POLICING INVESTMENT DECISIONS OF TRUSTEES IN TRUSTS FOR SUCCESSIVE BENEFICIARIES

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The wide range of investment vehicles open to trustees under modern trusts, either under broad investment clauses or the emerging statutory "prudent man" rule, coupled with the wide discretionary powers over investments so often granted to trustees, gives to trustees an apparently great de facto *power to affect the distribution of the economic benefits of the trust between successive beneficiaries. The same factors greatly inhibit any judicial attempt to control this* de facto *power through the traditional mode of application of equitable techniques for ensuring "even-handedness", which centre around* Howe v. Lord Dartmouth *and the corollary rules associated with that case. This article argues that there is a legitimate path which courts may take, not only to re-invigorate the* Howe v. Lord Dartmouth *group of rules as an effective means of affording a remedy for lack of even-handedness in the economic results of the exercise of the trustees' powers over investment, but also to break out beyond the traditional limits of operation of those rules for that purpose.*

Le grand choix de moyens d'investissement à la disposition des fiduciaires, que ce soit en vertu de clauses générales sur les investissements ou de la règle statutaire de "l'homme prudent" qui commence à s'imposer, de même que les pouvoirs discrétionnaires étendus qui sont si souvent accordés aux fiduciaires en matière d'investissement, expliquent le fait que les fiduciaires possèdent de facto *le pouvoir d'influencer la distribution, parmi les bénéficiaires successifs, des bénéfices économiques de la fiducie. Pour les mêmes raisons, il est difficile aux tribunaux d'essayer de règlementer ce pouvoir* de facto *en appliquant de façon traditionnelle les techniques d'équité qui assurent une juste distribution, techniques qui ont été énoncées dans* Howe v. Lord Dartmouth *avec les règles qui en découlent. Selon cet article, il resterait aux tribunaux une possibilité de refaire du groupe des règles énoncées dans* Howe v. Lord Dartmouth *un moyen effectif de recours contre le manque d'équité apparent dans les résultats économiques du pouvoir d'investissement tel que l'exercent les fiduciaires, mais aussi de dépasser, pour atteindre ce but, les limites traditionnelles de l'application de ces règles.*

Introduction

There can be few areas of our law in which our jurisprudence is so dated as with respect to investments by trustees for successive beneficiaries. One sentence in an English equity textbook goes to the heart of the problem. "The rules governing investment by trustees have been governed by the principles, first that trustees must avoid all risk to the capital of the fund, and secondly, that the value of the £ will remain stable".[1]

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[1] H.G. Hanbury and R.H. Maudsley, Modern Equity (11th ed., 1981), p. 545.

The unreality of the second "principle" in the current economic context has removed any practical validity which the first might once have had. In Judge Putnam's famous sentence, "Do what you will, the capital is at hazard".[2] If the trustees opt for traditional trustee investments in debt instruments, the capital is subjected to the certainty of loss of real value at maturity due to inflation. If they opt for equity investments, or other investment vehicles which possess potential for capital appreciation, they obtain an opportunity to at least mitigate loss of purchasing power of capital, but at the same time accept a risk, not only of loss of purchasing power, but also of dollar value loss. As trustees exercise their usually extensive powers to change or retain the state of investment of the corpus, they may, while grappling with the choices apparently open to them for safeguarding the interest of the capital beneficiaries, substantially alter the income flow of the life tenant. Conversely, if they focus on improving the income flow of the life-tenant, investment decisions made with this end in view may substantially affect the nature and degree of risk to which the corpus is subject.

Under a trust for successive beneficiaries, the exercise of the trustee's investment choices may have the *de facto* effect of transmuting what appear to be administrative powers to manage wealth into very significant dispositive powers of appointment over wealth. A person investing on his own account employs the factor of time in making choices. He may choose a high income return today, accepting this as compensation for anticipated loss of real value of his assets tomorrow. Or, he may choose to sacrifice income return today, anticipating that gains in the value of his capital tomorrow will compensate for the current sacrifice. Tax considerations aside, he may think, not only in terms of gains or losses of wealth, but also of the time at which he wishes to receive or suffer them. With successive beneficiaries, under standard trust accounting principles, decisions of this nature may allocate these anticipated gains of wealth, and the concomitant risks of loss, among different persons.

The wider the field of types of investment vehicles in which trustees are authorized to retain or reinvest the wealth entrusted to their care, the greater is their *de facto* power to achieve these allocative results. The pressures of responding to the challenges of a sophisticated and inflationary economy have led individual investors, and the general law itself, into a process of widening of the investment field for trustees. Not only has it become common to see the trust instrument grant wide powers of investment, but courts have for many years shown willingness to accept such clauses at close to their face value, rather than look for ways to read the language restrictively.[3] To the extent that trustees look to the general law

[2] *Harvard College et al.* v. *Amory* 9 Pick. 446, at p. 461 (Mass. Sup. Jud. Ct., 1830).

[3] E.g., *In re Harari's Settlement Trusts*, [1949] 1 All E.R. 430 (Ch.D.); *Re Jewish Orphanage Charity Endowments Trusts*, [1960] 1 W.L.R. 344, [1960] 1 All E.R. 764

for investment powers, legislatures, over a long period, have been broadening the field of permitted investments, and we may soon see in Canada[4] an increasing number of departures from the "legal list" concept in favour of the "prudent man" concept familiar in many American jurisdictions. Most significantly, courts in common law jurisdictions have been willing to use their variation of trusts jurisdiction to grant wider powers to trustees to invest outside traditional debt obligation fields, in avowed response to the erosion of real values of debt securities due to inflation.[5]

However, recognition by settlors, legislatures and courts of the desirability of conferring wider investment powers upon trustees has not been matched by a parallel evolution in the judicial policing of the enhanced *de facto* distributive power over the wealth generated by the trust corpus which is inherent in those wider investment powers. To speak of the duty of trustees to maintain an even hand between the beneficiaries is one thing. To give that alleged duty a practical bite, where a life tenant is complaining that the choice of assets for the trust is unduly sacrificing current income for potential capital gain, or the remainderman is complaining that overinvestment in debt obligations is devastating the real value of the capital, is

(Ch.D.); *Re Peczenik's Settlement Trusts*, [1964] 1 W.L.R. 720, [1964] 2 All E.R. 339 (Ch.D.).

[4] New Brunswick, Manitoba, the Northwest Territories and the Yukon Territory have adopted this rule: R.S.N.B. 1973, c. T-15, s. 2; R.S.M. 1970, c. T-160, s. 70, as am. S.M. 1982-83, c. 38, s. 5; R.O.N.W.T. 1974, c. T-8, s. 3; R.O.Y.T. 1971, c. T-5, s. 3, as am. O.Y.T. 1980 (1st Sess.), c. 33.

As an example, the New Brunswick version of the rule reads: "Unless a trustee is otherwise authorized or directed . . ., he may invest trust money in any kind of property, real, personal or mixed, but in so doing, he shall exercise the judgment and care that a man of prudence, discretion and intelligence would exercise as a trustee of the property of others".

See also Ontario Law Reform Commission, Report on the Law of Trusts (1984), vol. 1, pp. 187-222, 304-305. As this report was released after submission of this article, it is not possible to discuss the implications of the recommendations it makes on the thesis advanced here.

[5] E.g., *Re Coates' Will Trusts*, [1959] 1 W.L.R. 375, [1959] 2 All E.R. 51 (Ch.D.); *Re Byng's Will Trusts*, [1959] 1 W.L.R. 375, [1959] 2 All E.R. 54 (Ch.D.); *Re Allen's Settlement*, [1960] 1 W.L.R. 6, [1959] 3 All E.R. 673 (Ch.D.); *Re Baker*, [1961] V.R. 641 (Vict. S.C.); *Re Murray's Trusts*, [1967] N.Z.L.R. 341 (S.C.); *Re Kiely* (1972), 24 D.L.R. (3d) 389, [1972] 1 O.R. 845 (Ont. H.C.). As early as 1959, the practice note in *Re Allen's Settlement, supra*, indicated that the judges in England would no longer require applicants for a variation to broaden investment powers to submit expert evidence as to general economic conditions, or general argument as to the wisdom of extending investment powers. In *National Trustees Executors and Agency Company of Australasia Ltd.* v. *A.-G. for Victoria*, [1973] V.R. 610, at p. 611 (Vict. S.C.), the court said that it should take judicial notice of the inflationary trend when considering applications to widen trustee investment powers. "Indeed . . ., having regard to the overall picture of the inflationary trend which has emerged from the materials laid before the courts . . . it behoves trustee companies to consider whether in the interests of the beneficiaries they should not make applications of the kind presently before me."

another. The trend towards strengthening the hands of modern trustees in coping with an uncertain and inflationary economy may have the result of significantly blunting the classic tools of equity upon which we still mainly rely to ensure that an equitable balance is maintained between the interests of the competing beneficiaries. These tools, at their sharpest, can cut at only part of the problem.

The "classic tools" referred to are those which are designed to secure the apportionment, between the income and capital beneficiaries, of gains of wealth derived from some of the original assets received from a testator, pending the conversion of those assets into authorized investments, where there is a duty, imposed by the instrument or implied by law, to effect such a conversion—in short, the group of rules often collectively referred to as "The Rule in *Howe* v. *Lord Dartmouth*".[6]

Aspects of this group of rules have been extensively canvassed in Canadian legal literature in recent years,[7] and this article will not attempt a general revisitation of this subject. For present purposes, it suffices to remind the reader of some of the principal obstacles to utilization of these rules to balance the interests of successive beneficiaries. These are, the restriction of the operation of the rules to original assets, as received by the trustees, which the trustees are under a duty to convert into "authorized assets"; the restriction of the implied duty to convert to testamentary trusts of residuary personalty; the widening of the class of investments open to trustees, beyond the traditional "legal lists"; the frequency with which testators are led by their professional advisors to insert clauses which are construed to oust either a duty to convert or the corollary duty to apportion pending conversion; and the failure of equity to develop any equivalent techniques for apportioning gains or losses of wealth arising from assets into which the original corpus has been transformed by investment decisions of trustees.

I. *Wide Investment Powers: What now is an "unauthorized investment"?*

The widening of the types of permissable investment vehicles is the most critical obstacle to the employment by the courts of the *Howe* v. *Lord*

[6] (1802), 7 Ves. Jr. 137, 32 E.R. 56 (Ch.). Strictly, this case is authority for the implied duty to convert unauthorized assets of personalty held for successive beneficiaries of residue under a will. Other leading cases forming part of the group of rules are *Gibson* v. *Bott* (1802), 7 Ves. 90, 32 E.R. 37 (Ch.), and *Dimes* v. *Scott* (1828), 4 Russ. 195, 38 E.R. 778 (Ch.), which establish a duty to apportion where an express duty to convert is imposed by the instrument, and *Re Earl of Chesterfield's Trusts* (1883), 24 Ch. D. 643 (Ch.D.), which sets out a rule for apportionment where the asset is reversionary or non-income producing.

[7] See K.B. Cantlie, Comment (1976), 54 Can. Bar Rev. 678; M.C. Cullity, Comment (1972), 50 Can. Bar Rev. 116; P.G. Hogg, Comment (1981), 5 E. & T.Q. 181; M.M. Litman, Annotations (1977), 1 E.T.R. 11, (1978), 2 E.T.R. 3; A.H. Oosterhoff, The

Dartmouth group of rules to control the distributive power which trustees may exercise through their investment choices. As we abandon the traditional "list" concept of authorized trustee investments in favour of a "prudent man" approach, whether created by wide investment clauses in the instrument or by statute, the courts must be prepared to take a different approach to the question of what constitute "authorized investments" than has appeared in the cases to date, at least overtly, and must adapt the application of the remedies which the *Howe* v. *Lord Dartmouth* group of rules are designed to afford, to that different approach. If the courts do not adapt, the *Howe* v. *Dartmouth* group of rules, and more generally, the power of the court to intervene in cases where the investment choices of the trustees are unfairly benefitting one successive beneficiary at the expense of the other, will wither away.

The withering away of the limited apportioning mechanism that we have is a result of the dependence of that mechanism upon finding a duty to convert original assets which are not of a class in which the trustees of the particular trust are authorized to hold the trust corpus, into "authorized investments". Under the received law, if there is no duty upon the trustees to convert the original assets, the beneficiaries must take those assets, and their consequences, as they are, no matter how unbalanced the economic results of this may be as between the successive beneficiaries. Also, once converted into new investments chosen by the trustees, there is, except in very limited circumstances, no mechansim to apportion economic return between the beneficiaries. It is only where there is a duty to convert an original asset, not in authorized form, which duty has for some reason not yet been carried out, that the apportionment mechanisms may come into play. At that point, Equity may siphon off some portion of the economic gain which is *prima facie* income, and add it to capital account, or conversely, may treat part of what is *prima facie* a capital receipt as income, to be credited to the life tenant.

