



BUSINESS TRUSTS: CAN THEY SUE OR BE SUED? THE CURIOUS CASE OF SUNRISE REIT

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1. Overview

In a peculiar development in early 2007 — at least from the perspective of estates and trust law — two applications were brought before the Commercial List of the Ontario Superior Court of Justice in which business trusts were named as parties in their own right. In the first case, *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*,¹ two business trusts were named as respondents. In a subsequent application, these same trusts were named as applicants.² Have business trusts acquired juristic personality so that they can sue and be sued? Have the Rules of Civil Procedure been relaxed for business trusts? This article examines the questions raised by these two recent “Sunrise REIT” cases³ to determine: (i) whether rule 9.01(1) of the Rules of Civil Procedure, which addresses joinder issues in trust litigation, continues to apply to business trusts; and (ii) whether a new rule should be fashioned to permit business trusts to sue and be sued.

2. Rule 9: A Refresher

For those unaccustomed to the estates and trusts practice, a rules refresher might be in order. Historically, beneficiaries were required to be joined in proceedings involving trust property.⁴ However, rule

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1. 2007 CarswellOnt 1704, 29 B.L.R. (4th) 292 (S.C.J.) *per* Peppall J., *affd* 222 O.A.C. 102, 2007 CarswellOnt 1705, 85 O.R. (3d) 254 (C.A.) (*Sunrise No. 1*).
2. *Sunrise Living Real Estate Investment Trust (Re)* (unreported, March 23, 2007, Ont. S.C.J. (Commercial List), Court File No. 07-CL-6098) (*Sunrise No. 2*).
3. The author was formerly a litigation associate with Stikeman Elliott LLP. Although practicing with that firm at the time of *Sunrise No. 1*, he took no part in those proceedings. The views in this article do not purport to represent those of Stikeman Elliott LLP.
4. *Francis v. Harrison* (1889), 43 Ch. D. 183 at pp. 183 to 184 *per* North J.

9.01(1) of the Rules of Civil Procedure provides that a proceeding (an action or application) may be brought by or against a trustee as representing a trust and its beneficiaries without naming the beneficiaries as parties.⁵ The purpose of rule 9.01(1) and its predecessors⁶ was to deem the trustee to be a representative of the beneficiaries' interests so that beneficiaries need not be named as plaintiffs or defendants, subject to certain exceptions set out in rule 9.01(2) where there is presumed to be some adversity of interest.

3. The Sunrise REIT Cases

In February 2007, Ventas Inc. and two numbered companies (collectively, the Ventas Parties) commenced a proceeding against Sunrise Senior Living Real Estate Investment Trust (Sunrise REIT), Sunrise REIT Trust (the Subtrust), Sunrise REIT GP, Inc., Sunrise Senior Living Inc., and Health Care Property Investors, Inc. (collectively, the Sunrise Parties).⁷ The Ventas Parties and the Sunrise Parties had entered into an agreement of purchase and sale (the Ventas Purchase Agreement) following a strategic sale process that was commenced in September 2006. During the strategic sale process, Ventas Inc. and Health Care Property Investors, Inc. (HCPI), among others, entered into confidentiality agreements with Sunrise REIT. The confidentiality agreement with HCPI contained a standstill provision that prohibited HCPI from making an offer for the assets of the Sunrise Parties without the consent of Sunrise REIT. After the Ventas Parties submitted the successful bid and entered into the purchase and sale agreement, HCPI came back with a topping bid with a premium of 20% over the Ventas Parties' offer price. The Ventas Parties took the position that their agreement with the Sunrise Parties prohibited the Sunrise Parties from dealing with HCPI and that the Sunrise Parties were required to enforce the HCPI standstill provisions of the HCPI confidentiality agreement.

According to the Management Information Circular (the Circular), dated March 6, 2007, and issued in connection with the bid, Sunrise REIT was "an unincorporated open ended real estate investment trust established under the laws of the Province of

5. R.R.O. 1990, Reg. 194.

6. See Rules of Practice and Procedure, R.R.O. 1980, Reg. 540, rule 74(1) and the history of the rule in G.A. Gale, *Holmested & Gale on the Judicature Act of Ontario and Rules of Practice*, Vol. 2 (Toronto: Carswell, 1983), r. 74, §1, p. 913.

7. *Sunrise No. 1*, *supra*, footnote 1.

