

Title

Equity's maxims have many jurisprudential functions, one critical function being to sinew the equitable principles that regulate the law of trusts

Text

Equity's maxims have many jurisprudential functions, one critical function being to sinew the equitable principles that regulate the law of trusts. A court that is saddled with sorting out the rights, duties and obligations of the parties to a particular trust relationship who fails to appreciate this sinewing function risks crafting a decision that is doctrinally incomplete at best, incoherent at worst. Consider the Ohio case of *Morris v. Mathers*, 2024 WL 3495771, 2024-Ohio-2774. A trustee had expended personal funds to maintain and improve the trust estate. The trustee sought to be reimbursed. A beneficiary objected due to the absence of a formal written repayment agreement. The trustee quite rightly prevailed. "We find nothing in the trust language or statutory requirements that require...[the trustee before advancing his own funds]...to obtain written consent or to have an agreement in writing..." Yes, but the analysis is incomplete. Unaddressed in the decision is the relevant equity doctrine extrinsic to the terms of the trust and Ohio's version of the Uniform Trust Code that affirmatively affords and supports the trustee's right to be reimbursed. The external rationale is the trustee's inherent equitable right of reimbursement. See §3.5.2.3 of *Loring and Rounds: A Trustee's Handbook* (2024), the relevant parts of which section are reproduced in the appendix below. A critical complement to that rationale is the maxim that equity looks to the substance of a matter, not to how it is packaged. Substance or intent over form, in other words. Recall that the trust relationship first and foremost is an invention of, and to this day is a ward of, equity. The substance-over-form maxim also has been known to save an exercise of a power of appointment that is defective only in form, or to thwart a trustee's attempt, via the formalistic employment of a straw, to end-run equity's self-dealing proscriptions. See §8.12 of the Handbook, which considers 15 equity maxims of general applicability that also serve as sinews of trust jurisprudence. How is it, then, that the courts are coming to "miss the maxims" in fiduciary litigation? That mandatory formal instruction in equity doctrine is now a thing of the past in most if not all U.S. schools is mainly to blame. Also, that the drafters of the Uniform Trust Code sensibly elected not to codify, partially codify, or otherwise mess with equity-maxim jurisprudence has, however, perversely rendered, as a practical matter, this still vital corner of the Anglo-American legal tradition for all intents and purposes invisible.

Appendix

§3.5.2.3 Right in Equity to Exoneration and Reimbursement, *i.e.*, Indemnity; Payment of Attorneys' Fees [from *Loring and Rounds: A Trustee's Handbook* (2024)]

Exoneration and reimbursement. An agent generally incurs no liability for acting within the scope of the agency. It is the principal who is on the hook. By contrast, it is the trustee who acts as principal in connection with the administration of the trust. It is the trustee, not the beneficiary, who is personally liable

to third parties in contract⁸² and tort,⁸³ “whether or not he is acting in accordance with his powers and duties as trustee.”⁸⁴ Again, a trustee is a principal. He is neither an agent nor, absent special facts, an employee of the trust.⁸⁵

To the extent the trustee is entitled to indemnity, he has a security interest in the trust property such that he will not be compelled to make any distributions of income and principal to the beneficiaries until such time as he has been made whole from the trust estate.⁸⁶ Inasmuch as there is a rigid restriction against personal participation by the trustee in any of the profits and gains resulting from the administration of the trust estate,⁸⁷ equity takes pains to hold the trustee harmless from personal liability for obligations *properly incurred*.⁸⁸ English law is in accord.⁸⁹ Thus, unless the terms of the trust provide otherwise,⁹⁰ a trustee is entitled to indemnity out of the trust estate, either by exoneration or reimbursement, for expenses properly incurred in the administration and management of the trust,⁹¹ whether or not the trust contains a spendthrift provision.⁹² In England, so too is an outgoing trustee, even after he has parted with the trust property,⁹³ as is the trustee of a voidable trust.⁹⁴ “A trustee has a first charge or lien upon the trust fund in respect of the liabilities, costs and expenses covered by his right of indemnity.”⁹⁵ In some jurisdictions, this equitable right of indemnity has been codified by statute.⁹⁶ The trustee may even be entitled to interest on personal funds reasonably and appropriately advanced.⁹⁷ The trustee, of course, has no fiduciary duty to make advances out of his own pocket, absent special facts, but to the extent he chooses to do so, he is entitled to take “security for indemnification.”⁹⁸ A trustee who has made good any loss occasioned by his breach of trust is entitled to be indemnified for expenses reasonably incurred to the extent the trust estate is benefited