However, some of the original assets, as received by the trustees, may already be in the form of "authorized investments". The trustees would be entitled to place their investments in that form, and so are not required to go through the motions of selling the original assets and buying them back. If, then, the investment powers of the trustees are so wide in scope that almost any original asset received by them is of a class of asset in which the trustees would themselves be authorized to invest, there is nothing for any "duty to convert", which nominally may exist, to operate upon, and the whole adjusting process is cut off at its beginning.[8] The beneficiaries must

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Application of the Rule in *Howe* v. *Earl of Dartmouth* to Residuary Real Property (1980), 5 E. & T.Q. 127; R.E. Scane, Comment (1975), 2 E. & T.Q. 125; J. Smith, Does the Trustee's Duty of Impartiality Extend to Real Property (1981), 59 Can. Bar Rev. 687; D.W.M. Waters, Law of Trusts in Canada (2nd ed., 1984), pp. 791 *et seq.*

[8] *Re Lloyd*, [1949] 4 D.L.R. 99, [1949] O.R. 473 (Ont. H.C.); *Brown* v. *Gellatly* (1867), 2 Ch. App. 751 (C.A. Ch.).

then accept the allocative results of the trustees' investment decisions, including the decision whether to retain original assets or exchange them for other assets. Under the traditional application of the rules of equity, if these results are skewed in favour of either the life tenant or the remainderman , the aggrieved beneficiary would appear to be without remedy.

There is a flaw in the above argument which the courts may, and, in my submission, should exploit, not only for the purpose of countering the above described effects of broad investment powers on the "apportionment" remedies, but also to assist in revitalizing the principle of even-handedness generally, by increasing their ability to offer a remedy for investment decisions by trustees which allocate the economic gains derived from the trust inequitably to one beneficiary at the expense of the other.

The references to "authorized investments" suggest, on their face, that the issue as to whether or not a particular investment is "authorized" is merely an exercise in taxonomy. A particular investment does or does not come within an authorized class of investment vehicle. But to be truly an "authorized investment", a particular investment must not only come within an authorized class, but must be "prudent". The mere fact that a particular investment comes within an authorized class does not, *ipso facto*, establish that the investment is prudent, and therefore an "authorized investment".[9]

A resharpening of at least the "apportionment" tools with which equity implements its "even hand" principle will require the courts to develop the concept of what constitutes "prudence" in our modern economy. A modern "prudent man of business", investing for himself, would not take into account only the likelihood of getting his dollars back again. This is an important consideration, but where dollars are coming back at some future time, he will also consider what they are likely to be worth in purchasing power at that time. The same person, investing for others for whom he is responsible, will also weigh that consideration unless he is constrained to ignore it, for the consideration is as important to some of his beneficiaries as it is to him in his personal investments. On the other hand, he will not concentrate exclusively on the safety, both as to dollar value and purchasing power, of the capital. He has current needs to meet which require current income. He must make a judicious compromise.

We may at least assert that, under modern law, trustees are not forced to ignore the factor of loss of real value due to anticipated inflation in considering the prudence of a potential investment. Subject to the limitations, if any, imposed by the instrument or general law, it is not a breach of duty to place trust funds in classes of investments, such as equities, which do not purport to offer at some time a return of the precise amount of money invested in them. It is permissible to accept this increased risk of monetary

[9] *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727 (H.L.); *Chapman* v. *Browne*, [1902] 1 Ch. 785 (C.A.).

loss in order to attempt to protect against real loss due to inflation. Legislative policy usually contemplates at least a limited amount of such investments as a possibility.[10] The courts, in sanctioning variations to grant wider investment powers in order to enable investment in equities,[11] have given their own *imprimatur* to this course of action, for we may surely assume that the courts would not have sanctioned an inherently imprudent course for trustees.

There are, then, two aspects to the issue of prudence in the choice of investments. One—that which dominates the jurisprudence—focuses on the dollar security of a particular investment. The issue arises when an actual dollar loss of capital has occurred, and the court must determine whether the trustees must make good the loss, either because they should not have made that investment in the first place, or because they should have disposed of it at some earlier time than they did.

The other aspect of prudence, which more directly affects the particular problem of balancing the interests of successive beneficiaries is whether, given the fact that there *are* successive beneficiaries, a particular investment is one which trustees should make, or retain. That this consideration is a factor in the legal concept of prudence is undoubted, but the ambit of this factor has not been developed in a modern context. Where it has been applied,[12] the issue has been whether the trustees were entitled to invest in a less secure investment in order to increase the yield to a life tenant. The focus was on the security of return of the amount of money invested in a particular vehicle, not on security of purchasing power of that money. While this dollar security remains an important concern for capital beneficiaries, it is no longer the only concern, and possibly not even the predominant concern. Unless the courts are prepared to turn their backs to the reality of modern economic conditions, a duty to invest with the competing interests of successive beneficiaries in mind must include in the concept of "prudence" the consideration of mitigation of future loss of real

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[10] Apart from the jurisdictions which have adopted the "prudent man" rule for trustee investments (*supra*, footnote 4), all Canadian jurisdictions except Newfoundland and Saskatchewan permit limited investment in qualified common and preferred shares without court authorization. Saskatchewan permits investment in preferred shares. All of these jurisdictions have some restrictions on the percentage of market value of the corpus as at date of investment which may be placed in these classes of investments. British Columbia and Ontario presently permit the highest percentage of investment in equities without authorization by the trust instrument or the court (35%). In 1980, The Honourable Bertha Wilson (then a judge of the Ontario Court of Appeal), speaking extra-judicially, characterized this percentage as "inordinately low". B. Wilson, Trustees' Investment Powers, in Law Society of Upper Canada Special Lectures (1980), p. 1, at p. 4.

[11] *Supra*, footnote 5.

[12] *Raby* v. *Ridehalgh* (1841), 3 Beav. 430, 44 E.R. 41 (L.JJ.); *Stuart* v. *Stuart* (1841), 3 Beav. 430, 49 E.R. 169 (M.R.); *Re Dick*, [1891] 1 Ch. 423, at p. 431 (C.A.), *aff'd., sub nom. Hume* v. *Lopes*, [1892] A.C. 112 (H.L.); *Re Pauling's Settlement (No. 2)*, [1963] Ch. 576, [1963] 1 All E.R. 857 (Ch. D.).

value of the capital due to erosion of the purchasing power of the monetary unit by inflation, as well as consideration of safety of dollar value of the corpus, and the income interest of the life tenant.

If this is so, then the traditional approach of examining each individual investment held by the trustee, as if it stood alone,[13] to determine if it is "authorized", must be qualified by taking a prudent total portfolio approach as well. It is unlikely that any individual investment will be available to create an optimum balance between the competing interests, and if such should exist, it will probably be as much by good luck as good management if the trustees find it. If a balance is to be achieved, it is likely to be by diversification of classes of investments within the total holdings of the trust. An investment in, say, a well secured first mortgage, made under the powers conferred by a broad investment clause, may today be an excellent and authorized investment for successive beneficiaries if some significant proportion of the corpus is invested in assets which offer potential for capital appreciation to offset inflation. But, if the balance of the portfolio is invested in debt obligations, then, unless there is some legitimate ground for ignoring the remainderman's interest in mitigating the almost certain loss of future purchasing power involved in such investments, the investment may be imprudent, and hence, unauthorized.

Since, in the latter example, there is no intrinsic vice in the particular investment itself, it would be more accurate to characterize the transaction as an unauthorized purchase, rather than to label the investment vehicle itself as unauthorized. Once purchased, the individual investment is no more or no less unauthorized than any other of the same quality held by the trustees. It is the *mix* which is unauthorized.

Now, if for the present, we stay within the traditional limits of the *Howe* v. *Lord Dartmouth* group of rules, and assume that the portfolio in question is the corpus of a residuary trust of personalty created by will, and that there is either an express duty to convert, or, apart from an assumed broad investment power, no negation by the testator of the implied duty to convert which would be raised by *Howe* v. *Lord Dartmouth* itself, we still encounter difficulty in carrying this more refined concept of "authorized investments" into the operation of these rules. For, what is it that the trustees are under a duty to convert? If there is no intrinsic vice in any of the original investments bequeathed by the testator to the trustees—that is, none of them are of a class which would be excluded by the limits of the trustees' investment powers, and none are so inherently risky that the first, or more usual aspect of "prudence", referred to previously, would exclude

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[13] Equity has in one instance departed slightly from the asset by asset approach in that it does aggregate all of the unauthorized investments for the purpose of the apportionment calculation: *Re Owen*, [1912] 1 Ch. 519 (Ch. D.); *Re Fawcett*, [1940] Ch. 402 (Ch. D.). However, this occurs only after it has been determined that there are unauthorized investments which ought to have been converted.

them — no individual asset identifies itself as "unauthorized" to trigger the operation of the rules.

We would not expect this difficulty, of itself, to prove an insuperable obstacle to a court of equity. One thinks of an analogy from the law of tracing of assets. "If in 1815 the common law halted outside the banker's door, by 1879 equity had the courage to lift the latch, walk in and examine the books".[14] However, when equity examined the books, in the tracing context, it had a clear idea of what it was looking for, and of the significance of the object of its search. A judge who walks in to examine the trustee's portfolio, in order to determine whether there is an imprudent, hence unauthorized, mix of investments, is searching for a very amorphous object. As a child might ask on hearing the story of one of King Arthur's knights seeking the Holy Grail, "How would he know if he found it?".

Suppose we remove from the judge's problem the apparently formidable considerations that any given investment mix which he finds may be argued, first, to achieve a result that the particular settlor intended, and second, if the settlor did not intend any particular result, to be the consequence of the honest exercise of a discretion conferred upon the trustee. He still must make a very difficult judgment. We may even feel a twinge of sympathy if the judge says, "non possumus", refuses to treat consideration of maintenance of purchasing power as an element of "prudence", and retreats behind the fortifications of the traditional application of the *Howe* v. *Lord Dartmouth* group of rules—ready to do justice on the rare occasions when the battle comes within range of his guns!

However, I submit that vague as they may be, the criteria for deciding whether a portfolio of investments is prudent, in the sense I have been advocating, in the circumstances of a particular trust, are not too indeterminate to be applied. They do not lend themselves to precise mathematical results, but, remembering that the onus lies upon the beneficiary complaining of the trustee's investment choices to establish error, it is no more difficult to determine whether a particular result is on the right or wrong side of a line, even one seen through a glass, darkly, than in a host of other situations to which the courts apply themselves routinely.

The Supreme Court of Canada, in affirming the judgment of the British Columbia Court of Appeal in *Re Lauer and Stekl*,[15] has tacitly brought our jurisprudence at least "to the banker's door", in deciding whether and how the courts should go beyond the traditional application of the *Howe* v. *Lord Dartmouth* group of rules in policing the balancing of interests between the successive beneficiaries. Notwithstanding the con-

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[14] *Banque Belge Pour L'Etranger* v. *Hambrouck*, [1921] 1 K.B. 321, at p. 335 (C.A.), (per Atkin L.J.).

[15] (1973), 40 D.L.R. (3d) 407, [1973] 6 W.W.R. 249 (B.C.S.C.); rev'd, (1974), 47 D.L.R. (3d) 286, [1974] 6 W.W.R. 490 (B.C.C.A.); *aff'd*, [1976] 1 S.C.R. 781, (1975), 54 D.L.R. (3d) 159, [1976] 2 W.W.R. 382.

servative attitude of that court in the later case of *Lottman* v. *Stanford*,[16] I submit that, on close analysis, *Re Lauer and Stekl* may also serve as a mandate to "lift the latch and walk in". The case is not helpful on the question of what the court is looking for, once the books are in its hands.

Mr. Stekl, who died in 1965, left his entire estate to trustees, on trust to pay the income to his daughter, with remainder interests to her children, or, in default of issue, on other trusts. His trustees were directed to hold his estate upon trust to convert it into money, with power to retain any part of the estate in the form in which it might be at the testator's death, to pay his debts, funeral and testamentary expenses and duties, and to stand possessed of the residue upon the beneficial trusts declared. A substantial portion of the original and retained assets of the estate consisted of parcels of real property which were not producing revenue. Another portion of the retained original assets consisted of shares in two companies and an unsecured loan to one of these companies, none of which were revenue producing. The court was asked whether the life tenant was entitled to be credited with a notional income on all of these assets. The answer of the Court of Appeal and of the Supreme Court of Canada was "Yes". The duty to convert was construed as primary, and the power to retain original assets was treated as included to facilitate a beneficial and prudent conversion, rather than as an independent power to retain as permanent investments.

The interest of commentators[17] on this case has focused largely on the decision that, pending the conversion of the real property, the life tenant should be credited with a notional income thereon, a departure from the English rule which denies apportionment pending conversion in the case of realty, even under express trusts to convert. However, a more fundamental question is raised by this case, and left unremarked in the judgments. Why were any of the unproductive investments, real or personal, with respect to which a notional income was ordered to be credited to the life tenant, "unauthorized" as permanent investments for this estate?