Ontario, Canada”.⁸ The Circular also stated that the Subtrust was “a trust established under the laws of Ontario, Canada”.⁹ However, as is common among contracts involving business trusts, the Ventas Purchase Agreement was expressed to be an agreement between the Ventas Parties and the Sunrise Parties and drafted in the same manner as one would draft a commercial agreement between corporate entities. The Ventas Purchase Agreement was signed by the Chief Executive Officer of each of the Sunrise Parties on behalf of each trust and corporation. The trustees of the Sunrise REIT and the Subtrust did not sign the Ventas Purchase Agreement, nor did the Ventas Purchase Agreement state that the CEO was signing as agent of the trustees of the trust.

The issue of the capacity of Sunrise REIT and the Subtrust to be sued by the Ventas Parties and the requirements of Rule 9 were not commented upon by the applications judge or the Court of Appeal. Of course, it would have been technical in the extreme for anyone to have objected to the form of proceeding. However, there was an interesting sequel. When an amended bid from the Ventas Parties ultimately prevailed, the Sunrise Parties brought a separate application under the *Bulk Sales Act*¹⁰ for an exemption from the application of that statute to the transaction. Sunrise REIT and the Subtrust commenced the application in their own names rather than the names of one or all of the trustees. The endorsement was perfunctory and the issue of the capacity of Sunrise REIT and the Subtrust to bring that application does not appear to have arisen.¹¹

4. The Nature of the Trust

It is trite law that a trust does not have personality at common law or equity. Rather a trust is at its most fundamental level a category of equitable obligation.¹² It is a relationship between a natural or juristic person who is the legal holder of property and those to whom that legal owner owes equitable obligations in respect of that property — the beneficiaries. The flexibility and continuously evolving nature of the trust as an equitable concept is such that even the *Trustee Act*,¹³

8. Circular, p. 1.

9. Circular, p. C-4.

10. R.S.O. 1990, c. B.14.

11. *Sunrise No. 2*, *supra*, footnote 2.

12. *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at pp. 70-71, 1992 CarswellOnt 84 *per* La Forest J.

13. R.S.O. 1990, c. T.23.

which is the principal source of statutory regulation of trusts in Ontario, does not attempt to provide a comprehensive definition of a trust.¹⁴ However, the following convenient definition of a trust has been approved by courts in Ontario.¹⁵

A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and anyone of whom may enforce the obligation.¹⁶

The trustee is the legal owner of the trust property. The trustee is not, in his or her relations with others, acting as an agent of the beneficiaries. On the contrary, the trustee contracts directly with others and is personally liable for debts incurred in respect of the administration of the trust property, except that where they have been properly incurred, the trustee has a right to be indemnified out of the trust property.¹⁷

There is some debate whether it is proper to speak of the beneficiary as having “beneficial ownership”.¹⁸ When a beneficiary brings an action in respect of a trust, the beneficiary ordinarily sues not in respect of a property right but to compel the trustee to perform an equitable obligation in respect of the trust property. That is, the beneficiary has an *in personam* remedy against the trustee. There are exceptions, of course, particularly where the trustee has wrongfully disposed of trust property. In these cases, the beneficiary might assert

14. *Ibid.*, s. 1.

15. *Ford v. Laidlaw Carriers Inc.* (1993), 1 E.T.R. (2d) 117 at p. 188, 1993 CarswellOnt 552, 50 C.C.E.L. 165 (Gen. Div.) per Granger J., varied on other grounds 1994 CarswellOnt 1807, 12 C.C.P.B. 179 (C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 34. Also *Chiefswood Christian Fellowship v. Jacobs*, 2001 CarswellOnt 1864 at para. 6 (S.C.J.) per Reilly J.; *Ont. Worldair Ltd. (Re)* (1983), 45 C.B.R. (N.S.) 116 at pp. 119-20, 1983 CarswellOnt 162 (S.C.) per Saunders J.

16. David J. Hayton and Arthur Underhill, *Underhill's Law Relating to Trusts & Trustees*, 13th ed. (London: Butterworths, 1979), p. 1. See discussion in Donovan Waters, Mark Gillen and Lionel Smith, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Canada Ltd., 2005), pp. 3 to 5 (Waters).

