EXPRESS TRUSTS.

Three certainties: intention, object, subject matter.

Intention: settlor must have intended to create binding obligations.
Objects: enforceability – those who can benefit must be clear.
Subject matter: enforceability – must be able to ascertain which of the trustees' rights and interests are burdened by the trust.

INTENTION.

- Declarative Act
- Written act – c.f. *Korda v AET*
- impute / infer – *Paul v Constance*
    - Snell's: trust can be created without using word 'trust' – substance & effect of words.

This is the most important certainty. Objects & subject matter are more about enforceability – whereas intention is what legitimises the trust: settlor giving away her property, what does she want to do with it? Arguably, if there is a clear intention to do something, we should be able to satisfy the other two requirements.

What did the settlor do (not 'what did the settler intent to do').
Byrnes v Kindle: the expressed intention is to be found in the answer "what is the meaning of what the parties have said", not "what did the parties mean to say".
Objective interpretation but in light of all circumstances.

Paul v Constance 1976

inference – objective interpretation but in light of all the circumstances.

- "money is as much yours as mine"
- put joint bingo winnings in, one withdrawal they shared
- P's name could not be on the bank account as unmarried
- simple laypeople, would not know what was required

Was the $ held on trust for P?
Held that the words, combined with evidence they used the account together sufficient to make finding of intention.

- Mr C separates from Mrs C, takes up with P
- Mr C & P not marries, de facto
- Mr C gets an injury pay-out – puts into bank account
- Only Mr C name on account, cannot put P on as unmarries
- Mr C says: "money is as much yours as is mine"
- paid joint bingo winnings into account
- one withdrawal which split between them
- Mr C dies, no will, Mrs C tries to claim $

Judgment –
Words have to show imperative obligation. There is a historical distinction between moral obligation and holding something on trust.

- BUT cannot impose "stilted lawyers language" on unsophisticated people. i.e. most do not understand subtleties of equity.
- *Jones v Lock* – Jones put cheque into hands of baby
    - Existence of imperfect gift does not mean can infer the existence of a trust. must be a moral obligation.
- "Question is therefore whether in **all** the circumstances, the use of those words on numerous occasions as between the deceased and the plaintiff constituted an express declaration of trust"

Korda v AET 2015

need for clear expression in establishing a trust

Objective intention does not depend on the words of the deed but on the meaning of what the parties said in all the circumstances. However, here, the circumstances do not cause us to reach another conclusion that what was on the fact of the deed:
Statutory framework did not mandate trusteeship; just because would protect investor's monies does not mean can find; 1984 prospectus does not form part of the K; just because relationship consistent with being a trust does not mean there is a trust; tripartite agreement and the required separation of funds were statutory requirements; trusts can be flexible but not this flexible.

Was there an intention within the contractual matrix for F/MCo to be acting as a trustee (alongside AET) for the monies of the investors?
Held that the documents constituting the investment scheme – considered separately or together – did not indicate an intention for F/MCo to hold the timber $ on trust for the investors.

- Investors investing in wood
- Investments finance F Co's management of pine plantation. M Co = cuts & processes.
- Investors get covenants = rateable share of the net proceeds
- statutory scheme required a trustee – AET
- Trust deed – no provision that F Co to act as trustees
    - F Co - Settlor
    - AET - Trustee
    - Investors – beneficiaries
- Tripartite agreement –
    - M Co undertakes to do work, deducts expenses
    - F Co gets rest, deducts profit
    - AET receives rest to distribute according to the trust deed
- F/M Co failing, ANZ call in receivers – Korda
- AET: proceeds of the tree & land sales from March 2012 held on express trust for investors

Arguments for there being a trust –

Statutory framework: relevant documents were required under the division dealing with interests ($$ required to be kept in a separate pool. (this was accepted by the TJ and CA).

- HCA rejects: obligations of management company under the legislation were in covenant, not trust.
- "regulating framework was capable of accommodating a variety of interests and arrangements, but it did not mandate any trusteeship on the part of F/M co"

Legislative purpose: there was a legislative purpose in protecting investor's monies.

- HCA accepts but just because a finding of trust would best protect the interest, does not mean we can just find one.

1984 prospectus: referred to the investors gaining an "interest" = property right.