The investment clause in the will read:

> 7. I declare that my Trustees shall not be limited to investments authorized by law to trustees but may invest in such investments as they in their absolute discretion may see fit without incurring any personal liability for any loss occasioned thereby.[18]

If the trustees had entered upon the wasteful exercise of following literally the terms of the conversion clause, converted all of the original assets into money, and then bought back the assets in issue as permanent investments, in the exercise of their discretion under this clause, why would they be in breach of trust? For, if they would not be in breach of trust, this would mean that the assets were "authorized assets" for the purposes of this will. There

[16] (1977), 1 E.T.R. 11 (Ont. S.C.), rev'd., (1978), 2 E.T.R. 1 (Ont. C.A.), rev'd., [1980] 1 S.C.R. 1065, (1980), 107 D.L.R. (3d) 28, 6 E.T.R. 34.

[17] Cantlie, *loc. cit.*, footnote 7; Scane, *loc. cit.*, footnote 7.

[18] *Re Lauer and Stekl*, Case on Appeal, Supreme Court of Canada, p. 4.

would be nothing for the maxim, "equity deems as done that which ought to be done" to bite upon, and hence no foundation for the application of apportionment rules to credit the life tenant with a notional income.

Although there is authority for the proposition that even broad investment clauses do not authorize the making (or presumably, the retention) of unsecured loans as permanent investments,[19] the inappropriateness of the other assets at issue in the case as permanent investments appears to rest on failure to meet the overriding "prudence" test. But there is nothing in any of the judgments to suggest that the unproductive investments in shares or in realty carried any undue risk to the maintenance of the dollar value of the corpus. Indeed, unless one assumes that the trustees were acting maliciously towards the life tenant, or were mentally inert—assumptions which are not supported by anything in the judgments—the most plausible conclusion is that the trustees saw these assets as having potential for capital gain sufficiently great to counterbalance the complete lack of current income.

If the investments in issue were not imprudent because of excessive risk of loss of the dollar value of the capital, I submit that they must have been imprudent, and hence, unauthorized, in the second sense, i.e. because they created a total portfolio which was unsuitable for this trust for successive beneficiaries. It was unsuitable because it afforded grossly insufficient recognition to the life tenant's interest. There is nothing surprising in this general conclusion, of course. Both the Court of Appeal and the Supreme Court of Canada made it clear that the lack of "evenhandedness" was part of the foundation of their decisions. But, in employing the traditional language of the "apportionment pending conversion" cases to explain its conclusions, the Court of Appeal[20] disguised the fact that it followed that the investments in issue did not qualify as authorized investments for this trust.

It may be argued that the assets in issue were disqualified as investments authorized by the will because, due to their failure to yield any income at all, they were not "investments", authorized or unauthorized. In my submission, the cases do not justify such a sweeping conclusion. The term "investment" does not have any such unique primary meaning in modern usage, and there is no justification for the court attempting to select and impose such meaning, as against other meanings that the testator may reasonably be supposed to have had in mind. The court must try to find which of the possible meanings was intended.[21] A modern settlor is likely to be aware of the existence of vehicles which are not expected to yield

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[19] E.g., *Smith* v. *Smith* (1876), 23 Gr. 114. (Ch. on App.); *Khoo Tek Keong* v. *Ch'ng Joo Tuan Neoh*, [1934] A.C. 529 (P.C.).

[20] As the Supreme Court of Canada delivered only a short oral judgment in this case, the analysis must necessarily focus on the judgment of the Court of Appeal, delivered by McIntyre J.A. (as he then was).

[21] *Perrin* v. *Morgan*, [1943] A.C. 399, [1943] 1 All E.R. 187 (H.L.).

current income, but which are expected to enjoy a capital gain, and he is likely to do what the rest of the world does, and call these vehicles "investments", in exactly the same sense as he applies the word to his government bonds. In *Re Wragg*,[22] while the court defined "to invest" as including, as one of its meanings, "to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield", the issue was whether freehold property was an authorized investment under the wide investment clause of the will, so as to enable trustees to appropriate freeholds, which were original assets in the estate of the testator, given to the trustees on trusts for sale and conversion, to particular individual trusts under the will. In *Re Powers Will Trusts*,[23] the issue was whether trustees, acting under a wide investment clause, could purchase a freehold house as a residence for the life tenant and her children. The answer was "no", but it was not a dogmatic "no", and the court put less weight on the lack of income than on the fact that such a purchase might not be beneficial to the estate because a premium might have to be paid for vacant possession. In *Re Peczenik's Settlement Trusts*,[24] Buckley J. was asked to interpret generally a wide investment clause, and, in the course of holding that the clause entitled the trustees to invest "in any shares, any stock, or any property", added "[i]t must of course be property of a kind capable of being treated as an investment, not property which is acquired merely for use and enjoyment".[25] None of these cases required the court to consider whether a non-income bearing vehicle, held for its potential for capital appreciation, could qualify as an "investment" under a wide clause.

In any case, I submit that a holding that an asset which does not yield income on current account is not an "investment" is simply an application of the proposition that the concept of "prudence", in the context of investment for successive beneficiaries, imports due consideration of the interests of both successive beneficiaries. It is difficult to see any other rationale for the existence of such a supposed rule. Under an assumed requirement that each individual asset within the trust corpus must meet a prudence test, an asset which completely ignored the interest of the income beneficiary would have to be rejected categorically. But, if we proceed this

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[22] [1919] 2 Ch. 58 (Ch. D.).

[23] [1947] Ch. 572, [1947] 2 All E.R. 282 (Ch. D.). Jenkins J. said, at pp. 575 (Ch.), 283 (All E.R.): ". . . the clause . . . does not authorize the purchase of a freehold house with vacant possession as a home for the tenant for life . . . because such a purchase would not be a purchase by way of investment, or perhaps, more accurately, might not be a purchase by way of investment, inasmuch as part of the money would or might be paid for the advantage of vacant possession and the benefit the family would get from living in the house."

[24] *Supra*, footnote 3.

[25] *Ibid.*, at pp. 723 (W.L.R.), 341 (All E.R.).

far, why, then, should an asset which yields only a derisory income, at a level significantly below that available from other reasonably safe investments, suddenly become an "investment", and therefore, under a wide investment power, an "authorized investment"? A line of demarcation drawn between "no income" and "some income" makes little sense on policy grounds. Its only redeeming feature is ease of application.

Even if the reader is prepared to accept the argument that, unless *Re Lauer and Stekl* was wrong in the result, it suggests a hidden *ratio decidendi*, i.e., that lack of prudence in balancing successive interests will render otherwise qualified investments "unauthorized", it will also be noted that the application of the apportionment remedy by the courts in that case is not wholly consistent with the prudent portfolio thesis which is being advanced here. In ordering a notional income to be calculated on all of the unproductive assets in issue, the case suggests, on the traditional approach, that all of those assets were individually "unauthorized". But, on the "prudent portfolio" approach this would not necessarily be a proper conclusion, for, if the assets were within the classes of assets permitted by the investment clause, the fact that a *particular* asset is heavily weighted towards the interest of one or other of the beneficiaries does not *ipso facto* make the holding of that asset imprudent, thus turning it into an unauthorized asset.

Where the imprudence relates to the lack of balance in the total portfolio of assets, rather than to an undue element of risk of capital loss in an individual asset, one cannot treat the duty to convert as saying, "Convert Asset X, which is unauthorized, into an asset which is authorized". Under a wide investment clause, or under a statutory "prudent man" rule, Asset X is just as authorized—or unauthorized—as any other asset. The duty to convert in such cases must be taken as saying, "Convert the existing portfolio, which is now in an unauthorized imbalance, into a portfolio which does have an authorized balance". Pending actual conversion, the court should then apportion the wealth stream derived from the existing portfolio between the parties by allocating a notional income on the *entire* portfolio to the life tenant, and allocating the balance of income, if any, to capital. In my submission, where *Re Lauer and Stekl* missed the proper solution was in applying the apportionment only to the assets singled out by the life tenant for complaint. It should have been applied to the entire corpus held for the successive beneficiaries.

The higher courts in *Re Lauer and Stekl* might have forced themselves to confront this problem squarely had they not remitted a crucial element of the case back to the lower court for decision,[26] but rather wrestled with it themselves. That element was the quantification of the rate of interest to be used in establishing the notional income to be allowed to the life tenant

[26] The writer was advised by one of counsel that the case was settled before the directed reference was held.

pending actual conversion of the assets in issue. The reasons for judgment of the Court of Appeal held the life tenant to be entitled "to an annual income that would be a fair equivalent for what she would have received had the assets been converted and the proceeds of such conversion been invested in accordance with the provisions of the will".[27] At first glance, there is nothing startling about these terms of reference. Not only do they find precedent in a decision of the House of Lords,[28] in a case relied upon by the Court of Appeal, but the language simply expresses the rationale behind the conventional four percent, sometimes five percent, rates long used by the courts for this purpose. But a second glance reveals the Pandora's Box which they open. What assumptions should the court below make as to what investments "made in accordance with the provisions of the will" would be?

While the yield spread between debt securities and equities[29] at the testator's death at the beginning of 1965 may not have been so wide as to focus a spotlight on this issue (indeed, the conventional four percent rate might, intuitively, have looked about right),[30] by mid-1974, when the Court of Appeal handed down its decision, the spreads were widening.[31] Were the same direction to have been given in 1981 or 1982, the problem would have been patent as soon as the lower court commenced to address the question referred to it.

In fixing a notional rate, the court must be assuming the state of investment into which the court itself would convert the corpus were it administering the trust, and *ex hypothesi*, the court's selection would be prudent. If the court would have regard only to the safety of the dollar value of the corpus, under recent market conditions there would be no justifica-

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[27] (1974), 47 D.L.R. (3d) 286, at p. 292, [1974] 6 W.W.R. 490, at p. 497 (B.C.C.A.).

[28] *Wentworth* v. *Wentworth*, [1900] A.C. 163 (P.C.).

[29] The use of the terms "debt securities" and "equities" throughout this paper, to indicate opposite extremes of choices of investment vehicle, is, of course, simplistic. In our sophisticated investment market, there are many vehicles which carry some of the attributes of both pure debt securities and common shares. Some possible vehicles for trustee investment, such as land, or works of art (see *Carver* v. *Duncan*, [1983] 1 W.L.R. 494 (Ch. D.)) do not fall under either term in normal usage. The terms are used here as a convenient shorthand. "Debt securities" is intended to represent all of those investments which tend to return at some future time the same number of dollars as was expended in their purchase, and, for this reason, pay a relatively high rate of return on income account, as the investor seeks compensation in that manner for anticipated erosion of the future purchasing power of that capital. "Equities" includes those vehicles concerning which the investor anticipates that future erosion of purchasing power of the money invested therein will be compensated primarily by a rise in the capital value.

[30] Canada Savings Bonds issued in November, 1964, yielded 5% to maturity. In December, 1964, Canada bonds of 10 years maturity and over had an average yield of 5.03%. The average dividend yield on common stocks included in the weighted T.S.E. 300 Composite Index in December, 1964 was 3.04% (source: Wood Gundy, Ltd.).

[31] *Infra*, footnote 36.

tion for selecting a rate lower than that which could be obtained from a fresh investment into a mix of high grade debt securities. If the court does select a rate significantly lower than this, it must be bowing to some other imperative in assuming diversification into a class of investment which would pull the overall current yield down. Given that "the duty towards the tenant for life is to obtain as large a yield as is consistent with safety and the observance of the law under the instrument of trust as to the class of investment made",[32] the concept of "safety" would be being broadened from its traditional connotation in trust investment law. The only expansion which would make sense is the introduction of the concept of maintenance of purchasing power by accepting greater risk to security of dollar value in exchange for potential capital gain. In the recent conditions of the market, this may also involve the acceptance of lower current income, even after taking the dividend tax credit into account. In turn, only the "even-hand" principle could supply the imperative for such expansion of meaning.

At least one Canadian appellate court has addressed the implications of the direction given in *Re Lauer and Stekl*, and, almost without discussion, arrived at a rate which appears to have been fixed on the basis that the notional portfolio assumed by the court was *not* restricted to classes of investments which would give the highest current yield consistent with "dollar safety". In *Re Lottman*,[33] the majority of the Ontario Court of Appeal held that the rule in *Howe* v. *Lord Dartmouth* created an implied duty to convert underproductive realty. In continuing on to the "second branch" of that rule, that is, that pending actual conversion, the life tenant was entitled to be credited with a notional income, the court followed *Re Lauer and Stekl* "by allocating to [the life tenant] a notional income based on the average yield on authorized investments during the period".[34] This was set at seven percent, "assuming a mixed portfolio of equities, bonds and mortgages, fluctuating as to proportion over the period to reflect changing investment trends".[35] The judgment is silent as to what more detailed assumptions the court was making, or as to the evidence before it pertaining to possible rates of return. However, if the court had an accurate perception of available yields during the period,[36] it must have been postulating a very substantial infusion of equities into the portfolio to pull

[32] *Re Armstrong* (1924), 55 O.L.R. 639, at 641 (Ont. App. Div.).