⁸²See generally §7.3.1 of this handbook (trustee’s liability as legal owner in contract to nonbeneficiaries); Lewin ¶21-05 through ¶21-07 (England).

⁸³See generally §7.3.3 of this handbook (trustee’s liability as legal owner in tort to nonbeneficiaries); Lewin ¶21-08 (England).

⁸⁴Lewin ¶21-04.

⁸⁵See generally *Loring v. United States*, 80 F. Supp. 781 (D. Mass. 1948).

⁸⁶See Rest. (Second) of Trusts §244 cmt. c.

⁸⁷See generally §6.1.3 of this handbook (the trustee’s duty of loyalty).

⁸⁸See generally 4 Scott & Ascher §221.1; Bogert §718. “Under the general law a trustee is in general not entitled to indemnity out of the trust property in respect of liabilities to third parties and costs and expenses incurred in consequence of unauthorised acts.” Lewin ¶39-94 (England).

⁸⁹See *In re Beddoe* (Downes v. Cottam) [1893] 1 Ch. 547 (Eng.).

⁹⁰4 Scott & Ascher §22.1.4 (Terms of the Trust).

⁹¹Rest. (Third) of Trusts §38(2); Lewin ch. 21 (England); 3 Scott & Ascher §§18.1.2 (Power to Incur Expenses) (U.S.), 18.1.2.5 (Expenses of Management) (U.S.); 4 Scott & Ascher §22.1 (Expenses Properly Incurred).

⁹²4 Scott & Ascher §22.1.2 (Spendthrift Trusts).

⁹³Lewin ¶14-50.

⁹⁴Lewin ¶21-23. The purported trustee of a purported trust that is held void ab initio, however, may well not be entitled to indemnity out of the trust estate. Lewin ¶21-23.

⁹⁵Lewin ¶21-26 (England); 4 Scott & Ascher §§22.1 (Expenses Properly Incurred) (U.S.), 22.1.1 (Lien for Indemnity) (U.S.).

⁹⁶See, e.g., §31(1) of the English Trustee Act 2000; §47(2) of the Cayman Islands Trust Law (2001 revision); §59(4) NSW Trustee Act 1924; Article 22(2) of the Trusts Jersey Law (1984) (as substituted by Trusts (Amendment) (Jersey) Law (1989)).

⁹⁷4 Scott & Ascher §22.1.

⁹⁸4 Scott & Ascher §22.1.1 (Lien for Indemnity).

thereby.⁹⁹ A beneficiary who seeks equity must do equity.¹⁰⁰

A right of exoneration is a right in the trustee to pay creditors directly from the trust estate¹⁰¹ all of the expenses “reasonably and appropriately”¹⁰² incurred by him as its owner,¹⁰³ including taxes,¹⁰⁴ repair costs,¹⁰⁵ brokers' commissions,¹⁰⁶ expenses of running a trade or business on behalf of the trust,¹⁰⁷ premiums for insuring against liability in contract and tort to nonbeneficiaries,¹⁰⁸ and other legitimate expenses of prudently collecting, managing, preserving,¹⁰⁹ and protecting the trust property,¹¹⁰ including those properly incurred in hiring agents,¹¹¹ traveling,¹¹² leasing,¹¹³ investing,¹¹⁴ borrowing,¹¹⁵ and bringing, defending, and settling litigation, including attorneys' fees, and expenses of consulting counsel when there is reasonable

⁹⁹4 Scott & Ascher §§22.1.3 (Trustee in Default), 22.2.1 (Benefit to Trust Estate).

