

Trusts

- Settlor is the source of the property & legal title and create the trust by giving it to the trustee.
- For the settlor, the trust is a facility to make a gift (Rickett) which gives a legal structure for managing the property for the beneficiary on terms which the settlor chooses, with limitations on how beneficiaries access the property in the future. No longer limited to benefiting others by giving property, settlors can give property in a more structured way. Settlor can retain control and possible benefit over the trust in the future.
- Trustees receive property from the settlor on the basis they will make decisions for the benefit of the beneficiaries. They run the trust, distribute property and have control over property as given legal title. They can decide how property is utilised and who to exclude access to.
- Trustees have to act as a fiduciary owing a duty of care and loyalty to the beneficiary and also have to act according to the trust deed as specified by the settlor. Trustees cannot use the property for their own purposes.
- Once established, a settlor is theoretically no longer involved with the trust once they have transferred their legal title.
- Settlor can still be involved by becoming a self-declared trustee but can no longer exploit the property for themselves. Instead, they owe duties to beneficiaries and have to use the property for their benefit by exercising a standard of care.
- Settlor can also become the beneficiary after the property is transferred to someone else eg. property conveyancing, put money into lawyer's trust account. Still beneficiary's property in equity but the solicitor is the legal owner.
- Discretionary trust: trustee decides which beneficiary receives what according to trust deed. Distribution does not need to be equal and can accumulate money rather than distribute.
- Settlor cannot become both the trustee and beneficiary. Creates an alter-ego or sham trust. Eg. settlor creates a trust owing obligations to beneficiaries and is also both a trustee and beneficiary. This gives the settlor an opportunity to decide who receives the property if the trust does not give criteria for making a distribution. Doubtful whether settlor intended to create a trust as never intended to give effect to it and settlor was always going to remain the owner or the only person who the property was held for if owned by another trustee. The settlor decides what can be done with the property.
- Conceptual limitation on creating a trust – cannot owe obligations to yourself in that way but where only trustee and one of multiple no. of beneficiaries or no. of trustees holding property for you, that's ok.
- Trust triangle:
- Beneficiaries are the beneficial owners who hold equitable title.
- Settlor did not transfer the equitable title, as before the settlor created the trust to benefit others there was no equitable title.
- Settlor while still owners of the property only had a legal title and are the beneficial owner, can exclude others and exploit it however they want.
- Equitable title only occurs when a trust is declared and the settlor transfers the property to a trustee to hold on trust. The settlor has also transferred beneficial ownership to the beneficiary as the trustee can only use the property for the benefit of the beneficiary.
- Alasdair Hudson thinks the settlor transfers an equitable title.

Murrell v Hamilton

- Before entering into a relationship with Murrell, Hamilton establishes a trust over a house on land. Both Hamilton and Mirkin (his lawyer) were trustees Hamilton's family trust who held legal title over the house which was held for the benefit of beneficiaries which included Hamilton, children
- Ricketts: meaningless to say that the trust owned the property as sounds as if Hamilton owned the family trust, which is untrue as he only established a structure where he was a trustee with large degree of control but trustees have to act unanimously.
- Court held that it was a valid trust, which means the house cannot form part of the property pool used to pay Murrell under the Property Relationship regime. Under the regime, they had been in a defacto relationship of 8 years where the house forms part of a property pool which is divided 50/50
- Consequently, it was the trustees who owned the house, not Hamilton. Trustees owned it for the benefit of the beneficiaries who are the real owners with an equitable title or beneficial ownership. Trust is protective of beneficiary interests and the house cannot be shared 50/50 as if Hamilton owned it. Likewise, none of the beneficiaries in a discretionary trust can claim the house was their property.
- Constructive trust – Lankow v Rose:
 - (a) contributions, direct or indirect to the property in question;
 - (b) the expectation of an interest in the property;
 - (c) that such expectation is reasonable; and
 - (d) that the defendant should reasonably expect to yield the claimant an interest.
- In Vervoort, history of the doctrine of constructive trust before extension of the matrimonial property legislation to defacto couples, the equivalent of Murrell could have made a claim against Hamilton under constructive trust
- HC rejected constructive trust claim. An express trust imposes obligations on trustees to act unanimously as co-owners of the property for the beneficiaries, general principle of unanimity in trust law.
- HC found no unanimity as Murrell's constructive claim was for Trust property. Hamilton as one trustee may have given Murrell a reasonable expectation of an interest in the house because Hamilton acquiesces to the transfer of value. However, Mirkin as other trustee did not encourage a reasonable expectation of an interest.
- Mirkin's conscience was not bound to recognise property rights of Murrell to trust property. Only bound to express trust beneficiaries as he was not involved with building the house or with Murrell.
- CA: Murrell wins despite principle of unanimous trustee decision making. Hamilton left to his own devices as a builder signing contracts necessary for building materials and Mirkin ab jure trustee responsibilities to Hamilton. Hamilton's actions were binding on both trustees at least to contractual counterparties, hence it would be unconscionable for Hamilton to deny Murrell her claim on the basis that trustee unanimity was not satisfied.
- Court reasoned fundamental principle of trust law but in circumstances have to yield to fairness in an unusual fact situation. One trustee can bind another trustee's conscience.
- Hence trust property now subject to a constructive trust in favour of the claimant which prevents the trust from receiving an unjust enrichment and windfall for Murrell's work. Not depriving the trust of something they are entitled to by allowing the claim. Part of the value of the property which should not accrue to the trustees does not accrue to it.