- HCA rejects: firstly, not part of the K, i.e. does not define rights and obligations of the parties.
    - this differs from the CA who considered that the assurances in the prospectus formed part of the K (rights & obligations).
- To be sure, prospectus can go to context but "there is no reason to suppose that the concept of interest" as used in the prospectus, which was a marketing document, was to be understood as referring to a proprietary interest in land or trees.

Tripartite agreement: tripartite agreement required F/M Co to deal with the funds as separate – at no time, were they to deal with them as their own.

- HCA rejects: merely obligations under the statutory regime

Nature of the transaction & relationship: TJ considered the relationship "highly suggestive" of a trust, finding trustee consistent with the obligations contained in the relevant documents.

- HCA: just because an interpretation is not inconsistent with a finding, does not mean that an interpretation is therefore consistent.

Innate flexibility of trusts?

- HCA rejects: "to eschew an historical reluctance is one thing. to construct intention out of straws is quite another".

Ultimately, contextual & textual arguments fail to override the fact that on the trust deed, F/M Co were not listed as trustees' and AET was.

OBJECTS.

Who is to benefit from the trust? The court must know with sufficient certainty as to the beneficiaries so they can police the acts of trustee in acting ultra vires / fraud on a power; and if need be, so they can execute the trust. If it is unclear, neither the Court nor the trustee can enforce.

- *Morice:* "there can be no trust … for an incontestable power of disposition would be ownership. A trust must have a definite object"

Historically, all trusts required a COMPLETE LIST of objects. However, as discretionary trusts became increasingly utilised, a more generous / less stringent approach began to gain favour. *Re Baden's (No 1)* considered that only conceptual certainty was needed – i.e. a class of beneficiary sufficient, do not need to produce a complete list.

Possible uncertainty.

Conceptual uncertainty: do not know the class of persons as the concept is uncertain. DESCRIPTION OF CLASS.

- e.g. friends, interesting VUW faculty members.

evidential uncertainty: know what the concept is but is difficult to determine whether a particular individual falls into that class (in the abstract). DESCRIPTION OF INDIVIUAL.

- e.g. relatives of X; former colleagues
    - discretionary trust will not fail because of this unless it is "hopelessly wide": class is too wide to be **administratively unworkable** – trustees cannot pick out individuals from within that class.
    - *Baden's (No 1): "all the residents of greater London".*
    - if it a mere power, however, this is less of a concern.
    - MB: if settlor wants to make a broad trust & confer such general powers to trustee, why stop them?

What is the power?

fixed trust – closed list: evidential & conceptual certainty.

- entitlements of the beneficiaries are fixed, trustee does not have the power or the duty to choose who the beneficiary is, or how much property they are going to get.
- problem usually comes when there is a class of people identified – need to know how many in order to get right 'share' to each person.

mere / personal powers – conceptual.

- a power to vest (give) property to a beneficiary but the person given the power is under no obligation to exercise the power.
- required to consider exercising the power from time to time, but never has to actually exercise it
- powers are PERMISSIVE. Trustee is empowered but not obligated.
- *Re Gulbenhian:* "is or is not test".

discretionary (trust) powers – conceptual.

- a power to distribute which must be exercised – thus, the main difference to a personal power is COMPULSION.
- *Baden's (No 1):* can it be said with certainty that any given individual is, or is not, a member of the class?
    - point of certainty of object is to police / enforce. Settlor, in a discretionary trust, does not intend equal distribution, intends distribution is discretionary. Therefore would be "paradoxical" to require closed list.
    - However, what conceptual certainty means / allows in a discretionary trust is possibly stretched further by *Baden's No 2.*

McPhail v Doulton (Re Baden's Trust) (No 1)

establishes conceptual certainty sufficient for discretionary trusts.

Procedural: will a trust deed that confers the trustees discretionary powers (duties of distribution) to beneficiaries defined as a wide class of persons be valid despite there being no closed list of objects?
Held that so long as any given claimant can clearly be determined to be a beneficiary, a trust will be valid.

- B executed a deed settling a trust for the benefit for the staff of Matthew Hall & Co Ltd, their relatives and dependents.
    - employees / ex-officers / ex-employees
    - relatives / dependants of any such person

(1) Whether the provision constituted a trust or power?

In discretionary trusts, this distinction is narrow & artificial: unsatisfactory that the entire validity of disposition should depend on such delicate shading.