¹⁰⁰*See* §8.12 of this handbook (where the trust is recognized outside the United States) (containing a catalog of equity maxims).

¹⁰¹4 Scott & Ascher §22.1 (defining exoneration as “the power to use trust funds to discharge obligations that have arisen out of trust administration”).

¹⁰²Rest. (Third) of Trusts §88 cmt. b.

¹⁰³Rest. (Third) of Trusts §38 cmt. b; 4 Scott & Ascher §22.1.

¹⁰⁴*See generally* §7.3.4.1 of this handbook (trustee's liability for taxes and shareholder assessments); 4 Scott & Ascher §22.1.

¹⁰⁵Rest. (Third) of Trusts §88, cmt. b; 3 Scott & Ascher §18.1.2.2 (Repairs and Improvements); 4 Scott & Ascher §22.1 (Expenses Properly Incurred).

¹⁰⁶4 Scott & Ascher §22.1.

¹⁰⁷Lewin ¶21-14 (England).

¹⁰⁸Rest. (Third) of Trusts §88, cmt. b. *See generally* §§7.3.1 of this handbook (trustee's liability as legal owner in contract to nonbeneficiaries) and 7.3.3 of this handbook (trustee's liability as legal owner in tort to nonbeneficiaries); Lewin ¶21-17 (England); 3 Scott & Ascher §18.1.2.1 (U.S.).

¹⁰⁹*See generally* 3 Scott & Ascher §18.1.2.1 (Preservation of the Trust Property).

¹¹⁰Rest. (Third) of Trusts §88 cmt. b.

¹¹¹Rest. (Third) of Trusts §88 cmt. c; UTC §709 cmt.; 3 Scott & Ascher §18.1.2.3 (Employment of Agents) (noting, however, that unless the terms of the trust or a statute provides otherwise, the trustee ordinarily cannot properly at trust expense employ agents to perform services that the trustee is being compensated to perform, *e.g.*, keeping proper accounts or making the trust property productive, at least without an appropriate reduction of the trustee's own compensation). It goes without saying that a trustee may not retain an agent at trust expense to perform a nondelegable function, such as administering the dispositive provisions of a discretionary trust. 3 Scott & Ascher §18.1.2.3. *See also* 4 Scott & Ascher §22.1 (Expenses Properly Incurred).

¹¹²Lewin ¶21-13 (England).

¹¹³Rest. (Third) of Trusts §88 cmt. b.

¹¹⁴Rest. (Third) of Trusts §88 cmt. b.

¹¹⁵Rest. (Third) of Trusts §88 cmt. b. “[I]f a trustee borrows funds from a third party for use in the administration of the trust, the interest on the loan is payable (or reimbursable) from the trust estate, provided the rate of interest is reasonable and borrowing serves an appropriate trust purpose and is otherwise consistent with the trustee's fiduciary duties.” Rest. (Third) of Trusts §88 cmt. b.

cause.¹¹⁶ The expenditures must be in furtherance of the trust's purposes.¹¹⁷ "Improvements may serve to make the property more productive,¹¹⁸ or to make the premises safe and tenantable; therefore a trustee can properly incur improvement costs if and as the property's retention and improvement are prudent and suitable to the purposes of the trust."¹¹⁹ This right of exoneration is coupled with a right of reimbursement for sums paid from the trustee's own pocket for expenses properly incurred.¹²⁰ The trustee, however, still needs to be "cost-conscious."¹²¹ Unreasonable expenditures are not reimbursable.¹²²