[33] *Supra*, footnote 16.

[34] (1978), 2 E.T.R. 1, at p. 16.

[35] *Ibid.* The judgment of the Supreme Court of Canada, *supra*, footnote 16, did not comment on this issue.

[36] The testator in *Re Lottman* died in March, 1972. The judgment of the Ontario Court of Appeal was delivered in January, 1978. The following table is given to assist the reader in recollecting the range of returns offered in the market during that period:

C.S.B. = Indicated yield to maturity at date of issue on Canada Savings Bonds.

Mortgages = Rate in October on 5 year mortgages on prime residential property in Toronto (Source: Canada Permanent Trust Company).

the overall rate of interest down to that figure. This result can only be justified by accepting that the "even-hand" principle does insert the consideration of maintenance of purchasing power of corpus into the legal meaning of "prudence" in trustee investment law.

To summarise to this point, I submit that the courts need not and should not be baulked by the breadth of the apparent investment authority of trustees under most modern trusts from applying the principle of even-handedness where a duty to convert original assets is established. Confronted with an investment portfolio which is not demonstrating a reasonable compromise between the interests of the successive beneficiaries, and where the imbalance is not found to be otherwise authorized by the instrument, I submit that the court should label the overall portfolio as "unauthorized", and apply the apportionment rules accordingly. The practical difficulty lies in fixing a rate of interest for the apportionment calculation which reflects the investment opportunities open to the trustees and balances the competing interests. For this, we may well have to rely on a more or less intuitive resolution by the courts of the data offered by counsel, to achieve a tolerable approximation of a hypothetical ideal rate.

II. *Express powers to retain or to postpone conversion*

Not only is there a way to prevent the existing jurisprudence revolving about the *Howe* v. *Lord Dartmouth* group of rules from being rendered impotent by the trend to wide investment powers, but there may be more opportunities for the application of these rules, if the courts are prepared to select from the various and almost contradictory existing lines of authority, those precedents which enhance, rather than restrict their ability to police the exercise by trustees of discretionary powers, and, of course, if aggrieved beneficiaries frame their actions to create opportunities for the courts to exercise this jurisdiction. Of the many cases in this area of law, it seems surprising that the majority are involved only with construction issues—what were the powers or duties created by the instrument? Comparatively few proceed to a consideration of whether the powers or duties held to exist have been exercised properly, or at all. For present purposes, this is important where the instrument has been construed to impose a general duty to convert, but with a power to retain original assets as

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Equities = Average yield on the common stocks included in the T.S.E. 300 Composite Index as at close of trading on last trading day in November (Source: Wood Gundy, Ltd.).

	C.S.B.	*Mortgages*	*Equities*
1972	7.3 %	9.25%	2.65%
1973	7.54%	10.25%	3.01%
1974	9.75%	12.25%	5.31%
1975	9.38%	12.0%	4.83%
1976	9.13%	11.5%	5.03%
1977	8.06%	10.25%	4.87%

permanent investments, or to postpone conversion, where the power to postpone is construed as indicating an intention that there shall be no apportionment pending actual conversion.

It is common to find that a settlor or testator who has created a general duty to convert his original assets into authorized investments, either expressly, or by structuring his will so as to raise the implied duty under the Rule in *Howe* v. *Lord Dartmouth*, has mitigated that duty by inserting qualifying terms in the instrument. The qualifications tend to come under one of three broad headings, although the distinctions between them are frequently blurred in the cases.

(a) The trustees may be empowered to retain some or all of the original assets as "permanent investments" for the trust.[37] "Permanent" is a term of art. It does not imply that, having decided to retain certain original assets, the trustees are compelled to hold them so long as the trust lasts. It merely means that, once the trustees have validly exercised their power of retention with respect to an original asset, that asset, while it is retained, has the same status as an asset into which the trustees might properly have converted it, i.e. an "authorized investment".[38]

(b) The trustees may be empowered to postpone the conversion of the original assets for some period of time, commonly an indefinite[39] period determined by the trustees in the proper exercise of their discretion. The power is construed as affording the trustees an opportunity to avoid or mitigate a loss which might otherwise be suffered by forcing a sale of the assets in a disadvantageous market. A power of postponement of this nature is not designed to afford to the trustees an opportunity to confer additional benefits on one beneficiary at the expense of another—i.e. as a disguised dispositive power of appointment. An exercise of a power of this nature does not confer upon the original assets so retained a status equivalent to that afforded to "authorized investments".

The practical result of the distinction between the power to retain as a permanent asset, as in (a), above, and the power to postpone conversion in the interest of the estate as a whole, as in (b) above, is that, if the former is properly exercised, with respect to an asset, traditional law precludes

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[37] For an example of a construction leading to this conclusion, see the minority judgment (Cartwright and Estey JJ.) in *Royal Trust Co.* v. *Crawford*, [1955] S.C.R. 184, [1955] 2 D.L.R. 225.

[38] As in *Brown* v. *Gellatly*, *supra*, footnote 8.

[39] Where the testator postpones conversion for a definite period, often the duration of the life estate, this is usually taken as an indication that the testator wishes *in specie* enjoyment of the corpus during that time, thereby negating any apportionment of income during the period of postponement. *Alcock* v. *Sloper* (1833), 2 My. & K. 699, 39 E.R. 1111 (M.R.); *Rowe* v. *Rowe* (1861), 29 Beav. 276, 54 E.R. 633 (M.R.).

apportionment of the wealth flow from that asset. The settlor is presumed to have intended *in specie* enjoyment of the retained asset. On the other hand, even if a power to postpone conversion in the interest of the estate as a whole is properly exercised, apportionment is not precluded.[40]

(c) To the two broad types of qualifications to a duty to convert original assets, referred to in (a) and (b) above, we must add a third, a hybrid of the first two. A power to postpone conversion of original assets, apparently similar in form to that in (b) above, may be construed as permitting a temporary dispositive effect over the wealth generated by the original assets, in that, while the power to postpone conversion is being properly exercised, the corollary duty to apportion the wealth generated is negated. This differs from the power to retain as a permanent investment, as in (a) above, in that the duty to convert is still operative, requiring conversion when the trustees can find a suitable opportunity. It is similar to the power to postpone conversion referred to in (b), above, in that it is given for the purpose of facilitating orderly and advantageous disposition of the original assets, but differs from it in that, pending the conversion, the settlor has removed from the trustees the corollary duty to apportion.

Although, on their face, wills often appear to confer both a power to retain and a power to postpone conversion, it is not uncommon to observe the courts ignoring the apparent distinction created by the wording of the document, and treating what is expressed as a power to retain as if it were merely a power to postpone.[42] In effect, the courts are here giving an exegetical reading to the power to retain, treating it as elaborating the power to postpone. While conversion is postponed, the original assets are necessarily retained. Such a construction by the courts opens the door to apportionment. The alternative construction, that the power to retain is an independent power to retain as a permanent investment, closes it.

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[40] *Re Parry*, [1947] Ch. 23, [1946] 2 All E.R. 412 (Ch. D.); *Re Berry*, [1962] Ch. 97, [1961] 1 All E.R. 529 (Ch. D.), where Pennycuick J. disapproved a holding to the contrary in *Re Fisher*, [1943] Ch. 377, [1943] 2 All E.R. 615 (Ch. D.). These cases involved a power to postpone conversion attached to an *express* duty to convert. It is submitted that the statement is also true where there is merely an implied duty to convert, raised by *Howe* v. *Lord Dartmouth*: *Re Llewellyn's Trust* (1861), 29 Beav. 171, 54 E.R. 592 (M.R.); *Porter* v. *Baddeley* (1877), 5 Ch. D. 542 (Ch. D.); *Brown* v. *Gellatly*, *supra*, footnote 8. However where any duty to convert must rest on implication, the alacrity with which courts have treated a power to postpone conversion as indicating that the testator intended *in specie* enjoyment of the original assets often obscures this issue.

[41] Cases such as *Rowlls* v. *Bebb*, [1900] 2 Ch. 107 (C.A.); *Re Fisher*, *ibid.*, and *Re MacNaughton*, [1955] N.Z.L.R. 45 (S.C.) appear to come within this category.

[42] As in *Re Chaytor*, [1905] 1 Ch. 233 (Ch. D.); *Royal Trust Co.* v. *Crawford*, *supra*, footnote 37; *Fales* v. *Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, (1976), 70 D.L.R. (3d) 257, [1976] 6 W.W.R. 10.

These are the construction issues on which many of the cases are fought, and indeed, to which many of the cases confine themselves. But, for a party seeking the remedy of apportionment, loss of the battle over this construction issue need not mean the loss of the war. Given a general duty to convert, then, even if there is a power to retain original assets as permanent investments for the trust, until that power is properly exercised, the overriding duty to convert continues in full force.[43]

The circumstance that original assets are in fact still retained is not conclusive proof that the power has been exercised. Multiple trustees may not have achieved the required unanimity to make the positive decision to exercise the power.[44] Or, the trustees may not have turned their minds to the question.[45]

But, even if the trustees have made a positive decision to retain, was it, in the circumstances, a decision that they were entitled to make? If not, can and will the court interfere? The techniques available to courts to police even pure powers, exercisable by fiduciaries, if they are minded to do so, have been analyzed by Professor Cullity in a trilogy of articles,[46] and I shall not attempt to summarize his scholarship here. But one turn-of-the-century decision of the Court of Appeal in England not only points out a legitimate path which the court may take to set limits to investment discretions in the case of successive beneficiaries, but appears to indicate that that particular court was prepared to take it, had it been necessary to do so.

In *Rowlls* v. *Bebb*,[47] a testator gave his residuary personalty to trustees, on trust to convert it and invest the proceeds. The trustees were given "a discretionary power to postpone for such period as to them shall seem expedient" the conversion of the residuary personalty. The residuary estate was to be held for the testator's sister for life, with remainders to her children, or, if none, to other remaindermen including, in the event that happened, the two trustees of the will, in their personal capacities.

One of the assets of the testator's estate was the reversionary interest in a fund of consols standing in court to secure an annuity to the testator's sister, the life tenant under the testator's will. On the death of the life tenant, the remaindermen moved for transfer of the consols out of court to

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[43] *Rowlls* v. *Bebb, supra*, footnote 41; *Re Hey's Settlement Trusts*, [1945] Ch. 294, [1945] 1 All E.R. 618 (Ch. D.); *Re Haasz* (1959), 21 D.L.R. (2d) 12, at p. 14, [1959] O.W.N. 395, at p. 400, per Laidlaw J.A. (Ont. C.A.); *Re Guinness's Settlement*, [1966] 1 W.L.R. 1355, [1966] 2 All E.R. 497 (Ch. D.).

[44] As in *Re Haasz, ibid.*, on the approach taken by Laidlaw J.A.

[45] As in *Rowlls* v. *Bebb, supra*, footnote 41.

[46] M.C. Cullity, Judicial Control of Trustees' Discretions (1975), 25 U. of T.L.J. 99; Fiduciary Powers (1976), 54 Can. Bar Rev. 229; Trustees' Duties, Powers and Discretions—Exercise of Discretionary Powers, in Law Society of Upper Canada, Special Lectures (1980), p. 13.

[47] *Supra*, footnote 41.

themselves. The question arose as to whether they were entitled to the entire fund, or whether the rule in *Re Earl of Chesterfield's Trusts*[48] should be applied to allocate to the life tenant's estate a portion of that fund to represent foregone income from the capital sum which might have been received from the sale of the reversionary interest in the fund. Such a result would follow only if the trust to convert was applicable to this interest.

The trial judge held that the power to postpone conversion applied to the reversionary interest, and that, as the reversion had remained unsold, the life tenant's estate was not entitled to the benefit of any apportionment of the fund. The Court of Appeal agreed with this construction, and with the general statement of the result which would flow from it,[49] if, but only if, the power of postponement had been properly exercised. On this latter issue, the Court of Appeal reversed the trial judge.

As a preliminary point, it is obvious that the trustees, being, in the event, personally entitled to the capital of the reversionary interest, were in a conflict of interest position. But that element, which one would expect to be highly relevant in most cases, was not in this one, as the court stated that it was satisfied that the trustees, in the exercise of their powers, were unaffected by any consideration of their personal interest. Rather, the question of the application of the duty to convert this interest never crossed their minds. Thus, they had never actually exercised the power to postpone, and the duty to convert had continued to apply. Therefore, the apportionment rules applied in favour of the life tenant's estate.

However, in the course of its judgments, the court went further, although its additional comments may be *obiter dicta*. Lindley, M.R. stated that, as he construed the power to postpone, it was a "management" power only, and the trustees were not entitled to treat it as a power to redistribute beneficial interests.[50]

> I mean, there is nothing in the words which would give the trustees a right to say, apart from the management of the estate, "We will postpone selling the reversion in the interest of the children, at the expense of the tenant for life." I do not think that would be within the power. That would mean: "We will under our power of management, which if exercised might and would to a certain extent vary the rights inter se of the tenant for life and the remaindermen, compel the tenant for life, whether she likes it or not, to go without the increase of income to which she should be entitled if the reversion were sold." I do not think that would be within the scope of it. Supposing the tenant for life had insisted upon the conversion of this residuary interest, could the

[48] *Supra*, footnote 6.