- power of distribution coupled with a trust to dispose of the undistributed surplus; OR
- trust for distribution with a power to withhold a portion & accumulate OR otherwise dispose of it.

However, there is a clearly a trust power here:

- cl 9(a) mandatory language – "shall"
- power of selection = trust of distribution

(2) is the existing test for validity right in law?

For a trustee in a DT, a complete list of names would tell him little that he needs to know. Differences there are between trust powers & powers but such differences are not so great to require such different standards. The main reason for the closed list test is the principle of equal division.

- paradoxical to require that in DT – "the last thing the settlor ever intended: equal division among all probably would produce a result beneficial to none"
- equity is flexible, adapts to circumstancs as they arise.
- assimilation of the validity test does not involve the complete assimilation of trust powers with powers. PC emphasises important to maintain distinction.
    - fiduciary / mere personal: Court will not compel its exercise. only intervene if trustees exceed or exercise irrationally.
    - trust: Court will compel exercise – appoint new trustees OR direct distribution.

There, remains, however, a concept of administrative unworkability.

- this is when the meaning of the words is clear
- but the definition is so hopelessly wide, that it cannot be executed – "all residents of greater London".
    - For what it is worth, Wilberforce does not think this is such a case.

McPhail v Doulton (Re Baden's Trust) (No 2)

substantive: are relatives / dependents conceptually certain?

Sachs LJ:

- a practical enquiry of common sense
- Court does not need to be able to figure out whether someone is not within the relevant class (as well as having to figure out if someone is within it).
    - "once class of persons conceptually certain it them becomes a question of fact to be determined regarding whether a specific individual falls into it"
- **not required to give an exhaustive definition**
    - dependents: ordinary necessaries of life for a person of that class and position in life, wholly or partly dependent on another
        - MB: could give countless definitions to this, thinks it is uncertain.
    - relatives: trace legal descent from a common ancestor. does not matter that hypothetically could be anyone if go far back enough as the requirement of proof ensures not too wide – only provable within certain evidential parametres.
        - MB: isn't this conceptual uncertainty? Isn't whole point of conceptual certainty a definition of class. Feels like Sachs is saying here – even if conceptual uncertainty, contained by evidence and who is coming forward.

Megaw LJ:

- ordinary, well-understood words
- The Court does not need to know whether any given individual is not a member of the class (i.e. certainty X is not a relative) – that is requiring a closed list. Conceptual certainty does not require you to say "X is outside the list", merely "it is not proven whether X is in or out" – therefore, X is not in. MARGINS always exist.
- Test will be satisfied if a **substantial number of objects can be identified as falling within the trust** even if a substantial number of other people do not.
    - substantial number is a question of common sense, degree in relation to the particular facts
    - language can be vague, we will always have cases at the margins but that does not have to mean void.
    - those at the margins / those that are not certain, we just don't give too. i.e. does not matter whether we know someone does not fall into the facts, sufficient to say they have not proven.

What does conceptual uncertainty look like?

Re Becksbessinger – "to benefit the interests [the deceased] had, particularly in Christchurch"

- Tipping: can sufficient certainty be given to "interests which [the deceased] has" = conceptually uncertain.
    - "If the class is conceptually uncertain the disposition is invalid. If it is conceptually certain but poses evidential difficulties it is not invalid. It has always been the law that in those circumstances, given conceptual certainty,

evidential problems of determining whether a particular person does or does not qualify will not defeat the gift. They may defeat the particular claim but not the gift itself."

Crawford v Phillips 2018.

Intention / objects: ambiguous trust deed.

(1) whether the clauses created a trust or merely conferred a personal power – intention

Held that K had intention to create a trust as a matter of construction, clear that when key clauses were considered together there were mandatory trust obligations as opposed to mere gift.

(2) whether the trust then failed for lack of certainty of objects?

Held that there is however, uncertainty in relation to that happens after the management interest terminates: the words used are so vague that it is impossible to discern a conceptually certain person or group of persons who may benefit.

Interpreting the will –
Mandatory obligations
More than one person listed
Requirement to dispose after the main interest had vested
Professional context – exoneration of will / pay for any liability out of the trust fund
no gift over – indicated he wanted them to distribute all proceeds. Did not contemplate a non-exercise of the power.

