible evidence to clarify the situation.
[16] (4th ed.) vol. 48, p. 312, para. 571.

A Court of equity will enforce a secret trust, when proven by extrinsic evidence, to prevent the requirements of the particular Will's statute being used as an instrument of fraud.[17]

In Iankowski v. Pelek Estate[18], the Court considered the impact and admissibility of the extrinsic evidence of the Testatrix giving additional instructions regarding the residue of her Estate to the Executor at the time of signing the Will. A clause in the Will directed that the residue of the Testatrix's Estate should be transferred to the Executor "to deal with as he may in his discretion decide upon". The Executor took the position that the clause constituted a trust that together with other written directions given to the Executor by the Testatrix specifying the beneficiaries, created a valid secret trust which was not void for uncertainty. The Testatrix's husband, applied for an Order declaring the residue clause void for uncertainty.

At trial, the Court held that the meaning of the clause in the Will clearly did not create the trust but an absolute gift to the Executor; however, the Executor gave evidence that he was given the money in trust and on that basis the Court held that the clause in the Will did in fact create a secret trust. The Court held that the words in the clause, when combined with the instructions given, almost immediately after signing the Will, made it clear that the residue was to go to the parties named and that the trust was not void for uncertainty.

On appeal, the Manitoba Court of Appeal upheld the Trial Judge's decision. The majority of the Court of Appeal found that the Testatrix had a poor relationship with here husband and had retained her long-term lawyer to prepare her Will. The Will named her lawyer as sole Executor and upon signing the Will, the Testatrix told her lawyer to divide the residue equally among three named nephews.

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[17] Iankowski v. Pelek Estate, [1996] 2W.W.R.457 (Man.C.A.) page 483, See also RE Young, [1951] Ch 344.
[18] (1995) 99 Man. R. (2nd) 191 (Man. Q.B.), aff'd., [1996] 2 W.R. 457, 10 E.T.R. (2nd) 117, 131 D.L.R. (4th) 717, 107 Man. R. (2nd) 167, 109 W.A.C. 167, 131 D.L.R. (4th) 717 (Man. C.A.).

As stated above, in Jankowski v. Pelek Estate, the Testatrix provided in her Will that the residue, which included a substantial portion of her Estate, was to be paid to the Executor of her Estate, who was the lawyer who prepared the Will for her, and dealt with as he in his discretion decided. Immediately after executing the Will, the Testatrix told the lawyer whom should receive the residue of her Estate. The lawyer went on to write up a list of the names given to him by the Testatrix and had her sign it, but the list was not witnessed. It was clear from the evidence that the Testatrix wanted her second husband, the plaintiff, to receive only a nominal benefit. The husband, however, claimed that the trust with respect to the residue failed for uncertainty, thus creating an intestacy of the residue which he claimed to be entitled as the sole surviving beneficiary under the *Manitoba Intestate Succession Act*. In rejecting the claim of the husband, the majority of the Manitoba Court of Appeal held that a valid *inter vivos* secret trust of the residue had been created by the Testatrix, that there was an absolute gift of the residue to the Executor subject to a trust.

In coming to this conclusion, Helper, J.A.[19] held that it was wrong to use extrinsic evidence of intention to assist in the interpretation of the Will; however, the use of that extrinsic evidence to determine whether the Testatrix created a secret trust is both permissible and necessary.

Helper, J.A. went on to define a fully secret trust as a trust which a Court of equity imposes on a person who has obtained title to property obliging him to hold it for the benefit of the persons for whom or purposes for which he knew that it was given or allowed to pass to him. It arises where a Testatrix gives property to a person apparently beneficially, but as communicated to that person during his lifetime certain trusts on which the property is to be held. The trust clearly arises outside the Will. Any trust obligations which the legatee has undertaken was hidden from view, revealed only by extrinsic evidence. In such circumstances, where the Testator has communicated the intention that the legacy should be held in trust for others, where the objects of the trust are known to the legatee, and where the legatee agrees to act as Trustee or acquiesces

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[19] (1995) 131 D.L.R. 4 (717) (Man. C.A.) at page 741-742.

in that arrangement, the trust will be enforced and extrinsic evidence is admissible to prove the essential facts.[20]

The majority admitted the extrinsic evidence of the Testatrix's instructions in order to impose a secret trust on the lawyer to fulfill instructions.

In the dissent, Huband J.A. agrees with the majority in respect of the question of the admissibility of extrinsic evidence in cases where there is doubt as to the proper construction. The Court refers to the admissibility of extrinsic evidence in determining what the Court interpretation of the word "Executor" is in the circumstances.

(ii) Corroboration

Section 13 of the *Evidence Act*[21] provides as follows:

> 13. In any action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence, R.S.O. 1980, c. 145, s. 13.
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> In an action by or against the heirs, next-of-kin, executors, administrators, or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

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[20] Ibid. at page 741-742. Furthermore, a Court of Equity will enforce the secret trust to prevent the requirements of the Wills Act being used as an instrument of fraud: 48 Hals., 4th ed., reissue 1995, pp. 291-96, and Re Keen, [1937], 1 Ch. 236 (C.A.).

