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# Constitution of Trusts: An Analysis of *Re Pryce*

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## 1. Introduction

The case of *Re Pryce*<sup>1</sup> has been the subject of much academic debate and criticism over the years. The reason being that the decision is founded on neither principle nor authority. Particularly, the decision failed to recognise that the benefit of a covenant could form the basis of a valid trust. The problem is compounded by the fact that the reasoning has formed the basis for a number of subsequent decisions. However, whilst the rationale of the case was erroneous, in light of recent High Court authority, it is arguable that the result was justified and correct in the circumstances.

## 2. Relevant Authorities

The case of *Fletcher v Fletcher*<sup>2</sup> preceded *Re Pryce* and established, in a similar fact situation, that a chose in action can be the subject matter of a valid trust. This has been accepted in Australia.<sup>3</sup> However in *Re Pryce*, Eve J distinguished *Fletcher v Fletcher* on the basis that the subject matter in the latter case was presently existing property. Whereas the subject matter in the case before his Honour was future property, for which no consideration had been provided. *Re Pryce* was reluctantly followed by Simmonds J in *Re Kay's Settlement*<sup>4</sup>, His Honour's reasons being that the decision had stood for 21 years, Eve J had given a considered judgment, and the case before him was indistinguishable on the facts.

In *Re Cook's Settlement Trusts*,<sup>5</sup> Buckley J, citing *Fletcher v Fletcher*, rejected arguments of counsel for the beneficiaries that there was a fully constituted trust of

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1 [1917] 1 Ch 234.

2 (1844) 4 Hare 67.

3 *CSD (Qld) v Hopkin CLR s* (1945) 71 CLR 351 at 369; *Ollson v Dyson* (1968) 120 CLR 363 at 373.

4 [1939] Ch 329.

5 [1965] 6 Ch 102.

an enforceable promise. Justice Buckley seemed to base this view on the fact that the promise made was not in the form of a debt. However it is important to note that all that is required to create a trust is an enforceable promise, which is a chose in action. A debt is merely one type of chose in action and the categories of choses in action that can be the subject of a trust are not limited to these.<sup>6</sup> Additionally, Buckley J held that the case was one of contract, rather than trust. Curiously, *Re Pryce* has been followed in Australia in *Perpetual Trustee Co v Willers*<sup>7</sup> without critical analysis.

### 3. Justice Eve's Judgment

#### (a) Specific Performance and Damages

With regards to specific performance, Eve J was undoubtedly correct. Equity would specifically enforce a trust if valuable consideration was given. However equity, unlike the law, does not consider a deed under seal to be valuable consideration. Therefore, because the trustee is considered a volunteer in equity, he or she clearly can not ask for specific performance.

However, it does not follow, as Eve J suggested, that because specific performance was not available, damages were likewise barred. Justice Eve misconceived the effect of the *Judicature Act*. His Honour thought that the fusion of law and equity meant that equitable defences applied to a common law action for breach of a voluntary covenant. This view is clearly contrary to authority.<sup>8</sup> The fact that a remedy is not available for the volunteer in equity does not prevent an action at common law.

#### (b) Contract to Create a Trust or Trust of the Covenant?

Justice Eve found that as the settlement related to future property, it could not be the subject matter of a voluntary trust. The trust was not therefore fully constituted, and the covenant only amounted to a contract to create a trust. As the next of kin were volunteers, equity would not assist them and the covenant was unenforceable.

His Honour failed to recognise that it is possible to have a fully constituted trust involving an enforceable promise that is not supported by consideration. The benefit arising from a covenant is the right to enforce it, or to seek damages upon its default. These rights constitute a chose in action. Whether such a chose in action can be the subject matter of a trust has been subject to much debate. Lee argues that the chose in action is too uncertain to form the subject matter of a trust, but can form the subject matter of a contract.<sup>9</sup> Additionally, Lee argues that it is for the settlor alone to transfer the property on trust and that a voluntary promise

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6 See D Wright "Trusts Involving Enforceable Promises" (1996) 70 ALJ 911.

7 (1955) WN (NSW) 244.

8 *Cannon v Hartley* [1949] Ch 213; *Lloyds v Harper* (1880) 16 ChD 290.

9 See W Lee "The Public Policy of Re Cook's Settlement Trusts" (1969) 85 LQR 213.

should not give rise to a cause of action against him or her.

However, the weight of authority supports the contrary view that a chose in action can form the basis of a valid trust. For example, in *Re Cooks Settlement*, it was recognised that a chose in action could form the basis of a trust, based on *Fletcher v Fletcher*. However, Buckley J erroneously confined the idea to the chose of debt alone. Furthermore, the fact that both equitable and legal choses in action are capable of assignment, supports the view that they are capable of being held on trust for the benefit of another.<sup>10</sup>

Indeed the supporters of *Re Pryce* “confuse the benefit of the promise (which is present property and certain) with the subject matter of the promise (which may be future property and uncertain). An expectancy cannot be the subject matter of ... a valid trust; (however) a promise to settle an expectancy can be”<sup>11</sup>.