Objects –
no reference to who could benefit.
What if it was made clear that C&W could not benefit? would that be enough?
MB: admin unworkability – but why not if that is what settlor wants.

- K Phillips buys a farm
- Crawford manages farm – workers, grazing, maintenance, repair.
- K Phillips falls out with this brother (Y) – does not want Y to get any property
- K creates will that will set up trust on his death – C & Wells (lawyer) trustees
    - cl 3: all property left to C&W, to **permit** Crawford to continue to manage farm as he always had (use, occupy & maintain)
    - cl 4: dispose of property when Crawford no longer wants to work / dies
    - cl 5: C&W to pay all debts & admin expenses then dispose of the rest in a manner they deem appropriate
- Crawford = executor, trustee & has 'management interest' – wife of Y attempts to sue.

(1) intention: trustee vs donee

Matter of construction is when key clauses are considered together to put together the meaning in context.

cl 5 sets out mandatory trust obligations –

- trustees obliged to act to pay out all debts & expenses

Appointment of more than one trustee & executor (C&W) prevented C&W from acting as mere donees of the farm.

- usual practice when intending them to be trustees – **if only one, easier to say donee.**
- if had intended to be simple donees, will would have just said so. There would have been no need for a management interest.

cl 4 directed the trustees to dispose of the farm **after** determination of the management interest.

- survival of the trust post determining the main interest more indicative of a trust

cl 6 exonerated the wells from liability, **cl 7** gave any executor / trustee the right to payment of professional charges

- will's role purely professional = trust. Whereas if the will was more beneficial, that would indicate donee.

Absence of a **gift-over** indicated that phillips intended for C&W as trustees, distribute proceeds.

- a gift-over shows that the optional nature of the power, indicating that it is not a trust. This is because the settlor contemplated the non-exercise of the power.

= trust created for the disposal of the farm and distribution of the proceeds.

(2) certainty of object: who could the farm / proceeds be given too.

There is a clear uncertainty in what happens after that management interest terminates.

Cl 4 & 5 create trusts but do not specify with any attempt those who may benefit –

- timing of disposal & distribution. (MB: this not an objects issue, this is a perpetuities issue)
- unclear whether C or W are able to benefit, or whether their relatives / associates can benefit
- no exclusions – not clear who it cannot benefit
- no limitations on who may benefit

MB: this is a clear case of conceptual uncertainty, as there is no reference to who is supposed to benefit. If this was a power, this uncertainty might have been OK. But there remains a strange distinction between personal / trust powers.

SUBJECT MATTER.

A trust can only exist in relation to some particular property – enforcement.

(1) must be able to ascertain what, of the trustee's property is burdened by obligations to beneficiaries; and
(2) what part of this property each beneficiary is entitled too.

"my claim to ownership, whether legal or beneficial is nonsense unless I can say what it is that I own, and in consequence, that you don't" – need to be able to say what you own so you can exclude others.

Issues -

vague, ambiguous wording – unidentifiable.

Palmer v Simmonds: "bulk of my residuary estate"

- bulk is unclear – "what is meant is not the whole but some greater part … no certain, clear part of the estate"

Sprange v Duncan: "the remaining part of what is left, that he does not want"

- trust for one person able to do what he wants gwhile alive
- when dies, anything left over going to be held on trust for others – don't know what is going to be left.

Boyce v Boyce: "one of my three houses of her choosing to Marin, and the other two to other daughter"

- cannot give effect because Marin died – so don't know which one belongs to M.

Segregation of fungible property.

Re London Wine Co: remaining wine stock.

- must be able to "ascertain not only what the interest of the beneficiary is but to what property the interest has attached too"
    - 50 specific bottles needed to be set aside in order for there to be a trust.
    - not enough that you can satisfy out of existing pool - needs to be a clear separate pool.
- "a farmer who declares himself to be a trustee of two sheep (without identifying them) can be said to have created a perfect and complete trust… And it would seem to me to be immaterial that at the time he has a flock of sheep out of which he could satisfy the interest."

Re Goldcorp: gold ingots, some held following purchase by customers.

- on the facts, never a separate & sufficient stock of gold (i.e. that gold was transferred to following a customer's purchase)
- All gold, irrespective of whether it was formed part of the reserve, or whether it could be allocated to a customer, was held in the same vault.