Premiums for internal fiduciary liability insurance are generally not chargeable to the trust estate. English default law is in accord,¹²³ although there is an exception for trustees of charitable trusts.¹²⁴ The Uniform Trust Code (U.S.), however, may not be in accord.¹²⁵

What if the trustee without authority incurs an expense that confers a benefit on the trust estate? In that case, the trustee is ordinarily entitled to indemnity to the extent of the value of the benefit conferred.¹²⁶ The Restatement (Third) of Trusts is generally in accord.¹²⁷ Under the Uniform Trust Code, a trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, expenses that were not properly incurred in the administration of the trust to the extent necessary to prevent unjust enrichment of the trust.¹²⁸

¹¹⁶Rest. (Third) of Trusts §88 cmt. b; UTC §§709(a)(1), 1004. *See generally* 4 Scott & Ascher §22.1; 3 Scott on Trusts §188; Lewin ¶21-16 (England); Lee R. Russ, J.D., Annot., *Award of attorneys' fees out of trust estate in action by trustee against cotrustee*, 24 A.L.R.4th 624 (1983). *See also* F.M. English, Annot., *Right of coexecutor or cotrustee to retain independent legal counsel*, 66 A.L.R.2d 1169 (1959). *But see* Barber v. Barber, 915 P.2d 1204 (Alaska 1996) (trustee who brought complaint for instructions is a neutral party, not a "prevailing" party and therefore not entitled to legal fees); Malachowski v. Bank One, Indianapolis, 682 N.E.2d 530 (Ind. 1997) (though trustee prevailed, not awarded trustee fees because litigation not reasonably necessary). *See generally* §3.4.4.1 of this handbook (multiple trustees (cotrustees)) (discussing in part when a cotrustee is entitled to reimbursement from the trust estate for the costs of separate representation).

¹¹⁷Rest. (Third) of Trusts §88 cmt. b; 3 Scott & Ascher §18.1.2.4.

¹¹⁸4 Scott & Ascher §22.2.2 (Separable Transactions).

¹¹⁹Rest. (Third) of Trusts §88 cmt. b; 3 Scott & Ascher §18.1.2.4. *See also* 3 Scott & Ascher §18.1.2.2 (Repairs and Improvements); 4 Scott & Ascher §22.1 (Expenses Properly Incurred).

¹²⁰*See generally* Bogert §718; Hollaway v. Edwards, 68 Cal. App. 4th Supp. 94, 80 Cal. Rptr. 2d 166 (1998) (awarding trustee attorneys' fees incurred in defending a removal action brought by the cotrustee); Franzen v. Norwest Bank Colo., 955 P.2d 1018 (Colo. 1998) (holding that trustee was entitled to reimbursement of attorney's fees incurred in litigation initiated by beneficiary's agent seeking revocation of trust).

¹²¹3 Scott & Ascher §18.1.2.6.

¹²²3 Scott & Ascher §18.1.2.6 (When Trustee Improperly Incurs Expense).

¹²³Kemble v. Hicks [1999] P.L.R. 287 (Eng.).

¹²⁴Charities Act 1993 §73F (England).

¹²⁵UTC §816(11) would have as default law that a trustee may "ensure the trustee, the trustee's agents, and the beneficiaries against liability arising from the administration of the trust." This would include liability for breaches of trust. *See* UTC §816(11) cmt. Unstated though perhaps implied is that the cost of fiduciary-liability insurance may be borne by the trust estate rather than the trustee personally. Still, the exercise of any power to charge the trust estate with the cost of fiduciary liability insurance is subject to the myriad fiduciary duties that are the subject of Chapter 6 of this handbook. *See* UTC §815(b). *See generally* Bogert §599.

¹²⁶Rest. (Second) of Trusts §245 cmt. d. *See also* Lewin ¶21-25 (England); 3 Scott & Ascher §18.1.2.6 (When Trustee Improperly Incurs Expense) (U.S.); 4 Scott & Ascher §22.2.1 (Benefit to Trust Estate) (U.S.).