### (c) “Ought Not Sue”

Justice Eve not only said that the trustees were not bound to sue, but that they were bound *not* to sue. This does not reflect his reasoning.<sup>12</sup> Moreover, it goes beyond the maxim that equity will not assist a volunteer, but will additionally prevent a volunteer from pursuing their rights.<sup>13</sup>

However, Eve J found neither a trust of the future property, nor of the chose in action. Following on from that reasoning, he was correct in saying that the trustees ought not sue. This is because any damages obtained would be nominal; the benefit of the contract being for a third party. Secondly, if the trustees obtained substantial damages, any award would not be held on trust for the beneficiaries. Additionally, it has been argued that any award of damages would then be held on resulting trust for the settlor and that “equity should prohibit such circuitous action”.<sup>14</sup> However, where there is a fully constituted trust, there should be no discretion placed upon the trustees whether or not to sue.<sup>15</sup>

## 4. Intention

It is clearly established that a chose in action can be the subject matter of a valid trust. However, the difficulty lies in determining when such a trust will arise.<sup>16</sup> In order to create a trust, three certainties are required. That is, certainty of intention,

10 See *Property Law Act* 1974 (Qld), s199.

11 See R Meagher & J Lehane “Trusts of Voluntary Covenants” (1976) 92 LQR 427.

12 See R Meagher & W Gummow *Jacobs’ Law of Trusts in Australia* Butterworths, Sydney, 1997, p101.

13 This proposition was denied in *Canon v Hartley* [1949] Ch 213.

14 See A Oakley *Parker and Mellows - The Modern Law of Trusts* 6th ed. Sweet and Maxwell, London, 1994, p89.

15 cf. D Elliott “The Power of Trustees to Enforce Covenants in Favour of Volunteers” (1960) LQR 100. However, Professor Elliot’s reasoning has been rejected by J Barton “Trusts and Covenants” (1975) 91 LQR 236 at 237 and by R Meagher & J Lehane *supra* n11.

16 See A Oakley *supra* n14.

subject matter and objects.<sup>17</sup> In *Re Pryce*, Eve J refused to allow the next of kin to enforce the covenant, on the basis of a lack of certainty of subject matter. Specifically, the trust related to future property, which was uncertain and therefore incapable of forming the subject matter of a voluntary trust. Justice Eve erred in this respect, as the subject matter of the trust was the benefit of the covenant itself. Nevertheless, had Eve J correctly held that the benefit of the covenant could be the subject matter of the trust, the trust itself may have failed on the basis of lack of certainty of intention.

### (a) Future Application

Up until the middle of the nineteenth century, any expression of hope or desire on the part of the settlor was imperative and created a binding trust.<sup>18</sup> It was during this time that *Fletcher v Fletcher* was decided. However, the rules regarding intention changed towards the end of the nineteenth century, such that an express intention was required to create an express trust, and the courts were reluctant to find the requisite intention to create a trust of an enforceable promise.<sup>19</sup>

Whilst there is a contemporary view<sup>20</sup> that on strict equitable principles, an intention to create a trust, rather than an intention to create a benefit is required, the High Court has taken a contrary view. Following Fullagar J in *Wilson v Darling Island Stevedoring*,<sup>21</sup> the High Court in *Bahr v Nicolay* stated that “if the trust relationship is the appropriate means of creating or protecting [an] interest or of giving effect to the intention, then there is no reason why in a given case an intention to create a trust should not be inferred”.<sup>22</sup>

The High Court in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*<sup>23</sup> also approved this approach. In that case, Mason CJ and Wilson J said that “the courts may look to the nature of the transaction and the circumstances, including commercial necessity, in order to infer or impute intention”<sup>24</sup> Likewise, Deane J suggested that the requisite intention “should be inferred if it clearly appears that it was the intention of the promisee that the third party should himself be entitled to insist upon performance of the promise and receipt of the benefit and if the trust is, in the circumstances, the appropriate legal mechanism for giving effect to that intention”<sup>25</sup> His Honour continued that “[a]n intention to create a trust of the benefit of a contractual promise can be evidenced and/or carried into effect by the contract

17 *Knight v Knight* (1840) 3 Beav 148.

18 See A Oakley *supra* n14 at 85.

19 *Green v Russell* [1959] 2 QB 226; *Vandepite v Preferred Accident Insurance Corporation of NY* [1933] AC 70; *Re Schebsman* [1944] Ch 83.

20 See J Heydon & P Loughlan *Cases and Materials on Equity and Trusts* 5th ed, Butterworths, Sydney, 1997, p573.

21 (1965) 95 CLR 43 at 67.