BUT Elias CJ in *Wakatu:* *Re London Wine* & *Goldcorp* do not need for any "rigid rule" that a trust can never exist in non-segregated property – "**they in turn on whether a trust was in fact intended".**

- Lord Oliver himself accepted in *RLW* that the sheep example would be different if farmer had declared himself to be a trustee of a specified portion of the sheep (i.e. if he said 1/5, then pointed to 2 sheep).
- The judgment in *Goldcorp* expressly points out how "unascertained" property could form the subject matter of a trust – if ex-bulk, as opposed to generic.
    - i.e. similarity between *RLW* & *Goldcorp* is this idea (a) there was no intention, which subsequently meant (b) that the goods could have come from anywhere – not the fact they were not segregated.

Increasing flexibility in approach –

Hunter v Moss: 50 out of 950 shares (held in the same pool).

- intangible fungible exception: because all the shares were identical, does not matter if segregated or not.
- *Re Harvard* applies: intangibles are different.

White v Shortall: 222,000 shares in unitract out of 1.5 million.

- trust declared over the total shareholding / whole of the fungible intangible.
- By saying that intended to hold 222k of the shares, S was in effect saying: I am self-declaring a trust for the benefit of W & I in the proportion of 1,500: 222.

Lehman Bros: securities in different places, parent company could do what it likes with the funds. clear intent – stat required trust.

- Quasi application of *Hunter:* OK to just have them in a general trust pool
- when LBIE acquired a given holding of securities for LBF, it held its rights in respect of that holding as a trustee for LBF. Its duties as trustee were more limited than those of an ordinary trustee, because it did not have to keep the holding segregated and could not only mix it with other assets, with different beneficial ownership, but could deal with it on a short-term basis – for it's own benefit or that of others than LBF. However, its trusteeship was constituted at one, and the difficulties in accounting as a result of what happened later do not subvert the proposition that the securities were held on trust from the time of their first acquisition.
- i.e. *LB* don't really need to analyse, because they consider the intention was so clear, and that tracing can resolve the rest. Fact all went sour subsequent to the creation of the trust is not a reason to not find when there is such a clear intention.

Wakatu: 1/5 of land, defined within boundaries.

- doesn't matter that we don't know which 1/5 – there was a defined acreage within defined boundaries & a mechanism for eventually demarcating.
- Me: Is this a whole thing held on trust? Don't really analyse in this way as land is not fungible.

Re Goldcorp 1995 (PC).

segregation of gold? or a case of no intention.

Whether GC held gold kept in a general pool on trust for investors', who had purchased it on a non-allocated basis?

Held that to find a trust in a situation where goods were being sold generic would undermine the seller's intent in running their business. It was clear on the facts that if the seller had intended to hold the gold on trust, this would inhibit any future dealings with the gold, and they would only be able to use it specifically for that sale K. Further, the purchaser would, knowing it was a non-allocated basis would never have contemplated this would be the case.

- G sold unascertained bullion to non-allocated claimants for future delivery
  - brochure: physical delivery / non-allocated metal"
- customers gave $, agree to buy & sell physical bullion
- receive an insurance / certificate verifying ownership. Can request delivery – 7 working days.
- protection was ensured by statement: "the metal stocks of GC are audited monthly to ensure sufficient stock to meet all commitments."
- GC start facing financial difficulties, BNZ appoint receivers. BNZ floating charge = investors unsecured.
- So, investors' need property rights to defeat BNZ charge.

(1) general GC customers / investors – non-allocated claimants.

(a) Legal title: did the K transfer title in gold?

K was for the sale of **unascertained goods.** When goods are unascertained, there is a distinction between **generic goods** and **goods sold ex-bulk.**

- generic goods are sold on terms which preserve the seller's freedom to decide how and from what source he will obtain the goods from – on the facts, gold sold on a generic basis.
- goods sold ex-bulk must be supplied from a fixed and pre-determined source. But from within that fixed & pre-determined source, the seller may make his own mind up.

Common sense dictates that the buyer cannot acquire title until it is known to what goods the title relates. In a case of non-allocated goods, title cannot pass merely by virtue of the sale.

(b) equitable title: did the collateral promises result in the declaration of a trust?

Trust related to company's current stock of bullion; no other bullion to which it could relate.