[49] Thus, the court must have interpreted the clause empowering postponement of conversion as the "hybrid" form described previously, in the text accompanying footnote 41, *supra*, as it is clear from the judgments in the Court of Appeal that the trust to convert continued operative, and that the postponement power was granted only to facilitate orderly conversion. As is so common in the cases, the court did not discuss what led it to the further conclusion that the testator had intended to dispense with the requirement for apportionment pending the directed conversion.

[50] *Supra*, footnote 41, at pp. 116-117.

> trustees have refused to convert it? I think not . . . If they never did think about this power, and if they could not, even if they had thought of it, have properly refused in this particular instance to convert the residuary interest, what follows?

Rigby L.J. said:[51]

> [N]ot only is it plain that the trustees never did exercise their discretionary power to postpone [the reversionary interest's] conversion, but . . . it is equally plain that they ought never to have done so. To have done so would, in effect, have been a decision that they would take from the tenant for life the proportion of income to which she was entitled, and present it to the remaindermen . . . I cannot see any justification for that. . . . I think they were bound not to exercise their power to postpone so as to produce an unequal effect between the life tenant and the remaindermen.

Although the judgments in *Rowlls* v. *Bebb* demonstrate a judicial assertiveness with respect to the control of discretions which was not typical of the time or of the jurisdiction, the court was employing well-known tools of equity. The court considered the fundamental purpose for which these discretionary powers were granted by the testator, and concluded that this purpose was the effective management of the assets of the corpus for the benefit of the estate as a whole. Given this conclusion, any attempt to use these powers to achieve the dispositive result of varying the incidence of economic gains and losses between the successive beneficiaries would be an improper exercise of the power. Although none of the judges used the phrase, "fraud on a power", their reasoning is clearly that which underlies this doctrine. A court of equity was and is always ready to restrain an improper exercise of even a mere discretionary power. If the power could not be exercised to negate the primary duty to convert, that duty applied with full force.

As the judgments made clear, if the power is fundamentally a management, rather than a dispositive power, the court will expect the management to be carried out even-handedly. This I submit, does not mean that every individual decision must have an even-handed result. Both Lindley M.R. and Rigby L.J., particularly the former, were contemplating a "portfolio" approach.[52] If the corpus had contained other assets which were producing a result unduly favourable to the life tenant, the continued retention of the asset in question, unduly favourable to the remaindermen, might have been justified as a matter of managing the totality of the investments to a balanced overall result. Absent such balancing assets, continued retention of this reversionary interest could only have an improper, distributive result.

A similar approach is, of course, also inherent in the previous argument that the concept of "authorized investments", in a successive beneficiaries context, requires the overall maintenance of an "even hand" in the structuring of the asset mix, as a function of prudence. A power to invest

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[51] *Ibid.*, at p. 119. Collins L.J. concurred with the judgments of Lindley M.R. and Rigby L.J.

[52] *Ibid.*, at pp. 116-119.

among several classes of assets, including the power to vary the investments from time to time, involves a very substantial ambit of discretion, even where trustees are restricted to a statutory list. The argument that the even-hand rule sets limits on the exercise of such discretions assumes that these selection powers are essentially managerial, not dispositive in nature.

I submit that, unless there is something in the instrument, as construed in the light of admissible extrinsic evidence, to force a different conclusion, this is the most natural conclusion to reach as to the settlor's or testator's intention in creating these powers. Of course, a settlor who gives the matter any thought will realize that, unchecked, these selection powers could effect a substantial variation in the economic results as between his beneficiaries. But I suggest that it is a *non sequitur* to jump from this to a conclusion that the settlor must have intended, or at least acquiesced in, these consequences. It is possible that a settlor does intend such powers to be used dispositively. However, the mere grant of such powers is a devious method of indicating an intention to confer a dispositive power of appointment. In practice, today's settlor or testator who wishes to create successive interests has very little choice but to grant extensive powers over the assets which will comprise the estate. Given the sophisticated, unknowable and often volatile future economy in which the trust will have to function, many settlors, and their advisors, would regard an attempt to "dead-hand" the future management of the corpus in a form rigidly set by the settlor not as imprudent, but as insane. About all settlors can do is confide their assets, ample power to deal with them, and the interests of their beneficiaries, to their trustees, and pray that, in carrying out their role, those trustees will turn out to be intelligent, sensible and fair. I also suggest that it is reasonable to make the general assumption that, in employing the institution of the trust to achieve their ends, settlors are, however vaguely, taking comfort from and relying upon the fact that, in the background, the court will be standing by to offer some protection to their expectations.

Accordingly, just as a path is open to prevent wide investment powers from rendering the *Howe* v. *Lord Dartmouth* family of rules impotent as a tool to enforce the principle of even-handedness, so there is a path to prevent either an independent power to retain original assets as permanent investments, or a power to postpone conversion which is intended to negate apportionment pending conversion, from having a similar result. If there is a general duty to convert otherwise applicable to the assets in issue, then the negation of that duty through exercise of discretionary powers to retain or postpone conversion requires a positive decision. Equity can restrain an improper exercise of a discretionary power. If the court construes the complex of powers over investment of the corpus as essentially managerial rather than as dispositive, then, as suggested in *Rowlls* v. *Bebb*,[53] the trustees may and should be restrained from exercising the retention or

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[53] *Supra*, footnote 41.

postponement powers if the result of exercising them would be to continue an unauthorized imbalance in the total portfolio, as between the successive beneficiaries.[54] I submit that, from the point in time where the court considers that it is proper to restrain the exercise of the trustees' discretion to employ these powers, the remedy of apportionment should be afforded to the beneficiaries.

A similar approach is open where the testator has expressly negated any duty to apportion pending conversion by employing one of the common clauses to the effect that the income beneficiary is to receive all income produced by the original assets, and that assets not in fact producing income shall not be treated as producing income. There is no inherent necessity to interpret such clauses as negating any duty to convert which would otherwise be found to exist, as courts sometimes appear to do. The apportionment rules are widely regarded as an administrative nuisance. A testator may wish to remove this burden from his executors and trustees, thus temporarily throwing the risk of inequality of result where it happens to fall, while, as executors, they are administering the estate, and as trustees, are reshaping the form in which the testator's transmitted wealth is represented into that which suits the needs of the beneficiaries of the trust. It does not follow from this intention that the testator is authorizing a permanent imbalance between his beneficiaries. It is more reasonable to interpret the testator as assuming that his representatives will perform these administrative tasks diligently, bringing this interim state of affairs to an end as soon as possible.

I submit that clauses which in terms only negate apportionment pending conversion should be construed narrowly, as intended to be operative only until an opportunity for advantageous conversion has arrived. A court must be entitled to investigate whether the time when a duty to convert ought to have been carried out is now past. If the court concludes that good management of the estate as a whole no longer justifies retention of certain assets, particularly in view of the untoward dispositive effects such retention is causing, apportionment could be ordered for the balance of the period until actual conversion. Should a court conclude that the operation of such clauses was intended to negate apportionment until actual conversion, whether the trustees should have converted in the circumstances or not, then I submit that the court should consider an alternative remedy, directing the restructuring of the investment portfolio, as discussed later in this article.

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[54] Sometimes, the court may conclude that the powers should never have been exercised at all. The writer suspects that, more often, the proper conclusion will be that the original exercise of one of these powers was a legitimate exercise of the trustees' discretion, but that, with a change of circumstances over time, the continued exercise of the power, with its increasingly apparent deleterious effect on the interests of one of the successive beneficiaries, can no longer be justified.

A recent example of the effect of a clause negativing apportionment pending actual conversion is found in *Re McGregor*.[55] The trustees had held a parcel of unproductive vacant land from the testator's death in 1965, when it was valued at between $26,000 and $66,000, to 1974, when it was sold for about $500,000, of which the estate would net about $190,000 after taxes and expenses. There was an express trust to convert with powers to postpone and retain. The trial judge had held that the life tenant was entitled to an apportionment pending conversion under *Re Earl of Chesterfield's Trusts*.[56] The Ontario Court of Appeal agreed that this would have been the result but for a further clause providing that "no property not producing income shall be treated as producing income". Relying on that clause, the Court of Appeal held that the life tenant was not entitled to any apportionment of the proceeds of the conversion. The decision is correct on the basis of the questions posed to the court, but it does not appear that the court was asked to consider whether the trustees were justified in postponing conversion as long as they did. Suppose the land had still remained unconverted in 1980. One wonders what the court would have said, under those circumstances, if the question posed to it had been based upon that posed to the court in *Re Smith*,[57] e.g., whether the trustee was in breach of its duty to maintain an even hand by continuing to postpone the exercise of its duty to convert the property into securities which would provide a reasonable return for the life tenant? Given the court's holding in *Re McGregor*[58] that, apart from the clause stating that non-income producing property should not be treated as producing income, apportionment would be justified, the court must have been reading the powers to postpone conversion and retain original assets as ancillary to the primary trust to convert, i.e., as inserted to facilitate orderly conversion in the interests of the estate as a whole, and not to indicate a desire on the part of the testator for permanent *in specie* enjoyment. Thus, the trustees would have been under a continuing duty to convert when an opportunity for advantageous sale arose.[59] Assuming that the court had been asked to make, and had made a finding of fact that such time had arrived, then, on the approach indicated in *Rowlls* v. *Bebb*,[60] the situation of the parties could be dealt with on the basis that, from that time, further exercise of the power to postpone conversion was improper. The maxim, "Equity treats as done that which ought to have been done", could then be applied to justify apportionment from that time until actual conversion.

[55] (1981), 115 D.L.R. (3d) 697, 30 O.R. (2d) 146, 7 E.T.R. 137 (Ont. C.A.).

[56] *Supra*, footnote 6.

[57] (1970), 16 D.L.R. (3d) 130, [1971] 1 O.R. 584 (Ont. H.C.), aff'd (1971), 18 D.L.R. (3d) 405, [1971] 2 O.R. 541 (Ont. C.A.).

[58] *Supra*, footnote 55.

[59] *Re Haasz, supra*, footnote 43, per Laidlaw J.A., at pp. 14 (D.L.R.), 400 (O.W.N.); *Fales* v. *Canada Permanent Trust Co., supra*, footnote 42, at pp. 323 (S.C.R.), 273-274 (D.L.R.) 26 (W.W.R).

[60] *Supra*, footnote 41.

III. *The Implied Duty to Convert as a Function of the Duty of Care*

While I have argued that neither a wide investment power, nor the presence of powers to retain original assets as permanent investments, nor powers to postpone conversion, nor even clauses negativing a requirement of apportionment pending conversion, necessarily prevent a court from granting a remedy for an unbalanced portfolio, the approaches suggested have all assumed that the court can find an overriding duty to convert applicable to the corpus. Where the trust in question does not expressly impose a duty to convert, traditional law appears to leave us only with the rule in *Howe* v. *Lord Dartmouth*, in its strict sense, to supply the obligation. The problem is that there are a multitude of cases where the courts have, in my submission too facilely, found that the testator has indicated that any implied duty to convert which might otherwise have been raised by the rule has been ousted. For example, the presence of a power to retain assets permamently may itself be considered to have that effect. So may the express grant of a power to convert original assets,[61] on the ground that, if the trustees have a power to convert, they must have a power not to convert—i.e., to retain. Any standard text can multiply examples of this traditional tendency to find reasons not to apply the rule.[62]

Whatever the basis in any particular case for the inference that the testator is not raising a duty to convert by implication, that conclusion is frequently summed up as a finding that the testator intended the assets to be enjoyed *in specie*. That is, the testator intended the life tenant to take all the income, but only such income, if any, as the particular assets happen to produce. Such an intention is possible. But, as a generality, in a modern context, this is a curious intention to attribute to the average testator. A responsible testator will plan for the devolution of his wealth on death, but he is unlikely to be preoccupied with this issue during his lifetime. The bundle of assets which he happens to hold at death, and is handing on to his beneficiaries, though his trustees, is an accumulation of wealth crystallized in a form more likely selected to reflect his lifetime economic choices than as the best, or even as an appropriate form to satisfy the possible quite different needs of his beneficiaries. In short, he is planning for the transmission of wealth, not of the custody of sacred icons.[63] The conclusion that

[61] E.g., *Re Pitcairn*, [1896] 2 Ch. 199 (Ch. D.).

[62] The observation of Wigram V.C. in *Hinves* v. *Hinves* (1844), 3 Hare 609, at p. 611, 67 E.R. 523, at p. 524 (V.C.) that "[T]he court, in applying the rule has leant against conversion as strongly as is consistent with the supposition that the rule itself is well-founded . . ." appears to be a fair encapsulation of the prevailing judicial approach.