17. Waters, *ibid.*, p. 53 and p. 1149.

18. Catherine Brown, “Symposium: Beneficial Ownership and the Income Tax Act” (2003), 51 Cdn. Tax J. 401 at pp. 415-23; D.W.M. Waters, “The Nature of the Trust Beneficiary's Interest” (1967), 45 Can. Bar Rev. 219, cited in *Williams v. Canada* (2005), 18 E.T.R. (3d) 239 at p. 246, [2005] 4 C.T.C. 2499, 2005 D.T.C. 1228. See the useful case comment on *Williams* by Sheila M. Crummev, “Judicial Light Shed on the Meaning of ‘Change in Beneficial Ownership’” (2006), 25 E.T.P.J. 311 at p. 313.

a claim for following or tracing so as to assert a type of *in rem* remedy over the actual trust property.¹⁹

What emerges from the foregoing is that a trust has no personality in the following sense: A trust does not exist as a person (natural or juristic) separate and apart from the trustee and the beneficiaries. To put it bluntly, the trust property or trust obligation cannot sue or be sued. This is, at least, the situation at common law and equity. However, doubt, or at least confusion, with respect to the nature of trusts can arise because of the creeping recognition of trusts as persons in various statutes. This topic is discussed in the next section.

5. Trusts as Persons by Statutory Inclusion

A number of Ontario statutes include “trust” in the definition of a “person” for the purpose of interpreting the provisions of that particular statute.²⁰ These include the *Securities Act*,²¹ the *Business Corporations Act*,²² the *Business Names Act*,²³ the *Small Business Development Corporations Act*,²⁴ the *Community Small Business Investment Funds Act*,²⁵ the *Commodity Futures Act*,²⁶ the *Limited Partnerships Act*,²⁷ and the *Residential Tenancies Act, 2006*.²⁸ The *Transboundary Pollution Reciprocal Access Act* specifies that “business” trusts are included in the definition of “person” for the purposes of that statute.²⁹ The recent *Securities Transfer Act, 2006*, specifies that trusts *and* “business” trusts are persons.³⁰

Sunrise REIT was a reporting issuer under the *Securities Act*. In 1978 a “trust” became a “person” for the purposes of the *Securities Act*.³¹ However, the *Securities Act* does not modify the substance of a

19. Waters, *supra*, footnote 16, at pp. 1268 to 1269.

20. Although this paper is limited to an analysis of the position of trusts under the laws of Ontario, it should be noted that amendments not yet in force will modify the definition of “company” in the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, to include “income trust”. See S.C. 2005, c. 47, s. 124.

21. R.S.O. 1990, c. S.5, as amended (*Securities Act*).

22. R.S.O. 1990, c. B.16, s. 1

23. R.S.O. 1990, c. B.17, s. 1.

24. R.S.O. 1990, c. S.12, s. 1(1).

25. S.O. 1992, c. 18, s. 1(1).

26. R.S.O. 1990, c. C.20, s. 1(1).

27. R.S.O. 1990, c. L.16, s. 1

28. S.O. 2006, c. 17, s. 2(1)

29. R.S.O. 1990, c. T.18, s. 1.

30. S.O. 2006, c. 8, s. 1(1)

31. S.O. 1978, c. C.47, s. 1(1), para. 28 (1978 OSA).

trust or invest it with powers. A trust might become a reporting issuer but the *Securities Act* does not provide a trust with “the capacity and the rights, powers and privileges of a natural person” as the Ontario *Business Corporations Act* does for corporations.³²

Rather, the purpose of including trusts in the definition of “person” is limited to ensuring that the regulatory objectives of the *Securities Act* are met. A broadly inclusive definition of “person” makes sense given the remedial purposes of the *Securities Act*, which are to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in those markets.³³ Indeed, the Supreme Court of Canada has long held that definitions in the *Securities Act* should be “construed broadly” and “read in the context of the economic realities to which it is addressed”.³⁴ In the same way, the *Securities Act* included many relationships (both before and after the 1978 reforms) that are not recognized at common law or equity as having natural or juristic personality, such as unincorporated associations, unincorporated syndicates, and unincorporated organizations, in order to achieve its regulatory purposes.³⁵

The *Trust Beneficiaries' Liability Act, 2004*,³⁶ presented an opportunity to alter the substantive law governing business trusts. The purpose of that statute expressly limited the liabilities of beneficiaries “for any act, default, obligation or liability of the trust or any of its trustees” where the trust is (i) a reporting issuer under the *Securities Act* and (ii) is governed by the laws of Ontario. However, apart from limiting the liability of beneficiaries, the *Trust Beneficiaries' Liability Act, 2004* does little to alter to the substance of a trust.