"company cannot have **intended** to create an interest in its general stock of hold which would have inhibited any dealings with it otherwise than for the purpose of delivery under the sale K"

- company would never have intended to create a trust in its general stock of gold as it would inhibit any future dealings with the gold
- purchaser would never have contemplated that "his rights would be fixed by reference to a combination of the quantity of the bullion of the relevant description which the combination of the quantity of bullion of the relevant description which the company happened to have in stock at the relevant time".
  - simply put: The only trust that could be found would be in the general stock of bullion – but if we found it there, that would have practical implications on running the business. there was never intention – the business model would not have worked, purchasers therefore would never have contemplated.
- However, "no doubt" that a seller of goods sold ex-bulk can declare a trust over them.

(2) Mr Leggat – 52 maples coins, intended delivery. Changed his mind and bought another 1000 maple coins on the non-allocated basis.

(a) **legal title:** did L have legal title over the 52 maple coins?

Argued that there were at least 52 coins of which there was clear ascertainment & appropriation. Furthermore, there was such a close link (in time) with the 1000 other purchased there was enough of an impression that their legal effect would be the same?

- Rejected: fact remains it was an agreement for the purchase of generic goods.

(b) **equitable title**: the 1000 coins were "earmarked" for L.

Purchase of maple coins so large by comparison to the rest of the dealings – company bought substantial amount of extra coins. There was evidence that suggest GC did think of them in this way.

- Rejected: this would mean company would have to deal with them only for L's delivery & could not supply him with coins from any other source. Again, the K for sale stipulated generic goods only.

(3) W&H claimants – W&H stored & recorded separately. When sold to GC, GC sold en masse but kept separate from vendor's own stock. Quantity equal to amount W&H had in K with purchasers, different wording in their K.

(a) **equitable title?**

W&H held gold on trust, when GC absorbed the separate bullion into its own trading stock and mixed with own stock they were wrongfully dealt with goods not their own.

- accepted: W&H clearly intended to set up a trust, that carried over.
- the finding that W&H investors did have gold on trust **despite the mixing in with GC's general stock** emphasises how this is really a case of intention.

Tracing? lowest balance of metal held at any time. Thus, claimants trying to assert an equitable lien to the full value of their bullion.

- rejected: inequitable to impose a lien – received the same certificate and treated with the company in a no different than other claimants. Proportionally would give them too much $$ - tracing sufficient.

Hunter v Moss 1994 (UKCA)

tangible / intangible distinction.

Whether a declaration that 50 out of 950 shares of X company were to be held on trust was invalid for lack of segregation?

Held that the subject matter is an intangible fungible, there is no need to segregate as it does not matter which share is held on trust and which share is not.

- distinguishes *RLW*: "concerned with the appropriation of chattels and when the property in chattels passes. Here, concerned with the declaration of a trust, accepted that legal title remained in the D and was not intended to pass immediately to the plaintiff".

Criticism: Heyton. (Decision has been subject to extensive academic criticism).

- It does matter which shares – if 50 are sold:
  - who is to pay the capital gains tax on the 50?
  - If there sales are then re-invested, who is to claim the profit, or bear the loss?
- furthermore, there should be even less of an argument here than in *RLW*: here is a donee, where is *RLW* involved a purchaser.

White v Shortall 2006 (Aus).

all 1.5million shares held on trust?

Whether a declaration that 222k shares of X company were to be held on trust was invalid for lack of segregation?

Held that the statement effectively forced the D to look after the 222k shares, and do what he liked with the rest of the 1.5 million shares. Therefore, D through his declaration, made himself a trustee of all the shares, to be divided 1500: 222 between him and his wife as beneficiaries.

(1) *Goldcorp/RLW* approach: necessary to state which 222k shares were held on trust, and which were the remaining = seg pool.
(2) *Hunter* approach: intangible to don't need a segregated pool.
(3) A broader approach: declare all on trust, beneficiaries are the P & D, to receive at the stated ratio.

Urged to follow *Hunter*, J makes several criticisms.