[63] This view is diametrically opposed to that traditionally taken by the courts, which may underlie their eagerness to find an intention for *in specie* enjoyment of the estate. As one judge, Kekewich J., said, "I suppose, if the reported decisions were out of the way, no person acquainted with the ordinary thoughts of mankind would have any doubt that the testator meant his wife [the life tenant] to take the incomeof the property as he left it, and to

the testator intended *in specie* enjoyment seems even less plausible in a will in which the trustees are equipped with wide discretionary powers to deal with the assets and invest the transmitted wealth in other forms. If a conclusion raises doubts, we should look again at the arguments which allegedly compel us to reach that result.

The inference of a desire for *in specie* enjoyment drawn from a combination of absence of an express duty to convert, and the presence of a mere power to convert (or not to convert) the original assets into other investments is in turn based upon the conceptual distinction between a merely facultative power, and the so-called "power in the nature of a trust". In the former case, it is said that the court will not compel the exercise of the power—it will merely restrain an improper exercise of it. In the latter case, the court will compel exercise if the trustees fail to carry out the duty imposed upon them. Where the testator has not expressly imposed a duty, a power to convert the original assets into some other form appears facultative only, and if the trustees do not choose to exercise it, that is their privilege. The testator contemplated that the power might not be exercised, and was satisfied to leave this decision to the trustees. The court will not interfere, and the beneficiaries must accept the consequences of the trustees' decision. So runs the argument.

The difficulty is that this reasoning tacitly assumes that only the two extreme positions exist. Either the testator wants all of his assets converted, and says so by imposing a duty, or he is, at best, indifferent to the consequences of conversion or non-conversion, in which case he does not impose a duty to convert, but confers a mere power to convert, or a power to retain, or both. However, this argument focuses on the trees, and ignores the woods. An express duty to convert applies to all of the assets, and, unless further qualified, permits of no discretion not to convert if that seems the best thing to do. It does not follow from the fact that the testator has refrained from imposing a duty in such sweeping terms that he is satisfied to have no duty at all under any circumstances. He could perfectly wisely be contemplating that the trustees would convert and should convert *if circumstances so require*. Surely, that is what he is trying to convey when he mitigates an express general duty to convert by granting a power to retain permanently. He is just approaching the expression of his intentions from the other direction.

We, as lawyers, draw the inferences which we have traditionally drawn because, in examining the words of the testator in connection with problems of this nature, we regularly make the mistake that we are constantly warning ourselves of in connection with other problems. We focus on one or two clauses, and fail to read them in the context of the whole will and its surrounding circumstances. The clauses imposing

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enjoy it as he left it": *Re Eaton*, [1894] W.N. 32, (1849) 70 L.T. 761, 10 T.L.R. 594 (Ch. D.).

duties, or creating powers, to convert original assets do not stand alone. They are part of a matrix of administrative powers, whether or not coupled with express duties, created to facilitate the optimum administration of the trust. If a settlor were to draw all of the administrative powers conferred by the instrument in purely facultative language, a *seriatim* approach to each power would led to the overall conclusion that the trustees were under no positive duty to administer the trust at all. Except in rare cases, this would strike most settlors as absurd.

A crisp distinction between facultative powers and powers in the nature of a trust is sensible when applied to powers of appointment over the property. If a purely facultative dispositive power is not exercised, the proprietary rights do not remain in limbo. They go where the law takes them in default of appointment. This situation is not *in pari materia* to a collection of administrative powers, for if at least some of these are not exercised from time to time, as occasion may require, the trust remains essentially inert. It is conceivable that a settlor envisions his trustees as mere passive custodians of the assets which he transmits to them, but in a trust for successive beneficiaries, where he has taken the trouble to equip the trustees with an armoury of powers, this is not a necessary conclusion to be drawn, and will seldom be a persuasive one.

Approaching the same issue from another direction, the House of Lords[64] has reminded us that, even with distributive powers, the simple opposition of pure powers to trust powers is too simplistic, when those powers are attached to a fiduciary office. There is at least a duty to consider whether the powers should be used. In a fiduciary context, "consider" surely cannot mean, "think about idly". Applied to administrative powers over the investment of the corpus, a duty to consider must include a reasonably diligent survey of the assets in the trustees' hands, and of the choices which their powers make open to them. In surveying the assets in their portfolio, can it seriously be denied that it is the trustee's duty to consider, not only whether the assets are intrinsically "safe", as far as the dollar value of the corpus is concerned, but whether or not, overall, they are forwarding the legitimate interests of all of the beneficiaries. If the answer to the latter question is negative, if the general direction of movement to a more satisfactory position is apparent, and if there is no reasonable explanation advanced for refusing to undertake the movement, can it really be true that the trustees, having "considered", are entitled to yawn and do nothing, simply because the powers which have been conferred upon them to make the indicated move are expressed in facultative, rather than mandatory terms?[65] I suggest that this conclusion would surprise most settlors.

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[64] In *McPhail* v. *Doulton*, [1971] A.C. 424, at p. 449, [1970] 2 All E.R. 228, at p. 240 (H.L.), per Lord Wilberforce.

[65] In *Re Haasz, supra*, footnote 43, multiple trustees were deadlocked over whether to accept an offer to purchase certain shares which comprised part of the original assets of the

I further suggest that we are approaching, if we have not reached, a state where this conclusion is not the law. It is not some mechanistic incantation, such as the traditional formulations of the rule in *Howe* v. *Lord Dartmouth*, which raises the implied duty to convert unauthorised original assets. The duty is raised by the obligation, undertaken by every trustee, to manage the affairs of his trust prudently. Simply, trustees are under a general duty to do that which is reasonable, within the limits of their powers, to protect the interests of each of the successive beneficiaries. In some cases, this general duty will resolve itself into a more particular duty to convert some or all of the original assets into some other form, in order to provide that protection. In *Fales* v. *Canada Permanent Trust Company*,[66] Dickson J. said:

> Every trustee has been expected to act as the person of ordinary prudence would act. This standard, of course, may be relaxed or modified up to a point by the terms of a will, and, in the present case, there can be no doubt that the co-trustees were given wide latitude. But however wide the discretionary powers contained in the will, a trustee's primary duty is preservation of the trust assets, and the enlargement of recognized powers does not relieve him of the duty of using ordinary skill and prudence, nor from the application of common sense.

In *Fales*, the court was addressing a different problem from that addressed in this article. It was confronting the more common aspect of imprudence with respect to trust investments, i.e. the acquisition or retention of a particular investment which presented an undue hazard of loss of dollar

estate. The will gave the trustees power to convert any part of the estate into money, or retain any part of the estate in its original form. Morden J.A. found that these powers were equal in status, contrary to the view taken by Laidlaw J.A., who found that there was a primary trust to convert, with only an ancillary discretion to retain. However, Morden J.A. continued: "The unanimous exercise of one power involved at the same time the exercise of the other. These powers cannot be isolated one from the other and each considered separately. The executors here do not agree upon the exercise of either power and so long as this situation continues in the absence of action by the court, para. 7 of the will [which conferred the powers to convert and to retain] remains completely inoperative. The testator intended the powers conferred by that paragraph to be exercised by his executors. In my view, they were and are under an imperative duty to exercise one power or the other. As long as they fail to discharge this duty, the intention of the testator will be frustrated with the result that the beneficiaries may suffer": *ibid.*, at pp. 21 (D.L.R.), 398 (O.W.N.). See also *Re Billes* (1983), 148 D.L.R. (3d) 512, 42 O.R. (2d) 110, 14 E.T.R. 247 (Ont. H.C.).

Referring to the situation which would have existed in *Re Haasz* had the trustees agreed unanimously either to convert or retain the assets in question, Morden J.A. said, "the court will not interfere with or override their unanimous decision so long as they act *bona fide and fairly as between the beneficiaries*": *ibid.*, at pp. 19 (D.L.R.), 397 (O.W.N.). (Emphasis added).

In some early English cases the court, in administration actions, was prepared to override the discretion of the trustees and order the execution of a power drafted in facultative terms, when the court was able to find an overriding trust to manage. *Nickisson* v. *Cockill* (1863), 3 DeG., J. & S. 622, at pp. 633-634, 46 E.R. 778, at p. 782 (L.C.); *Tempest* v. *Lord Camoys* (1868), 21 Ch. D. 576n, at p. 577n (C.A.). These cases were distinguished in *Re Courtier* (1886), 34 Ch. D. 136 (C.A.), but see Bowen L.J. at p. 141.

[66] *Supra*, footnote 42, at pp. 316 (S.C.R.), 268 (D.L.R.), 20 (W.W.R.).

value of the capital represented by it. Also, the court was dealing with a will which contained an express duty to convert, which it invoked in reaching its decision. However, Dickson J.'s words imply that there is a positive duty upon trustees to make use of their powers prudently, as circumstances require. If so, the decision in *Fales* would have been the same had the clause in the will dealing with conversion of assets been worded to confer a mere facultative power to convert, rather than imposing a trust to convert. I submit that, on an overall reading of the court's judgment, this is a plausible conclusion. If courts can be persuaded to adopt an enlarged view of the connotation of "prudence" and "preservation of the trust assets" along the lines advocated here, then this passage from the Supreme Court of Canada's judgment is pregnant with possibilities. Much of the *arcana* which time has attached to the *Howe* v. *Lord Dartmouth* group of rules could be swept away as anachronistic, and the courts could resolve the issues between the successive beneficiaries by employing the "duty of care" approach with which all judges are comfortable.

A "duty of care" approach will focus attention on two basic construction issues, often camouflaged by the language used in describing the search for a dubious intention of *in specie* enjoyment, as the courts are forced to examine the nature of that duty in a particular case. The first issue is, has the testator indicated that one of the successive interests is to be regarded as predominant, with the other taking, so to speak, what is left after the predominant interest is satisfied? If so, then the duty of the trustees is to arrange their investments to reflect the weighting of the interests which the testator has indicated.[67] If not, the trustees should attempt to create a portfolio of investments which balances the respective interests equally. The general duty to do that which is prudent in order to allow to each beneficiary his proper share of the wealth-generating capacity of the trust applies in either case. The testator may have rearranged the size of the respective shares from that which Equity would assume from the mere creation of successive interests, and if so, the same general duty will call for a different course of action.

The second basic issue is whether, given the quantum of the respective interests as originally established by the testator, the testator also intended to give to the trustees a power to vary the size of these interests from time to

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[67] A common indicator that the life tenant is entitled to more of the total wealth generated by the corpus than an even-handed distribution would otherwise justify is a power of encroachment on capital. Although, in terms, such a power authorizes payment of capital to the income beneficiary, the purpose behind the grant of the power may often be achieved, in whole or in part, by changing the investments to increase the income flow. There may be cases where this course appears more beneficial to both life tenant and remainderman than does actual transfer of capital to the life tenant. The writer suggests that a power of encroachment should be considered as authorizing a portfolio selection weighted towards income production at the expense of real value protection, to the extent of the scope of the encroachment power.

time through the use of their investment powers. This is the question, previously referred to, whether the collection of powers over the investment of the trust assets is intended as a dispositive power of appointment, or only as a means of better managing the already established interests of all of the successive beneficiaries. If the powers are managerial only, then the duty of care towards one of the beneficiaries controls the extent to which the powers can be used to confer an advantage upon the other at the expense of the first. If the powers are dispositive, such control is absent, for, by exercising the power, the trustees may change the quantum of the respective interests. I have argued previously that the conclusion that the powers are dispositive should not be arrived at lightly. The presumption should be that they are managerial.

IV. *Controlling Investment Choices Subsequently Made by the Trustees*

To this point, the argument has been developed within the traditional area of operation of the *Howe* v. *Lord Dartmouth* family of rules, to advance the thesis that there is more potential for judicial supervision and control of investment decisions concerning the original assets received by the trustees than might appear on the surface of the textbook treatment of the subject. When we turn to the investments subsequently selected by the trustees themselves, we leave that family of rules behind. But the broader "even hand" principle is not left behind as well. The trustees must choose "authorized investments". On the argument previously advanced, this requires selection of a portfolio which, to the extent possible within the classes of investment vehicles open to the trustees, serves the interests of both income and capital beneficiaries, and, in the case of the latter, takes account of the interest in mitigating loss of real value of the corpus as well as safety of monetary value. If this is the nature of the duty, what remedies to enforce it are available?

Where trustees have chosen new investments to replace the assets originally vested in them, equity has, except in one limited circumstance, never applied its apportionment techniques to adjust the balance between the successive beneficiaries.[68] This is so even if the trustee is also an affected beneficiary.[69] If the new investments are "authorized", then the gains or losses lie where they fall. If the new investments are unauthorized, the trustees are in breach of trust, and, if loss ensues to the monetary value of the capital, they must make it good. There does not seem to be any reason why trustees should not also have to make good a loss of income to the life tenant caused by unauthorized investments. If the loss cannot be

[68] *Stroud* v. *Gwyer* (1860), 28 Beav. 130, 54 E.R. 315 (M.R.); *Slade* v. *Chaine*, [1908] 1 Ch. 522 (Ch. D.).