[21] R.S.O. 1990, c.E. 23.

As to the question of corroboration in secret trust cases, in Re Riffel Estate[22] the Court held it was not bound by the statutory requirement for corroboration in respect of Estate matters as is sometimes the case in other jurisdictions as is noted above by the noted authors in Sopinka and Lederman.[23] In cases brought by or against a party who was unable to give evidence either by reason of death or other disability, an interested party was not, at common law, allowed to give evidence. The noted authors concluded that this rule of practice became an absolute requirement when it was incorporated into the many provincial Evidence Acts. However, in Re Riffel Estate, the Court was not bound by this statutory principle as the *Saskatchewan Evidence Act* did not include such a rule of practice.

In Re Riffel Estate, the Court relied on Cross on Evidence (5th edition), where it is stated at page 205 that a claim against the Estate of a deceased person will not generally be allowed on the uncorroborative evidence of the claimant, but there is no rule of law against allowing it, although caution is nevertheless called for.

In contrast, in Charlton v. Cipperley[24], the Testator left his Estate to his second wife absolutely. The children of the Testator by his first marriage alleged a secret trust in their favour. The Alberta Court of Appeal had no difficulty in concluding that evidence as to the alleged statements by the Testator to his second wife were admissible, although two of the appellate judges were concerned with the question of corroboration in view of section 12 of the Alberta Evidence Act, R.S.A. 1980, c. A-21 which provides:

> 12. In an action by or against heirs, next-of-kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any manner occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

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[22] 28 E.T.R. 1, 64 Sask. R. 190 (Sask. Q.B.).

[23] Supra, note 45.

[24] (1984), 19 E.T.R. 66, 32 Alta. L.R. (2nd) 289, 54 A.R. 269, 12 D.L.R. (4th) 582 (Alta. C.A.).

In Charlton v. Cipperley[25], the Alberta Court of Appeal took a more traditional approach to the question of necessity of corroboration in Estate matters. In jurisdictions such as Ontario, where similar corroborative evidence is a statutory requirement, the approach in Charlton v. Cipperley is probably a stronger approach to follow.

From a practical standpoint, circumstances were an individual becomes aware of facts and circumstances which may indicate that a secret trust of half secret trust exists, he or she can apply to the Court for advice and direction as to whether or not the assets of the estate should be delivered to the beneficiary on the basis of the secret trust.

6. Powers of Appointment--Overview

A Power of Appointment has been variously described as:

(i) "a power conferred on a person in order to give him the authority to dispose of property that he does not personally own";

(ii) "a right bestowed on an owner of property permitting the donee of the property to direct or appoint in a certain manner an interest in property for the benefit of certain individuals"; and

(iii) "an authority given by one person to another to determine who shall receive the property that is the subject matter of the trust."

For our purposes, the most common example of a Power of Appointment is the appointment of an estate trustee in whom the estate, as trust property, vests to be distributed pursuant to the terms of the Will.

A **general power of appointment** may be exercised in favour of anyone.

A **special or limited power of appointment** may be exercised in favour of specified persons or a defined class.

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[25] Ibid.

An **intermediate or hybrid power of appointment** may be exercised in favour of anyone except specified persons or classes of persons who are to be excluded from the benefit of the exercise of discretion.

If the holder of the Power of Appointment has no obligation to exercise the power, the power is referred to as a **mere power** or a **discretionary power.**

If the holder of a power has an obligation to exercise the power, the power is referred to as a **trust power** or a **mandatory power** or a **power in the nature of a trust.**

For our purposes, we are concerned with Powers of Appointment given to an estate trustee or a non-trustee to exercise his or her discretion in the allocation of the trust property. In most cases the estate trustee and the trustee of such a trust with a power of appointment will be the same person.

7. The Power of Appointment as Permissible Delegation of Testamentary Power

As a general proposition, the case authorities which take issue with the delegation of testamentary authority are generally cases in which trusts offend the rule against certainty of objects.

In *Re Nicholls*, the Court of Appeal considered a Will under which a testatrix gave her estate to her executor in trust and directed the executor to follow the directions of a specific individual, Carson Cowan, for the distribution of the residue of her estate. The executor was given directions by Cowan to distribute the estate among six members of a religious sect to which the deceased had belonged. On the executor's application for directions, the Court of First Instance found that the Will created a valid general power of appointment. On appeal by the executor, the Court of Appeal dismissed the appeal and found as follows (quoting from the Reasons for Decision:

1. "A power of appointment can be held valid as not offending against the prohibition upon delegating testamentary power upon either of two principles, one, that the giving of a power of appointment does not amount to a delegation if there is indicated with sufficient particularity the class of persons or objects to be benefited; that they are ascertained or ascertainable..."

2. "The [second] principle upon which general powers of appointment have been supported is that it is equivalent to property and that such a disposition in accordance with the established practice as to general powers of appointment is to be treated as a disposition by the testator of the property: that, since the donee can give the property subject to the power to himself if he so chooses, the testator has in fact disposed of it by Will."