Poor reasoning –

- Unreasoned distinguish with *RLW* – "method of law involves the application of abstract principles of law to particular fact situations. sometimes, factual situations that are in some respects vastly different are governed by a common legal principle".
- Unreasoned conclusion re: floating charge over a blended fund: reasoning "simply assumes, or asserts that it is possible for a person to declare himself a trustee of a particular number od shares he holds in particular company. it is because of the efficacy of the declaration of a trust that no question of a blended fund need arise"
- uses analogies to manipulate the law

Approach here: there was **a clear declaration of intention.**

- 222k held on trust for p, rest for himself. This left him free to deal with the 1.5 how he pleased, provided it did not drop below 222k. P could call for the 222k at any time.
- Identification does not matter. Rights of a shareholder only need to be identified in terms of owning shares – not the particular shares. The shares are not numbered – undifferentiated balance in share register.
- This does not resolve the fundamental criticisms made of the *Hunter* approach – what if some are sold and reinvested to make a profit?

Decision reflects the fact discretionary trust are extending the definition of trusts –

- in many DT, the only intent that a particular beneficiary can claim to have at a particular time is the bested interest subject to defeasance. A DB cannot point to any given asset and say "that is mine"; at best they can "that interest is mine provided …"

Re Lehman Bros **2012 (UKSC)**

an application of *Hunter?*

Very clear intention: commercial purposes & statutory regulation.

Issues with the subject matter –

- mixed in the accounts; parent shares with subsidiary shares
- LB retains full control to do what it likes.

Reasons to distinguish *Hunter* – At certain times, monies coming into big securities but then authorised under the trustee LB (parent) that it can treat **as it's own property.** They could sell for security purposes / do whatever they wanted and leave nothing in the account.

- **Rejected:** Yes, LB not as limited in what it could do c.f. normal trustee.
- **But** it still had to account to LBF for its dealings with the relevant shares. If those included dealings on its own accoutns, that would be part of the accounting.
- Thus, if there was **anything** in the account, whatever that was was held on trust. Any shortfall can be dealt with by tracing.
- trust certainly not the most sensible option but fact remains that a trust was intended.
- when LBIE acquired a given holding of securities for LBF, it held its rights in respect of that holding as a trustee for LBF. Its duties as trustee were more limited than those of an ordinary trustee, because it did not have to keep the holding segregated and could not only mix it with other assets, with different beneficial ownership, but could deal with it on a short-term basis – for it's own benefit or that of others than LBF.

What about *Goldcorp?*

- HOL considers there is a clear difference of intention here. *Goldcorp* not the best authority for subject matter.

Wakatu v A-G **2017 NZSC.**

not fungible but certainty within parameters sufficient.

Did the Crown hold 10% of X land on trust for Māori?

Held that while the specific 10% was not identified, there was an agreed system of how that was to be selected (if things had happened how they ought to have happened) within certain parameters (i.e. ex-bulk).

- NZ company alienating land
- Crown attempted to resolve situation – ballot out to private buyers but allocate a tenth to Māori.

Land is not fungible – what part you receive matters.
HC & CA: lack of certainty – "unascertained" property cannot form a trust.
Elias CJ -
RLW & *Goldcorp* –
cases do not stand for any "rigid rule" – they turn on whether a trust was in fact intended.

- in *GoldCorp*, HoL accept that it is possible for a vendor of ex-bulk goods to "effectively declare himself trustee of the bulk in favour of the buyer so as to confer pro tanto an equitable title"
    - therefore the judgment expressly points out how "unascertained" property could form the subject matter of a trust (just not when generic).
    - CJ emphasises how gold was sold on a non-allocated basis = generic. can be sourced from anywhere.
- both *RLW* & *Goldcorp* left the goods indefinitely – here, it was only expected to be temporary.
- Oliver accepted in *RLW* that the sheep example would be different if the farmer expressly noted the stock which would constitute the trust
    - **here, there was such express constitution – defined parameters of land.**

Application –

- agreed system of selection
- identified geographical area – sufficient to fulfil 10%
- ex-bulk: "fixed and predetermined source"
- intended to inhibit dealings in the whole quantity – c.f. *Goldcorp*
- temporary lack of differentiation
- no competing equities

SUMMARY OF CERTAINITIES.

CONSTITUTION OF TRUST PROPERTY.

A trust does not exist until the settlor has 'put' the property into the trust – transfer it to the trustee. If this has not happened, the trust does not yet exist and cannot be enforced.

Two ways –

(1) self-declaration

A self-declaration 'I declare a trust over my property' does not require a transfer to effect, as the settlor is declaring himself to be the trustee. A self-declaration can be constructed out of a statement.