[69] *Re Hoyles*, [1912] 1 Ch. 67 (Ch. D.).

recovered from the trustees, it will be apportioned between the beneficiaries.[70]

The decision not to apportion the economic results of unauthorized investments selected by the trustees appears justifiable in theory. Where one of the successive beneficiaries is making a windfall gain at the expense of the other, as the result of an improperly structured investment portfolio, it may seem that the beneficiary who suffers the loss should be compensated by the trustees who made the error, rather than by the other beneficiary who is the innocent recipient of the gain. However, while this approach may work satisfactorily in the traditional type of case where capital loss has been suffered through a drop in value of a particular investment which was unauthorized because it was not within the permitted class of investments, or was unduly risky even if within a permitted class, practical difficulties are likely to make it less effective where a beneficiary is complaining of the overall results of an unbalanced portfolio. By focussing on the trustee's pockets as the source of any remedy, the result may be that there is no remedy at all in too many cases where the respective positions of the beneficiaries should be corrected. Quite properly, the courts have long recognized the difficult position of the honest trustee faced with many possible choices in the management of the trust estate, and have been cautious in imposing personal liability for what the clarity of hindsight may reveal as errors of judgment in the exercise of discretion.[71]

Except where the trustees' disregard for the interest of one of their beneficiaries strikes the court as gross, we may well expect the court to exonerate the trustees from personal liability, either by holding that what now is found to be an improperly balanced portfolio has been arrived at without punishable fault on the part of the trustees, or by granting relief under the common statutory relieving provisions. In considering fault, the court should be cautious in drawing conclusions from the state of the portfolio at any one point in time. For example, trustees may reasonably have concluded that economic conditions required a temporary retreat from certain classes of investment vehicles and concentration in others, in the best interests of both successive beneficiaries. In considering whether to relieve the trustees, the court should consider not only the uncertainties of the economy which faced them, but also the very uncertain state of the law facing trustees who are honestly attempting to consider where their duty lies.

However, the fact that the trustees may be personally exonerated for past losses to one of the beneficiaries does not mean that the court should suffer an improper imbalance to continue. The courts' problem will be how

[70] *Re Bird*, [1901] 1 Ch. 916 (Ch. D.).

[71] "Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgment": *Re Chapman*, [1896] 2 Ch. 763, at p. 766 (C.A.), per Lindley L.J.

to frame a remedy. The courts should now re-examine with a critical eye the existing case law which denies the remedy of apportionment in the case of unauthorized investments chosen by the trustees themselves.[72] For all of its administrative difficulties, this remedy, if available, would usually permit courts to avoid direct interference with investment choices made by the trustees. For example, if the trustees are holding a portfolio of assets which is weighted heavily towards potential capital gain, at the expense of current income, the court could suffer them to continue to hold it—at a price. The price would be reimbursement to the life tenant of the additional income which would have been earned had the portfolio been structured to reflect the life tenant's proper interest in the wealth generating capacity of the capital.[73]

However, if the courts do not feel able, at this late date, to introduce apportionment as a remedy in the case of investments chosen by the trustees, or consider that, in specific cases, it is inappropriate, they should exercise their supervisory jurisdiction directly upon the investment portfolio itself. No judge will enter lightly upon the role of an investment counsel. In practice, the court often will be able to carry out its policing function without taking upon itself this ultimate step. In *Re Smith*,[74] the court made no formal positive direction with respect to the investments held by the trustee, of which the life tenant was complaining, nor was it asked to do so. But its declaration that the trustee was in breach of duty for violation of the principle of even-handedness in continuing to hold the investments as originally transferred to it certainly constituted the broadest of hints to the successor trustee.

Where judicial hints fall upon deaf ears, the court may go further. *Mortimer* v. *Picton*,[75] a judgment of Lord Westbury, L.C., illustrates a course of action which nicely balanced judicial respect for the discretion conferred upon the trustees with an insistence upon proper exercise of that discretion. Under a marriage settlement, an income of £500 per annum had been settled on the wife. Without the wife's knowledge, some of the land settled to procure this income was encumbered. Several years later, hus-

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[72] See cases cited, *supra*, footnotes 68, 69.

[73] However, if the courts should ever decide to adopt apportionment as a remedy in the circumstances mentioned, the writer urges that they not carry forward the mode of apportionment used in *Re Earl of Chesterfield's Trusts*, *supra*, footnote 6, where the life tenant is being compensated for retention of underproductive assets. Apart from the daunting mathematics of that formula, the deferral of receipt of compensation until actual conversion is iniquitous. Settlors set up life interests to benefit life tenants, not, as is so often the case under the *Chesterfield's Trusts* rule, life tenants' estates. The deferred compensation given by that rule defeats the support purpose which underlies most life estates. If the trustees do not hold other assets which conveniently could be liquidated to supply the compensation on a current basis, they should restructure their investment portfolio, no matter how advantageous, from the point of view of potential capital gain, the present portfolio may be.

[74] *Supra*, footnote 57.

[75] (1863), 4 DeG., J. & S. 166, 46 E.R. 880 (L.C.).

band and wife separated, and the wife complained of the security for her income. Under a new arrangement, the wife released her interest in the lands comprised in the original settlement, and these, together with other lands, were settled on trust to sell and invest so much of the proceeds, or if necessary, all, in three percent Consols, or, if necessary, in public funds or government or real securities in England and Wales, sufficient to produce at least £500 per annum. The corpus was settled on the husband for life, then on the wife for life, with remainder to the husband.

The funds were in fact invested in Consols, and, at the husband's death, it was found that these were producing considerably less than £500 per annum. The husband had previously sold about one-third of his remainder interest in the corpus.

After the second settlement had been created, Parliament had enlarged the investment powers of trustees, by enabling them to invest trust funds, unless forbidden to do so in, *inter alia*, Bank of England or East India stock.[76] The wife requested that the investments, currently in court, should be varied into Bank or East India stock, which were paying a higher income than Consols, so as to give her an income more nearly approximating the £500 which she was intended to have. The purchasers of the portion of the husband's remainder interest objected, because of increased risk to the capital.[77]

At first instance, the Master of the Rolls dismissed the application on the ground that the proposed change would violate the even hand rule by benefitting the life tenant at an increased risk of capital loss to the remaindermen.

When the appeal first came before Lord Westbury, on December 5, 1863, he contented himself with noting that it was incumbent upon the trustees to invest in such a manner as would best answer the purposes of their trust. There was some peril in all the courses open to the trustees to achieve this, and the choice should be left to the trustees.

On December 21, 1863 the matter returned before the Lord Chancellor, with no change in the state of investment. The Court's tone became firmer. Although the settlement was not drafted so as to guarantee to the wife her £500 per year through resort to capital, it was clear that the primary purpose of the resettlement was to give to the wife a better means of achieving that level of income than was provided under the original settlement. It thus became the duty of the trustees "so to dispose of the trust fund as to accomplish, if possible, that chief end of the whole arrangement".[78] The Lord Chancellor suggested that the trustees should

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[76] 22 & 23 Vict., c. 35, s. 32; 23 & 24 Vict., c. 38, s. 10.

[77] East India Stock, at the time of the application in 1863, was selling for considerably in excess of £200, but was subject to being redeemed in 1874 for £200.

[78] *Supra*, footnote 75, at pp. 179 (DeG. J.& S.), 884 (E.R.).

try to find a good mortgage on which to invest the funds. If not, he would consider directing an investment in East India stock.

On January 12, 1864, nothing further having been accomplished, the court took the matter into its own hands, and ordered that the Consols in court be sold, and the proceeds invested in East India stock. In proceeding in this manner, Lord Westbury was resorting to what is probably the most fundamental proposition in trust law, although he did not refer to it specifically. "As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under that control; or if the trustee dies, the court itself can execute the trust: a trust, therefore, which in case of mal-administration could be reformed, and a due administration directed; . . ."[79] In the case before Lord Westbury, due administration required a departure from even-handedness, to the extent required to secure the minimum level of income contemplated when the trusts were created, but the point is that the court was not powerless in the face of the investment discretion conferred upon the trustees to insist that the discretion be exercised on the principles proper to that trust.[80]

Lord Westbury had the advantage of confronting only a very limited number of choices. A judge today, faced with a wide investment clause, or a statutory "prudent man" investment power, who considers it necessary to intervene in a comparable manner, faces an immeasurably more difficult task. However, if the court ultimately is driven to direct a reference to settle an investment scheme, the parties will be able to bring their evidence and their submissions to the Master's table, and if they cannot there agree among themselves, it is better that the court should accept the possibility of its own investment errors than the certainty of its own sterility, should it be frightened off from acting at all.

V. *Expanding the Implied Duty to Convert Beyond Residuary Personality*

The question still remains, can any of the arguments previously advanced be made to jump the jurisprudential gap into those areas where, according to the textbooks, none of the *Howe* v. *Lord Dartmouth* group of rules apply? These areas are, testamentary trusts of land where there is no express duty to convert imposed by the testator; non-residuary testamentary settlements of any kind of property; and *inter vivos* settlements of any kind of property.

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[79] *Morice* v. *The Bishop of Durham* (1805), 10 Ves. Jr. 521, at p. 539, 32 E.R. 947, at p. 954, per Lord Eldon L.C.

[80] English courts have considered themselves to have greater jurisdiction to interfere with the exercise of trustees' discretion when the trust assets in question were in court, as was the case in *Mortimer* v. *Picton*, *supra*, footnote 75, than when they were in the custody of the trustees themselves. This fact diminishes the authority of the case in the argument presented here. The writer submits that, in a modern Canadian context, whether the assets are in the custody of the court or the trustees should be irrelevant. Wherever they are, they are trust assets, and if they are being "maladministered", the court can do something about it. If the court cannot, then it must be because there is no trust.

I submit that the gap exists only with respect to original assets. Where the trustees have selected their own investments to replace the original assets settled upon them, there is no reason to refrain from applying the same policing techniques as may be applicable to new investments selected by the trustees for testamentary settlements of residuary personalty. The court's jurisdiction to intervene here does not rest on finding a duty to convert original assets. It rests upon the more general duty of trustees to have regard to the interests of all their beneficiaries—a duty which is assumed to be owed to all equally, except to the extent that the settlor has authorized or directed a preference of one over another.

But, with original assets, everything turns on finding a duty to convert into authorized assets. In all of the three cases, land, non-residuary testamentary settlements, and *inter vivos* trusts, the textbook answer appears clear—in the absence of an express duty imposed by the settlor, no such duty will be raised by implication of law. The rationale again appears to be the ubiquitous *in specie* argument—in the circumstances, the settlor who has not directed conversion must be taken to have intended the settled assets to be enjoyed by the successive beneficiaries in the unconverted form. The sweeping generality of this conclusion means that, merely by knowing that the interests of the successive beneficiaries were created by an *inter vivos* trust or a non-residuary testamentary trust, or that the asset is land, the court, without any further regard to the instrument (except a peep to ascertain that there is no express direction to convert) or to the surrounding circumstances, can be content that it has given effect to the settlor's intention on this issue so vital to the beneficiaries. I find this assurance to be at least curious.

Where the original asset is land, and no express duty to convert it has been imposed, an attempt to jump the gap without the aid of legislation appears hopeless, whatever be the nature of the disposition by which the settlement is created. It is not realistic to expect the Supreme Court of Canada to overrule its own recent judgment in *Lottman* v. *Stanford*[81] in the forseeable future. Even if the argument, previously made in this article, that an expanded concept of prudence imposes a positive duty upon the trustees to exercise their powers so as to obtain a proper portfolio balance, should be accepted, land must stand as an anomaly, outside the reach of that duty, as long as *Lottman* v. *Stanford* maintains its authority.

However, even where the original asset is land, and there is no express duty to convert it, there still may be some room for an aggrieved beneficiary to manoeuvre. If the land includes buildings, and is producing current income, there is now at least some authority for the withholding of a depreciation reserve, even where that land is not part of the plant of a

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[81] *Supra*, footnote 16.

business.[82] I have argued elsewhere[83] that the courts should use the power to require or forbid the establishment of such a reserve as a limited mechanism to adjust imbalance in the economic returns from the asset to the successive beneficiaries. Further, where trustees are continuing to hold land that is producing an economic return which is significantly weighted in favour of one beneficiary at the expense of the other, the fact that *Lottman* precludes any remedy, either in the form of apportionment of the returns from that land or, presumably, in the form of an order that the land be exchanged for other assets which would balance the returns more equitably, does not mean that the court is completely powerless. I submit that it does not follow from *Lottman* that the trustees can disregard the fact that their retention of that asset is producing an imbalance. To the extent that the trustees hold other assets which *are* subject to a duty to convert, then the fact that one beneficiary is already obtaining an advantage over the other from the retention of an asset which is itself immune to judicial adjustment should be taken into account in determining what is an authorized portfolio of those *other* assets. The concept of prudence would then dictate a counter-balancing weighting of the remaining portfolio. Obviously, if the value of the land is greater than that of the remainder of the assets, and if the weighting of the returns from that land is extremely unbalanced, as between the successive beneficiaries, complete redress of the situation is impossible. However, something is better than nothing.