All of the other Ontario statutes that include “trust” in the definition of a “person” are similarly restricted to the regulation of trusts and not to endowing them with any natural person-like powers. Although there is creeping recognition in legislation of trusts as persons for regulatory purposes, none of this has changed the nature of a trust. That is, it cannot be said that there is any endowment of trusts with juristic personality. This should not be surprising to the

32. R.S.O. 1990, c. B.16, s. 15.

33. *Ibid.*, s. 1.1.

34. *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. 112 at p. 127, 80 D.L.R. (3d) 529, 2 B.L.R. 212 *per de Grandpré J.*

35. *Securities Act.*, *supra*, footnote 21, s. 1(1), 1978 OSA, *supra*, footnote 31, s. 1(1), para. 12.

36. S.O. 2004, c. 29, Sch. A, s. 1(1).

trust practitioner, since recognition of a trust as a juristic person would mark a fundamental change in the nature of the trust.

6. But Can Trusts Sue or Be Sued? Should They?

Without status as a juristic person, a trust cannot sue or be sued as of right in the name of the trust. Absent leave of the court, the proper procedure is for the trustees to sue or be sued as representing the trust and its beneficiaries. The trust, *qua* trust, is in much the same quandary as the unincorporated association insofar as its status before the courts is concerned. An unincorporated association, having no legal existence apart from its members, cannot be sued in the name of the association.³⁷ A proceeding by or against an unincorporated association is a nullity³⁸ (not merely a procedural irregularity) and a proceeding by a plaintiff without capacity to be sued can be dismissed on a motion under rule 21.01(3)(b).³⁹ Indeed, the trust was once used to avoid this result by permitting the unincorporated association to give its property to one or more of the unincorporated association members to hold on trust, so that trustee(s) could maintain an action.⁴⁰ Absent the trust arrangement, the proper procedure is either to join all of the members or to obtain a representation order under Rule 12 of the Rules of Civil Procedure.⁴¹

Notwithstanding the precedent of the Sunrise REIT cases, the

37. *Robinson v. Adams*, [1925] 1 D.L.R. 359 at p. 362 (Ont. C.A.) *per* Latchford C.J.; *S. (J.R.) v. Glendinning* (2000), 49 C.P.C. (4th) 360 at pp. 369-71, 2000 CarswellOnt 3555 (S.C.J.) *per* Ross J.

38. W.B. Williston, Q.C. and R.J. Rolls, *The Law of Civil Procedure, Vol. 1* (Toronto: Butterworths, 1970), p. 207, citing *London Association for Protection of Trade v. Greenlands Ltd.*, [1916] 2 A.C. 15 at pp. 38 to 39 (H.L.) *per* Lord Parker of Waddington. Also see *Robinson v. Adams, ibid.*, at p. 362.

39. See, *e.g.*, *S. (J.R.) v. Glendinning, supra*, footnote 37.

40. Williston and Rolls, *supra*, footnote 38, at p. 210.

41. *National Life Assurance Co. of Canada v. Hucker* (2001), 6 C.P.C. (5th) 212 at pp. 214-15, 2001 CarswellOnt 1407 (Ont. Master) *per* Master McLeod. Rule 12.08 provides that “where numerous persons are members of an unincorporated association or trade union” the court may authorize one or more of them to bring an action. The test for leave requires the members to demonstrate that a class proceeding would be “an unduly expensive or inconvenient means for determining” the claims. Similarly, Rule 12.07 provides that “where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all”. Unlike Rule 12.08, the procedure is not limited to unincorporated associations and trade unions and no leave is required, although the court may make an order to the same effect.

Rules of Civil Procedure and case law are clear that a trust does not have the capacity to sue or be sued. Is reform needed? The nature of a business trust is qualitatively different from that of a non-business trust. Most business trusts, particularly reporting issuers under the jurisdiction of the *Securities Act*, have sophisticated trust deeds and governance structures. They have boards of trustees and operate much like corporations or even some limited partnerships. Trustees are elected. There are annual meetings of unitholders. All or substantially all of the working assets of the trust are held in corporate entities. With the enactment of the *Trust Beneficiaries' Liability Act, 2004*, the limitation of liability for business trusts that are reporting issuers makes those entities much more like corporations or limited partnerships.

