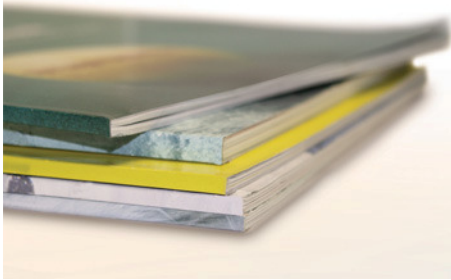


Trustee De Son Tort Explained

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In the recent judgment in **Cunningham v. Cunningham & Others** [2009] JRC 124, the court considered the concept of a trustee de son tort and whether an agent, appointed by a duly constituted trustee, could itself be a trustee de son tort in circumstances where the agent's actions caused loss to the trust fund.

The plaintiff and the First Defendant (two brothers) were beneficiaries under a Jersey trust who became involved in a litigious dispute. The First Defendant, who was also the settlor and protector of the trust, exercised his power to appoint/remove trustees in order to remove the existing trustee and replace it with the Second Defendant ("Sovereign International"), which then excluded the plaintiff as a beneficiary.

The plaintiff sought to join Sovereign Gibraltar (an associated company of Sovereign International) as a defendant on the basis that it had done the work on behalf of Sovereign International and had therefore acted as a trustee de son tort.

Commonplace in the Trust Industry

It was argued on behalf of both Sovereign International and Sovereign Gibraltar that it was commonplace in the trust industry for the administration of a trust to be carried out largely by another company (other than the trustee) within the same group of companies as the corporate trustee. It

was submitted that it would cause considerable surprise in the industry if such a company was to find itself designated a trustee de son tort. It was further submitted that because it was common practice it was important that an authoritative decision be given as to whether such an administrative company should be treated as a trustee de son tort.

Administrative Company

The court considered various formulations as to what constitutes a trustee de son tort.

It quoted from Lewin on Trusts (18th Edition) which says at 42-74:-

"If a person by mistake or otherwise assumes the character of trustee when it does not really belong to him, he becomes a trustee de son tort and he may be called to account by the beneficiaries for the money he has received under the colour of the trust. A trustee de son tort closely resembles an express trustee. The principle is that a person who assumes an office ought not to be in a better position than if he were what he pretends; he is accountable as if he had the authority which he has assumed. While it is essential, if a person is to become a trustee de son tort, that he consciously takes the office of trustee, it does not matter whether he knows all the trusts or the extent of his powers."

The court also quoted from Thomas and Hudson, The Law on Trusts which says at para 30.03:-

“... trustees de son tort are not expressly declared by the settlor to be trustees but rather are deemed to be constructive trustees by operation of law, due to their meddling with trust affairs, they are therefore constructive trustees. Smith LJ [in Mara v. Browne [1896] 1 Ch 199 at 209] stated the nature of this form of constructive trust in the following way:

“...if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may therefore make himself what is called in law, trustee of his own wrong – i.e. trustee de son tort, or, as it is also termed, a constructive trustee.”

The court found that of critical importance in the various formulations was that a person who intermeddles in a trust must be one “... not having authority from a trustee” or who “takes it upon himself” to act as a trustee.

Authorised Delegate

In the court’s judgment, an agent or delegate acting with the authority of a duly appointed trustee in not committing any ‘wrong’ by acting within the scope of his delegation and is not ‘intermeddling’ in the trust so as to constitute him a trustee de son tort. In such circumstances the agent or delegate is acting in the capacity in which he has been authorised to act, and it is the trustee who has delegated who is acting as trustee of the trust.

Underlying Rationale

The court explained that the underlying rationale for imposing liability on a trustee de son tort is that if there is no trustee, and a person intermeddles as if they were a trustee, the only person against whom the beneficiaries would have a remedy would be the intermeddler and so he should be liable as if he were a trustee. In circumstances where, as in **Cunningham**, there is a trustee then the beneficiaries have a remedy against the trustee, who in turn may or may not have a remedy against their agent. Thus, there would be no justification in such circumstances in constituting the agent a trustee de son tort.

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