Where personalty is settled by *inter vivos* or non-residuary testamentary trusts, there may still be opportunity to jump the gap. At least the possibility has not been foreclosed by the Supreme Court of Canada, although the approach of the Court, as revealed in *Lottman*, does not augur well for the success of any attempt.

As a preliminary point, I submit that there is no gap, and no problem, when the original asset is money. Here, there is a well recognized duty upon trustees to convert money into some form of productive investment, and if this is not accomplished with reasonable diligence, the trustees are liable for interest lost.[84] The discretion exercised by the trustees in making those investments can be policed by the same techniques as may be available in the case of reinvestments by the trustees of the corpus of a testamentary residuary trust of personalty. There is no basis for any conceptual distinction arising out of the mode of creation of the settlement, and there is no reason to draw any different inference as to the intentions of the settlor.

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[82] *Re Zive* (1977), 77 D.L.R. (3d) 669, 23 N.S.R. (2d) 477 and 26 N.S.R. (2d) 651 (N.S.T.D.). Unfortunately, from the writer's point of view, the later Ontario decision in *Re Katz* (1980), 112 D.L.R. (3d) 529, 29 O.R. (2d) 81, 7 E.T.R. 222 (Ont. H.C.) may be read as diminishing the scope of *Re Zive* considerably.

[83] (1981), 5 E. & T.Q. 277.

[84] *Stafford* v. *Fiddon* (1857), 23 Beav. 386, 53 E.R. 151 (M.R.); *Blogg* v. *Johnson* (1867), L.R. 2 Ch. App. 225, at p. 228 (C.A.); *Re Jones* (1883), 49 L.T. 91 (Ch. D.).

Where the assets originally settled are investments specifically selected for an *inter vivos* trust or for a non-residuary testamentary trust by the settlor, the inference that the settlor intended *in specie* enjoyment is stronger than in the case of a residuary testamentary trust. I cannot quarrel with that generality. I do challenge the absolutist conclusion that, in every case of an *inter vivos* or non-residuary testamentary trust which does not contain an express direction to convert, the inference is so strong that further investigation of the intention of the settlor is unnecessary, with the consequence that a life tenant or a remainderman who is aggrieved by the results of an unbalanced investment portfolio is necessarily without remedy.

In an extreme situation where the settlor has settled specific assets and has not conferred any power upon the trustees to vary the investments, no other conclusion than that the settlor intended *in specie* enjoyment, and its consequences to the beneficiaries, seems possible. In modern trusts, such extreme cases will be rare. Usually, there will be power to vary conferred, and it is increasingly likely that power to reinvest within a wide range of types of investments will be given. Here, the inference of an intention of *in specie* enjoyment becomes less compelling.

I submit that there are, *a priori*, two basic reasons why a settlor might choose to settle specific investments upon trust for successive beneficiaries, and, at the same time, confer power to vary the state of investment. Different inferences as to the intention as to *in specie* enjoyment flow from each of them. The first—and the one tactitly assumed in the jurisprudence—is that the settlor is primarily concerned with the conservation of the asset settled. The powers to vary are added as an acknowledgement of the unknowability of the future. If the time should come where, in the opinion of the trustees, subsequent events make the continued holding of that investment unwise, the settlor does not want the assets trapped. The second possible reason is that the settlor has chosen the assets in question as a matter of convenience in transferring wealth of the trust. He had the assets in his portfolio to meet his own personal requirements. A selection from among those assets is a convenient means of quantifying the amount of wealth to be settled, and of conveying that wealth to the trustees, who are then expected to use their powers to shape that original wealth into the form most suitable to carry out their duties to their beneficiaries.

If conservation is found to be a primary purpose, the conclusion that the settlor intended *in specie* enjoyment, and its consequences, is proper. If convenience was the primary reason for the choice, an inference of intention of *in specie* enjoyment, arising solely from the fact of selection by the settlor, is a *non sequitur*. Absent the compulsion of that inference, a duty to convert the original assets into a properly balanced portfolio should arise from the positive duty to act prudently, having in mind the existence of successive beneficiaries, which I have previously argued exists.

This more sophisticated search for the settlor's intention, which I submit is both possible and necessary in the case of *inter vivos* trusts, poses a much more difficult task for trustees and courts than does the law as currently stated in the textbooks—if that is the law. Unless and until trust documents start addressing themselves explicitly to this basic problem, the document itself may contain contradictory indications. The nature of the settled assets may sometimes provide a clue. A transfer of a portfolio of shares in a number of widely-held public companies may suggest the convenience motive. A trust consisting solely of the controlling interest in a family corporation may suggest the conservation motive. The apparent motivation for setting up the trust may be another indicator. From the mere creation of a life estate, we may infer that the settlor assumed that the life tenant would derive some benefit from it, and, in the absence of contra-indicators, we may even assume that the benefit was expected to be more or less commensurate with the amount of the capital set aside to provide it. This may be an explanation for the refusal of the Ontario court in *Re Smith*[85] to draw the conventional *in specie* inference, although it is not an explanation which the judgments themselves give.

With the exception of the editors of *Halsbury*, who preface their reference to the non-applicability of *Howe* v. *Lord Dartmouth* to *inter vivos* trusts with a cautionary "it seems",[86] the editors of the standard English works treat that non-applicability as settled and absolute. Strangely, the direct authority always relied upon is the decision of a single judge in 1901. I doubt that the case, *Re Van Straubenzee*,[87] bears the weight of establishing the general rule commonly attributed to it. Cozens-Hardy J. did say that *Howe* v. *Lord Dartmouth*, as far as he was aware, had never been applied except with respect to testamentary residuary trusts of personalty, and he declined to apply the rule in that case, but his judgment appears based more upon the facts in that case than upon some general principle. A marriage settlement entered into by a father settled a specific amount of stock on the wife, his daughter, for life, then to the husband for life, with one-half of the remainder interest going to the settlor, in the events that happened. The wife covenanted to settle after-acquired property on the trustees on the same trusts. The trustees had no power under the settlement to vary investments. The settlor subsequently died, bequeathing a share of his residuary estate in trust for the daughter absolutely. This residue, caught by the covenant to settle after-acquired property, itself included the settlor's remainder interest in the settlement, which fell into possession on the wife's death. The life tenant's executors claimed a notional income on this remainder interest. The court pointed out that, as contracts, covenants to settle must be performed strictly and this covenant called for after-

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[85] *Supra*, footnote 57.

[86] Laws of England (3rd ed.), vol. 38, p. 880, para. 1486.

[87] [1901] 2 Ch. 779 (Ch. D.).

acquired property to be held on the same trusts as the originally settled stock. The original trust had not even included a power, let alone a trust, for sale of the original corpus. Under those circumstances, no duty to convert could be implied, and thus, there was no basis for an apportionment.

Two earlier cases[88] referred to in *Re Van Straubenzee* also fail to establish any general principle that a duty to convert can never be implied in an *inter vivos* trust. Although, in a later case in the Court of Appeal,[89] Cozens-Hardy M.R., who, as a trial judge, had decided *Re Van Straubenzee*, did make a general statement to the effect that *Howe* v. *Lord Dartmouth* never applied to *inter vivos* trusts, that statement was an *obiter dictum*. The case concerned an improper investment by the trustee, not unauthorized original assets. *Re Van Straubenzee* itself did not refer to one earlier case[90] where the judge allowed the life tenant under an *inter vivos* trust only a notional rate of interest on an unauthorized original asset, which was left uncalled by the trustee, and then permitted to be converted into a similar, also unauthorized asset.

The strongest arguments, based on *stare decisis*, for a general rule that an implied duty to convert will not be raised in the case of *inter vivos* trusts are indirect. The first lies in the manner in which the rule in *Howe* v. *Lord Dartmouth* is traditionally formulated, as referable to testamentary trusts of residuary personalty. *Inclusio unius, exclusio alterius*. The second lies in the long absence of any authority imposing an implied duty to convert, until *Re Smith*[91] was decided in Ontario. The latter argument might be explained away by the daunting effect of the textbook writers' generalization, coupled with an awareness by lawyers of the alacrity with which English courts, in particular, would find an intention of *in specie* enjoyment even in situations where the traditional rule in *Howe* v. *Lord Dartmouth* was *prima facie* operative. The former argument is much more formidable. It seems clear, in the principal case, that Lord Eldon considered that the mere fact that a testamentary gift was specific would preclude finding any implied duty to convert, and it seems to be an obvious extrapolation that, if asked about *inter vivos* trusts of property other than money, he would have swept

[88] *Milford* v. *Peile* (1854), 17 Beav. 602, 51 E.R. 1169 (M.R.); *Hope* v. *Hope* (1885), 1 Jur. (N.S.) 770 (V.C.).

[89] *Slade* v. *Chaine*, *supra*, footnote 68.

[90] *Re Hill* (1881), 50 L.J. (Ch.) 551, 45 L.T. 26 (Ch. D.).

[91] *Supra*, footnote 57. *Re Smith* did not hold that there was an implied duty to convert all of the original assets of the *inter vivos* trust in issue in that case. The life tenant, who was complaining of the low yield of the shares of Imperial Oil Limited which comprised the corpus, as compared to the yield available from other investments which were open to the trustees, did not seek the remedy of apportionment, so the issue of a general implied duty to convert was not raised. The court, answering a question posed to it, held that the trustee was in breach of its duty to maintain an even hand by refusing to exercise its power to invest in securities which would produce a reasonable return for the life tenant. By implication, there must have been an implied duty to convert at least some of the original assets and reinvest the proceeds in investments which would produce a better balanced overall result.

them in under the same assumption. But technically, the principal case and the multitude of wills cases which have considered its application were not cases involving *inter vivos* trusts, and there is reason for caution in casually transferring the *inclusio unius* rule of statutory interpretation into interpretation of a line of decided cases. Heretical with respect to the long-standing assumption of equity lawyers as *Re Smith* was, it does not appear to have technically violated *stare decisis* by ignoring any case whose actual *ratio decidendi* was binding upon it. In refusing to be foreclosed from investigating whether the trustee was carrying out its duty to all of its beneficiaries properly, and, if necessary, from affording a remedy, by the mere form by which the settlement was created, the Ontario court was taking a desirable step. Further, it was a step which was consistent with the reluctance of modern courts to be hamstrung by construction rules evolved in other cases dealing with other documents, in ascertaining the true interpretation of the document.

Conclusion

In summary, I submit that a path is open for Canadian courts to exercise a more effective degree of control over the wide investment discretion commonly conferred upon trustees in modern trusts than appears on the surface of the textbook treatment of the subject. To follow that path appears to require some radical departures from the traditional case law, but the departures are not so radical as they may first appear. We require an incorporation of regard to maintenance of purchasing power into the trustees' duty of care towards the capital beneficiary. The wisdom and desirability of taking account of this factor have already been acknowledged by courts in many jurisdictions, in sanctioning variations of investment powers to permit investment in equities. We require a total portfolio approach to the concept of authorized investments, rather than an asset by asset approach. I have argued that the internal logic of recent leading Canadian cases brings us at least to the brink of such a step. We require an alertness to the question whether investment discretions are given for the purpose of altering the interests of the successive beneficiaries. The distinction between managerial and distributive powers has often been referred to. We require a reappraisal of inferences which have been drawn in past cases, from the nature of the powers given or withheld, as to settlors' intentions regarding *in specie* enjoyment. It is not a departure from principle to assume that modern settlors are setting up their trusts with modern problems in mind.

What may be more radical, in the arguments advanced here, is the thesis that the trustees' duty to reinvest some or all of the assets originally transmitted to them in order to achieve an overall asset structure which maintains, over the life of the trust, a fair balance between the interests of the successive beneficiaries, is not raised only by an express general duty to convert, found in the instrument, or by the traditional formulation of the

Rule in *Howe* v. *Lord Dartmouth*. It may be raised, as circumstances demand, simply as a necessary response to a general duty of care. In managing the assets of the trust, the trustees are always under a positive duty to take reasonable care for the legitimate interests of all the beneficiaries. The extent of that duty is limited, in the case of successive beneficiaries, by the necessity to reconcile and balance the inevitable opposition of their interests, and it may be further controlled by directions of the settlor. But it is always present as a positive duty and once the nature and extent of the legitimate interests of the successive beneficiaries are defined the court should take the appropriate means to ensure that the beneficiaries receive the appropriate benefits of the observance of that duty. Yet, is it really surprising today to see an argument that the complex structure of law built up by Equity around the field of trustee investments is but one more tentacle of the universal principle which *Donoghue* v. *Stevenson*[92] laid bare?

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[92] [1932] A.C. 562 (H.L.).