- CA: Before Murrell moved in, it was an unfinished shell of a house which she turned into a modern house by adding value to it, which they later sold. Because of her contributions, there was a constructive trust over an express trust.
- Murrell does not receive half, she only receives what she had contributed i.e. 15% of the value and rental for a year despite. Hamilton never intending Murrell to have any interest in the property via express trust.

Ricketts: Express Trust - (excessive) instrumentalism in New Zealand trusts law?

- Cannot have a constructive trust over property already held under an express trust
- Trust law in NZ is instrumentalist and in a shambolic state
- Court trying to reach a desired result where a claimant has no claim to property relationship pool because of an express trust and the claimant has given value and had a reasonable expectation in the property. Courts should not overstep the line when it has already recognised an express trust.
- Courts are not giving effect to basic principles of trust law. Should not jettison fundamental principles of trust law, should find a different way of achieving the desired goal and give effect to the rule of law where the desired goal is inconsistent with a basic principle of the law
- Not the role of the courts to jettison what a trust is, role of the courts to uphold fundamental principles of law of obligations
- There is a longstanding history of principles and rules which tells us what the law of obligations are.
- Trustee unanimity is a “red herring” as a reason for why a court should not recognise a constructive trust over property held on an express trust.
- Not the real issue where the courts have destroyed the idea of an express trust. This is because under an express trust, the beneficiaries are the equitable or beneficial owners and the trustees have legal ownership where they can only use the property for the benefit of the beneficiaries. For the courts to compel the trustees to do things for third parties who are not the beneficiaries with property rights seems like taking away property from the express trust fiduciaries and giving it to others. This is not what trustees are meant to do because it is a likely breach of trust and they are “stealing” from the beneficiary to give to the third party.
- *Nemo dat* rule: a trustee cannot give to another what they do not have. “unthinkable in the equity jurisdiction.”
- If recognise a constructive trust over property already held under an express trust, issue of whether trustees are holding property on express trust for beneficiaries or because of their conduct hold property for third parties.
- “The... doctrine creates an internal incoherence.equity then, having created by [the express trust] a right to property... is invited to dismantle its own creation by redistributing rights to the property in a different way. ... Equity is forced into an internal battle – and that destabilises the very foundations of equity.”

Vevoort v Forrest

- Court's approach to trusts must "meet the reality of how property is owned in NZ"
- 1) No theft as claimant's claim depends on contributions to trust property. Beneficiaries of express trust have no claim in conscience to the increase in value from the contribution
- 2) Reality of NZ trust landscape justified recognizing constructive trust over an express trust. Trustees of family discretionary trusts are also beneficiaries and in control of the trust, hence must recognize that a trustee's ability to give third parties expectations in trust property in return for their contributions.
- Reality of trusts in NZ where despite trust law principle of unanimity, one trustee can do actions which give rise to a constructive trust. Otherwise, claimants who transferred value into a trust will be denied a remedy because only one trustee gave them an expectation of interest and the trust will be unjustly enriched while the other trustees' consciences are not bound. This is where one trustee does most things while the other trustees do little.
- Ricketts: instrumentalist reasoning, jettisoning basic principles of trust law where beneficiary property rights are undermined to uphold a desired goal. Conceptual objection as trustees cannot give away property which does not belong to them as trustees hold property for the beneficiary. "Robin Hood" law
- CA: following Murrell, reversing an unjust enrichment and windfall the trustees hold for the beneficiaries. The court is not taking property away from the beneficiaries or trustees but instead, recognizes trustees on behalf of beneficiaries are not entitled to keep the value that claimant has given them in the circumstances. Followed Lankow constructive trust as it transfers value back to the claimant. Can disregard basic principles of trust law due to the reality of how property is held.
- Reality of family discretionary trusts that trustees are also beneficiaries and in control of them. Common for the settlor as a beneficiary to retain some extent of control, which can give rise to expectations of interest on behalf of the claimant but do not have liability of ownership. Not a doctrinal response to Rickett as looks at bad consequences of trusts.
- Rickett: State has given up protecting private property in favour of instrumentalist objectives. Court's reasoning was instrumental because if they were too strict with trust law principles, then the claimant loses out despite giving value to the property.

- Doctrinal justification for a constructive trust over an existing express trust
- **Relativity of equitable titles**
- There can be multiple ownership interests over the same property
- Stevens: it is possible to have a priority dispute between competing trusts.
- Fox: “possible to create an indefinite number of equivalent equitable titles to the same item of property”
- Can challenge Rickett’s idea of trustees holding property for beneficiaries in express trusts and therefore cannot create a property right in third parties doctrinally.
- Normally the beneficiary who was the first in time has the best claim.
- There can be a competition between express trust beneficiaries as to who had the equitable property right first. Hence, the claimant contributing to the property generates a second equitable title over constructive trusts.
- Given the first in time prevails and the express trust beneficiaries were the first in time, their interests can be postponed for the interests constructive trust beneficiary because the person involved in the earlier interest has something which should yield to the later interest.
- A discretionary beneficiary may have encouraged the second interest eg. Hamilton or when one party has not given any value can have their interests postpone to the equitable interests of someone who has given value.
- CA: the value is limited to the extent of the interest the claimant has
- Mark: maybe Rickett has not identified a fundamental line and a legitimate doctrinal way of justifying what the CA did even though they did not undertake such an analysis
- Get a reminder and example of different kinds of trusts which can exist, express trust intentionally created by settlor vs constructive trust where court construes what you have done as led to a trust