

When is a fraud on a power actually a fraud?

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Fraud on a power is a well-established trust doctrine and one that crops up frequently in contentious trust applications both onshore and offshore. As such, it is always useful to have an aide-mémoire of the basics and also remind ourselves where, what may at first appear to be a fraud, is, in fact, perfectly acceptable.

As per Lewin 30-066:

1. the donee of a beneficial power may exercise it as he pleases;
2. the donee of a power of any other kind must not misuse it;
3. where the power is a limited but non-fiduciary power a person is under no obligation to exercise it or to consider doing so but where they do they must do so for a proper purpose; and
4. the donee of a fiduciary power is under an obligation to at least consider exercising it and if it does so it must do so for a proper purpose.

The potential for a fraud on a power therefore does not merely cover powers of appointment but can be extended to more or less all powers exercised; amendment, investment, appointment of new trustees etc.

So, when is the donee at risk of perpetrating fraud in exercising these powers?

Vatcher v Paull [1915] AC 372, at page 378 established:

"The term [fraud] in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could properly be termed dishonest or immoral. It merely means

that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."

Commonly the claim is that the donee has exercised the power in favour of some person or purpose who is not an object of the power.

In *Lady Wellesley v Earl of Mornington (1855) 2 K & J* a father who exercised his power in favour of his child who was seriously ill with the purpose of benefitting himself; as he would inherit when the child died, was a fraud but contrast with the case a year later of *Beere v Hoffmister (1856) 23 Beav 101* that established the donee can exercise its power to benefit a child even though the donee is the child's next of kin and will take such benefit if the child dies.

A more modern example would be a parent seeking an appointment out of a trust for the benefit of their child when the child itself is not a beneficiary of the trust. While on the face of it the proposal appears to be a potential fraud on a power by the trustee, this could be alleviated by some moral obligation the parent has to the child, particularly if he would put himself in a negative position if the Trustee did not accede to his request for an appointment to him to be applied for the child's benefit. It is a benefit to parent if the Trustee agrees to settle his moral obligation to his child.

Likewise, in the common situation where trustees are asked to assist the settlement of financial claims on divorce; recent cases law has made it clear that the trustees can exercise their power in favour of someone who is not the object of the trust in order to make it easier for an object to meet their obligations following an ancillary relief award on a divorce.

Lewin is clear on this point, at 30-077, *"an express arrangement to benefit a person who is not an object will not itself invalidate the appointment if the purpose is the benefit of an object."*

Finally, while reminding ourselves of the basics of this doctrine it is also worth remembering the consequences; such a fraudulent exercise of a power will be void in equity not merely voidable on application. Put simply the exercise will have no effect on the beneficial interests and they will remain unchanged, as though the power had not been exercised. It also goes without saying that a fraud on a power perpetrated by a trustee is also prima facie a breach of trust.

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