¹²⁷Rest. (Third) of Trusts §88 cmt. a.

¹²⁸UTC §709(a)(2). *See generally* 4 Scott & Ascher §22.2.1 (Benefit to Trust Estate).

“Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefited the trust.”¹²⁹ Also, if a trustee improperly incurs an expense the benefit of which the beneficiary can accept or reject, the trustee is not entitled to indemnity if the right of rejection is, in fact, exercised. Thus, if a trustee improperly purchases with his own funds an automobile for the trust, the trustee is not entitled to indemnity if the beneficiary declines to ratify the transaction. The trustee, however, may keep the automobile for himself.

If a trustee properly enters into a contract on behalf of the trust and thereby incurs personal liability, he is entitled to be indemnified from the trust estate.¹³⁰ “Although the trustee breaks a contract properly made by him in the administration of the trust and thereby incurs a liability for breach of contract, he is entitled to indemnity to the extent to which he thereby benefited the trust estate.”¹³¹ Also, “[w]here a tort to a third person results from the negligence of an agent or servant properly employed by the trustee in the administration of the trust, and the trustee is not personally at fault, although the trustee is liable to the third person, he is entitled to indemnity out of the trust estate.”¹³²

If the trustee in breach of trust satisfies from the trust estate a liability to a third person that was incurred in the course of administering the trust, the third person would not be obliged to make the trust estate whole if the third person were a BFP.¹³³ To qualify as a BFP, the third person would have to have given full value, taken legal title to the payment, and been reasonably unaware of the breach.¹³⁴ The beneficiary always has recourse against the wrongdoing trustee personally, whether or not the third person is a BFP:

The Chancellors, when appealed to by the beneficiaries, felt that there was no reason in equity or conscience why a person who had acquired property in good faith and for value should be disturbed. They therefore kept their hands off. As between the two innocent parties, they let the loss that resulted from the breach of trust lie where it fell. They left the beneficiaries to seek redress against the wrongdoing trustee.¹³⁵

¹²⁹UTC §709 cmt. “Appropriate grounds ... [for delay or even denying reimbursement for expenses which benefited the trust]... include: (a) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the expense has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing the purposes of the trust.” UTC §709 cmt.

¹³⁰4 Scott & Ascher §22.3 (Contractual Liability). *See generally* §7.3.1 of this handbook (trustee’s contractual liability as the legal owner to nonbeneficiaries).

¹³¹Rest. (Second) of Trusts §246 cmt. c. “Thus, if the trustee in the proper exercise of a power makes a contract to sell trust property, and subsequently receives a better offer for the property and sells it, he is entitled to indemnity for his liability on the contract to the extent which the breach of contract resulted in his obtaining a higher price.” Rest. (Second) of Trusts §246 cmt. c.

¹³²Rest. (Second) of Trusts §247 cmt. b. *See generally* 4 Scott & Ascher §22.4 (Tort Liability). *See generally* §7.3.3 of this handbook (trustee’s liability as legal owner in tort to nonbeneficiaries).

¹³³*See generally* §5.4.2 of this handbook (rights of the beneficiary as against BFPs and other transferees of the underlying trust property), 8.3.2 of this handbook (bona fide purchase for value of trust property, specifically what constitutes notice that a transfer is in breach of trust?), and §8.15.63 of this handbook (doctrine of bona fide purchase; the BFP). *See also* §8.3.6 of this handbook (negotiable instruments and the duty of third parties to inquire into the trustee’s authority). For a comparison of the BFP, a creature of equity, with the holder in due course, a creature of law, *see* §8.15.68 of this handbook (holders in due course in the trust context).

¹³⁴5 Scott & Ascher §29.2.7 (Debts Incurred During Trust Administration).

¹³⁵5 Scott & Ascher §29.1.1 (Bona Fide Purchaser).