Although it would be a radical change to suggest that trusts be endowed with juristic personality, it would be a modest extension of the Rules of Civil Procedure to permit business trusts, particularly those regulated as reporting issuers under the *Securities Act*, to sue and be sued. Precedent exists in Rule 8 of the Rules of Civil Procedure for partnerships and for sole proprietorships. Rule 8.01(1) permits a partnership to sue or be sued in the firm name. Rule 8.06(1) provides that an order against the partnership in the firm name can be enforced against the partnership assets. Similarly, rule 8.07(1) provides that an unincorporated sole proprietorship can sue or be sued in its business name. Rule 8.07(2) provides that rule 8.06(1) also applies to sole proprietorships. Therefore, an order against the sole proprietorship in the business name can be enforced against the assets of the business. In order to address the issue of personal liability, rule 8.06(2), which applies equally to partnerships and sole proprietorships, provides that where the partners or the sole proprietor is also joined in the proceeding, an order can be enforced against the personal assets of the partner or sole proprietor.

The provisions of Rule 8 have not created any great problems for partnerships, which, with the advent of limited partnerships and limited liability partnerships, come in many structures, some exceedingly complex. Nor has Rule 8 provided difficulty with respect to sole proprietorships. The rule has not changed the substantive law underlying partnerships or sole proprietorships. It does not change the substantive law governing the rights of third parties or the obligations to third parties. It is, in effect, a procedural short-hand that has been adopted for efficiency.

With a modicum of effort, these provisions could be modified to

apply to the business trust. Indeed, it would be quite straightforward to do so with respect to business trusts that are reporting issuers under the *Securities Act*. Beneficiaries of these trusts already enjoy limited liability. There is no purpose served by requiring that a proceeding be commenced in the name of the trustees. The *Business Names Act* can be extended to require that trusts register their business names in order to be able to maintain an action in the same way this applies to corporations, partnerships and sole proprietorships.⁴²

The provisions of the *Securities Act* provide a comprehensive system of public disclosure so that no defendant is misled as to the nature of the plaintiff business trust. Nor is there any reason to require that a plaintiff in proceeding against a business trust name the trustees as defendants any more than there is in the case of a partnership. Even where the trust is the only named party, the true parties underlying such an action would be the trustees at the time the cause of action accrued, just as partners are the true parties in the case of a partnership. The only instance where a requirement that proceedings be commenced against the trustees would serve any purpose is where a plaintiff seeks to enforce a judgment not only against the trust property, but also against the trustees. In the event the plaintiff wishes to seek such a remedy, the trustees could be joined, as is the case with proceedings against a partnership or a sole proprietorship.

7. Conclusion: A New Rule Should Be Considered

The creeping recognition of trusts as persons for regulatory purposes has not endowed trusts with a juristic personality to sue or be sued in their own right. The Rules of Civil Procedure continue to require that a trust sue or be sued in the name of the trustees. However, there seems to be little justification for the continuance of the prohibition of trusts *qua* trusts as parties, particularly the highly organized business trusts that are reporting issuers under the *Securities Act*. The following possible amendment to the Rules of Civil Procedure would be a practical solution for such trusts:

8.08 (1) In respect of a trust to which subsection 1(1) the *Trust Beneficiaries' Liability Act, 2004*, applies, a proceeding may be commenced by or against the trust using the business name of the trust.

(2) Rules 8.01 to 8.06 apply, with necessary modifications, to a proceeding by or against a trust using a business name, as though the

42. *Business Names Act, supra*, footnote 23, s. 7(1).

trustee or trustees were a partner or partners and the business name were the firm name of a partnership.

The amendment would not endow business trusts with juristic personality but would permit them to sue and be sued in the same manner as a partnership or sole proprietorship. A corresponding change could be made to rule 31.03(3) of the Rules of Civil Procedure to treat trustees in the same manner as a partnership or sole proprietorship for the purposes of discovery. Although the trust as a business vehicle might have declined from its previous status as the darling of the investment markets, we are probably only just beginning to see litigation and statutory arrangements before the courts. The time for amendment might yet be ripe.