# Now You See It? The Curious Tale of Illusory Appointments Under English Powers

*Andy Lewis**

In day-to-day practice, lawyers know that choosing who gets the money out of a discretionary trust can be fraught with difficulty. Pension lawyers can certainly tap a rich vein of 'war stories' in this area by asking their trustee clients, or looking at the decisions of the Pensions Ombudsman.

Although the modern principles are well established, readers may be entertained by a brief look at one of the roundabout routes the law has taken to its current destination. However much we might grumble now, it seems life was a lot more difficult in the old days.

In the 18th and early 19th centuries there were strange goings-on in the courts of equity.

Our story begins with no statute in sight. The scope of a power to appoint property among objects was determined strictly by the language of the instrument conferring the power. The limits were tested in early cases, which essentially asked: Can trustees distribute property to one of a class of objects, leaving the others in the class with nothing? Often, and somewhat surprisingly to modern eyes, the answer was 'No': everyone in the class had to get something. The courts would base their decisions upon whether or not the power, on its true construction, permitted some or all of the objects to be excluded from a distribution.

If the power did not permit the exclusion of objects, then the donee had to appoint the property among *all* the objects in the class, or the execution of the power would fail. For example, in *Malim v Keighley*, a power of appointment 'to and among' a group of children did not permit some of the children to be excluded altogether. Lord Loughborough LC held that the donee

> 'must give a part to each of them under the words ''to and among'': she could not negative the [testator's] desire to give to the illegitimate daughter. If she had made a disposition, and left her out, that would have been bad'.[1]

This type of power became known as a 'non-exclusive' power. By contrast, in *Thomas v Thomas* the testator had left £1,000 on trust for each of his six children, to be paid at age 21 or marriage. His will provided that if any of the children died before age 21 or marriage, the £1,000 intended for that child should be distributed 'to one or more of his children then living' as his executrix thought fit. One of the children died unmarried under age 21, and the executrix appointed the entire legacy to one of the other children. The Lord Keeper ruled

---

* Solicitor Associate, Travers Smith LLP. An early version of this article appeared in the APL Monthly Update – the email newsletter for members of the Association of Pension Lawyers. My thanks to David Pollard for putting me on to this interesting curiosity in the first place, and to Paul Stannard and Robert Ash for their comments. Any mistakes are mine alone.

1 (1795) 2 Ves Jun 529, 533.

'... this is *casus provisus*, it is expressly provided, that she might give all to one.'[2] In other words, the power permitted the donee to exclude some of the objects from a distribution, at her discretion. This was an 'exclusive' power.

Now, one might think that a Regency donee could get around an unhelpfully-worded non-exclusive power by distributing nominal amounts to some objects while making more substantial awards to the other more favoured objects. Our forebears were way ahead of us, but unfortunately so were the courts. Short shrift was given to this practice (colourfully described as 'cutting objects off with a shilling').[3] To this end the courts took upon themselves an equitable jurisdiction to set aside insubstantial or 'illusory' appointments and replace them with appointments the court regarded as 'substantial'.

It quickly became clear that this jurisdiction was rather problematic to operate. At the start of his 1804 judgment in *Butcher v Butcher*, Sir William Grant MR bemoaned the direction of the case law and wailed: 'What is an illusory share, and what a substantial share?'[4]

Dissatisfaction mounted. Judicial attempts to develop an equitable principle of replacing an 'illusory' appointment with a proportionate amount of the total disposition (using proportions derived from precedent) apparently met the end of the road in *Bax v Whitbread*.[5] In 1837, after a survey of the 18th and early 19th century case law (including those mentioned above), *The Jurist* offered its readers this scathing view:

> 'After reading this deplorable picture of the state of the law on a question materially affecting the welfare of so many persons, and recollecting that [the Lord Chancellor] Lord Eldon could at once have remedied this evil by a short act of parliament, one cannot but be struck with the perverseness or imbecility of the nature of the man who could abstain from applying so simple a remedy to an evil of such magnitude.'[6]

Fortunately the legislators had by then ridden to the rescue. *The Jurist* continued:

> 'A state of the law so injurious to the public, and so discreditable to the court, was finally restored to its proper condition by the statute of 1 Will 4, c 46, ''to alter and amend the Law relating to Illusory Appointments''.'[7]

This statute, the Illusory Appointments Act 1830, authorised illusory appointments as a way of working around non-exclusive powers. The effect of the Act was that as long as everyone in the class of objects of a non-exclusive power got something (however trivial), the appointments could not be challenged.

But this legislation did not provide a complete answer. There was still, apparently, plenty of room for legal debate after 1830 – such as whether or not an appointment really fell within the 'illusory' category protected by the 1830 Act.[8] The case law probably reached

2 (1705) 2 Vernon's Cases in Chancery 513.
3 I am paraphrasing here from John Mowbray, 'Choosing among the beneficiaries of discretionary trusts' [1998] 5 PCB 239. This article, and Geraint Thomas, *Thomas on Powers*, 2nd ed (Oxford: Oxford University Press, 2012), 3.102–3.106, both provide helpful overviews of this area.
4 (1804) 9 Ves Jun 382, 393.
5 (1809) 16 Ves Jun 15. Lord Eldon LC said at 18: 'as I cannot understand the doctrine, I will follow it, as far as it is gone, but no farther.'
6 'On illusory appointments', (1837) 3(36) *The Jurist*, 16 September 1837, 653.
7 *Ibid.*
8 See *Re Capon's Trusts* (1879) 10 Ch D 484.

'peak weird' in March 1874 with *Gainsford v Dunn*, which contains a conveniently short overview of the law at that point. The practical outcome in that case was the court upholding awards of the vast bulk of a testatrix's estate to two beneficiaries (who had claimed the entirety of it), leaving the three other bereaved objects (her brother and two sisters) with £5 each, because of the effect of the 1830 Act.

Perhaps the three unfortunates in *Gainsford* were lucky they got as much as £5. In his judgment in the case, Sir George Jessell MR said:

> 'The rule is, that there must be at least *a farthing*[9] payable out of the fund subject to the power, and, ... however small the sum appointed may be, the appointment cannot be objected to as being illusory.'[10] [emphasis added]

Relief finally came with further amending legislation (the Powers of Appointment Act 1874) which permitted appointments to one or more of a class of objects to the complete exclusion of others, unless the trust instrument provided otherwise. The way ahead was now clearer.

In better news, today's English trust lawyers need not panic over the mountain of discretionary decisions they may have waded through. Section 158 of the Law of Property Act 1925 helpfully maintains the statutory position established by its 1830 and 1874 ancestors. It is now said that all powers of appointment are exclusive powers, as they have been since 1874.[11] Thus appointments to one object to the exclusion of others are permissible unless there is express wording in the power to declare 'the amount of any share from which any object of the power is not to be excluded'.[12]

9 For younger readers, a farthing was one quarter of one (old) penny (equivalent to 0.1p today), the lowest value coin of the realm.

10 (1873–1874) LR Eq 405, 409.

11 Geraint Thomas, *Thomas on Powers*, 3.106. The law on illusory appointments has fed into wider contemporary discussions about the proper exercise of trustee powers: see Paul Matthews, 'The Doctrine of Fraud on a Power: Part 1' [2007] PCB 131 and David Pollard, 'Exercising powers: proper purposes rather than best interests: fiduciaries and Eclairs' (2016) 30(2) TLI 71.

12 Section 158(2) of the Law of Property Act 1925. See Geraint Thomas, *Thomas on Powers*, 3.107-3.112 for a discussion of some of the subtleties of this provision.