22 *Bahr v Nicolay* (1988) 164 CLR 604 at 618.

23 (1988) 165 CLR 107.

24 *Ibid* at 121.

25 *Ibid* at 147.

itself or by action of the promisee *aliunde*". However, the parties are not "restricted to the terms of the contract or precluded from relying on other circumstances to establish or negative the existence of a trust in the third party's favour in any dispute [between the parties]".

In *Commissioner of Stamp Duties (Qld) v Jolliffe*, Knox CJ and Gavan Duffy J stated that "[w]e know of no authority, and none was cited, which would justify us in deciding that by using any form of words a trust can be created contrary to the real intention of the person alleged to create it".<sup>26</sup> Thus the High Court was asserting that intention of the settlor is of paramount importance. The court will attempt to discern the settlor's true intention, and it is that intention that will determine whether a trust is created. Whilst the courts have largely claimed to be examining the parties intention to create a trust, they have in reality been looking at the settlor's intention to benefit another.<sup>27</sup>

### (b) Relevance to *Re Pryce*

*Trident* and *Bahr* establish that where there is an intention on the part of the settlor to benefit another, a trust will be inferred where this would be an appropriate mechanism. Therefore, the objective to establish the trust in *Re Pryce* would be to find an intention to benefit the next of kin. Prima facie, the settlement is in a deed, thus suggesting an intention to benefit the next of kin. However, as *Jolliffe* indicates, it is the true intention that is relevant. Likewise, in *Trident*, Deane J believed that all the circumstances are to be taken into account.

At the time of *Re Pryce*, marriage settlements were common and included standard covenants. The purpose of a marriage settlement "was to protect the wife and provide for both spouses and their joint issue, not to provide for the next of kin, persons whose identities were unknown at the date of the settlement."<sup>28</sup> The parties were unlikely to contemplate that the covenant would be enforced in favour of the next of kin.<sup>29</sup> Therefore, the intention was *not* to benefit the next of kin. Applying the High Court's approach, it is probable that *Re Pryce* would be decided similarly today.

However, in relation to the court's general approach to the enforceability of a voluntary trust for the benefit of a third party, in most cases, the court would enforce the covenant according to its terms. In contemporary times, the technical distinctions, criticisms and justifications contained in the cases and academic commentary, are obsolete. Rather, they have been swept aside in favour of an examination of the settlor's intention. If a party enters into a voluntary deed to confer a gift on third party, this is sufficient evidence of an intention to benefit the third party, and a court will give effect to this by creating a trust. Particularly, the requirements of

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26 (1920) 28 CLR 178 at 181.

27 See D Wright *supra* n6.

28 See B Dwyer "Trusts, Contracts and Covenants" (1995) 14 (2) UTLR 143.

29 See J Barton *supra* n15 at 237.

intention have been relaxed, and the settlor's general intention alone will suffice in order to create the trust.

It is unfortunate that Eve J did not base his decision on lack of intention, providing a real basis for the decision to be distinguished. Moreover, his Honour could have distinguished *Fletcher* on the basis that the requisite intention in the two cases was different. In *Fletcher*, the trust contained a covenant in favour of named beneficiaries, so that the intention was clear.<sup>30</sup> Whereas in *Re Pryce*, the ultimate beneficiaries were unknown at the time of entry into the deed and it is difficult to infer an intention to benefit an unknown party. Similarly, in *Re Kay's Settlement* the beneficiaries were children, who were likely to have been intended to benefit.

### (c) Intention and Justice

The test of intention also accords with notions of justice. It may be possible to resolve the apparent anomaly espoused in *Re Pryce* on the basis that the result was just in the circumstances. The case may simply be an example of judges hiding behind superficial reasoning in order to achieve a pre-determined result. That is, it would not be fair for the next of kin to enforce the promise when the settlor did not intend this to occur. A decision that a trust existed in *Re Pryce*, would have produced an unjust result. The wife would have been required to relinquish property she owned absolutely in return for a mere life interest to confer a benefit on her statutory next of kin.<sup>31</sup>

## 5. Conclusion

The judgments in *Trident* and *Bahr v Nicolay* signify a transformation in the purpose of intention in the law of trusts. The requisite intention now incorporates two elements. Firstly, there must be an intention to benefit another and, secondly, it is for the court to determine whether the trust is the appropriate means of giving effect to such an intention. Consequently, regardless of Eve J's flawed reasoning, it is likely that the result reached in *Re Pryce* would be the same today. Thus what appeared to be an unjustified decision may, in light of modern judicial trends, have been correct in the circumstances.

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30 See H Ford & W Lee *Principles of the Law of Trusts* 1st ed LBC Information Services, Sydney, 1983 at [330].

31 *Ibid* at [328].