3. "It must ever be remembered that a trust and a power of appointment differ. There is no duty to exercise a discretionary power; it is not a trust; and the general principles which make a trust void for uncertainty since no one can enforce it, have no application."

4. "I conclude...that the authorities are in such a state of uncertainty that this appeal should be decided on the basis of principle or policy. Would any contemporary societal interest be prejudiced by permitting a general power of appointment created by will to be treated by the law in the same way as a general power of appointment created by an inter vivos instrument? I am unable to see how that question can be answered in the affirmative. I do not rest my answer on the general principle that prefers a construction that will avoid an intestacy. More appropriate, and a better guide, is the principle expressed correctly and succinctly in the "Report of the Ontario Law Reform Commission on The Proposed Adoption in Ontario of the Uniform Wills Act, 1968:" "The right of an individual to own and dispose of his assets is basic to our law. Any effort to restrict or circumscribe that right should only be permitted where the necessity for restriction clearly justifies interference with the basic freedom of the individual to dispose of his property." I am not persuaded that the formal requirements of part I of the *Succession law Reform Act*, formerly the *Wills Act*, are a sufficient justification.

Indeed, the amendment in 1977 making holograph wills valid is evidence of the existence of a less formalistic attitude towards testamentary disposition of property."

5. "It may be true that it is not clearly evident from the testatrix's language in this case that the testatrix contemplated that the donee of the power would ever direct that the residue be given to him. That, however, is not a complete answer. There is equally nothing in her language that indicates that she would have any objection to his direction that he be given the residue. Her words show that she intended unfettered discretion, a discretion, so it seems to me, that an absolute owner would have."

8. Judicial Sanctions for the Improper Exercise of a Power of Appointment

As the exercise of a power of appointment requires the donee of the power of appointment to turn his or her mind to the exercise of the discretion, a claim for liability is triggered when the donee fails to act in accordance with the standard of care owed to the beneficiaries. This standard of care will effectively trump the improper exercise of discretion or the non-exercise of discretion.

The Court will intervene if the trustees, in having failed to act under the terms of the Trust, cannot demonstrate that they gave proper consideration to whether they ought to exercise discretion for the benefit of any of the beneficiaries: "A trustee, as a trustee, has a fundamental duty to give his mind to whether he ought to exercise a power."[26].

Donovan Waters suggests that the non-exercise of discretion may amount to bad faith:

> "A trustee is in bad faith if he intentionally exercises a discretionary power for his own benefit; but it could be argued that bad faith includes the situation where the trustee abuses his discretion by

[26] Law of Trusts in Canada, Donovan Waters

exercising it in a manner, or not exercising it for a reason, which is outside the scope of his discretion." [27]

In Boe v. Alexander[28] the Court stated:

> "From a consideration of these cases, it is in my view clear that the jurisdiction of the Court to review the exercise of the trustee's discretion cannot be displaced by even the broadest language creating the discretion. The law imposes overriding duties on trustees, breach of which will call for the Court's intervention....A privative clause protecting the exercise of a trustee's discretion will not be effective to prevent judicial review whenever the trustees:
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> a. have failed to exercise the discretion at all;
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> b. have acted dishonestly;
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> c. have failed to exercise the level of prudence to be expected from a reasonable businessman; and
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> d. have failed to hold the balance evenly between beneficiaries, or have acted in a manner prejudicial to the interests of a beneficiary."

In *Re Blow*, "absolute and uncontrolled" discretion was shown to be irrelevant where the trustee has simply failed to consider, as he should, the exercise of the power.[29]

The Court will have cause to intervene in the exercise of Trustees' discretion if the trustees, "having done nothing, cannot show that they gave proper consideration to whether they ought to exercise their discretion."[30]

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[27] see Waters
[28] (1985), 21 E.T.R. 246 (B.S.S.C.), affirmed (1987), 28 E.T.R. 228 (B.C.C.A.)
[29] (1977), 18 O.R. (2d) 516.

In summary, the non-exercise of a discretionary power gives rise to a cause of action, namely, negligence and breach of fiduciary duty.[31]

9. A Novel Judicial Remedy to Correct the Improper Exercise of a Power of Appointment

While this subheading is properly the subject of an entire paper, a relatively recent development in England lower court decisions is of considerable interest. Several commentators have made note of what has come to be referred to as the Rule in *Re Hastings-Bass*[32] This "rule" has been recently stated as follows:

> "Where trustees act under a discretion given to them by the terms of a trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account."[33]

The case from which this enunciation of the Rule in *Hastings-Bass* is quoted is one of the latest in a line of English cases in which the Court has been asked to make, and has granted, an order invalidating an exercise of a power of appointment after it became apparent that the exercise of that power had unintended adverse tax consequences.

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[30] *Boucher v. Boucher Estate* (1990) 108 NBR (2d) 220 (N.B.Q.B.).
[31] *Wilson, Re* [1937] O.R. 769.
[32] *Re Hastings-Bass*, [1975]Ch.25 (C.A.).
[33] *Sieff v. Fox*, [2005] 1 W.L.R. 3811 (ch.D.) at para. [119].