- *Choithram v Pagarani*: a self-declaration that effectively vests in one trustee sufficient as it is assumed the settlor-trustee will then go through the required steps to vest in the other transfers.

(2) transferring legal title to the trustees

The trustee(s) can be transferred legal title. Equity will not usually perfect an imperfect gift unless the donor has done everything obligated he has done to effect the transfer (and it is the fault of some third party), or there has been detrimental reliance by the donee which justifies such a finding. (constructive).

- *Milroy v Lord*: equity will not perfect an imperfect a gift.
- *Re Rose*: gift will be an effective transfer where the donor has done everything obliged to do.
- *Pennington v Waste*: detrimental reliance by donee justifies an imposition of a constructive trust.

Milroy v Lord 1862

equity will not perfect an imperfect gift.

- Medley had shares, wished to transfer themm – bank required certain regulations
- M executed a deed (bene = niece), transferred 50 shares to Lord (trustee)
- But the transfer was not effected properly: did not what was necessary to transfer the shares
- M dies – who owns the shares?

Held that the settlor must have done everything to necessary to be done in order to transfer. If the settlement intended to be effectuated by one of the modes [below], the court will not give effect to it by another one of those modes.

three ways –

(1) Make a gift; (2) transfer to hold on benefit; **(3) make a declaration of trust in favour of beneficiary**

Rose v IRD 1952

every effort rule (estate tax)

When was the trust constituted?

Held that although legal title did not pass until June when the shares finally registered by the company, the beneficial title passed as soon as Mr R completed the share transfer forms.

- Mr R wished to transfer to Mrs R. filed share forms – 30 March 1943
- company did not register changes until 30 June 1943.
- Mr R: died February 1947
- Estate tax: IRD claims tax on gifts made under will. People used to avoid this by giving gifts before they died, so IRD bought in new rule – if you make the gift X amount of years before you die, then we will charge tax.

Milroy v Lord: what transaction / arrangement was intended?

- Mr R clearly intended to transfer the trustees title. So will equity perfect the imperfection?

The perfection focusses on you as a gift-giver. In *Milroy,* Medley could have done more to ensure transfer was complete. Here, Mr R did everything he could in his power to effect transfer. Therefore, if the gift-giver has done everything they can to make the gift valid but the gift needs some other thing (i.e. act of third party) in order to perfect, equity can perfect that.

- rationale? gives effect to realities / common sense.

Choithram v Pagarani

construction of self-declaration; transfer?

Whether the words "I have given my property to the trust" were words of gift or could be construed as a self-declaration; and whether the property transferred to the trustees.

- TCP wished to set up a foundation, executed a trust deed in presence of others (him+ 3 trustees), said statement
- Told the accountant to transfer the accounts & shares to the trust – accountant altered one but not other two.

(1) Meaning of "I have given my property to the trust"?

CA - Considers *Milroy* – will **not** give a **benevolent construction** to ineffective words of gift. these are words of gift.

SC - These are **novel** facts, and therefore raise a new point. Although the words used by TCP would normally amount to mere gift, in this context, there is only one possible meaning:

- **the foundation has no legal existence apart from the trust declared by the foundation trust deed.** therefore the words "I give to the foundation" can only mean "I give to the trustees of the foundation trust deed to be held them on the trusts of the foundation trust deed"
    - **words of gift on trust, not words of outright gift**
    - probably quite important that there was a factual finding re: clear intention to transfer the property to trust.

(2) transfer to other trustees?

Even if words can be interpreted to be words on gift on trust, only transferred to himself (and not other trustees)?

- *Bridge* held that vesting property in one of X trustees insufficient. SC distinguishes on a technicality (legal estate wherein neither donor nor trustee had an interest).

SC considers that so long as one trustee self-declares, Court can perfect because the trustee who self-declares can then give effect to legal ownership. "No distinction between self-declaration as sole trustee, or self-declaration as one of X trustees".

MB: this finding requires TCP to have had a "sophisticated understanding" of trust law. As also important was the fact that he believed all he needed to create the trust was the deed (implies self-dec intended, did not believe **needed** to sign legal docs).

TRUSTEE DUTIES.

Information duties; irrationality; mandatory relevant considerations; conflict of interest. Trustee must act in accordance with powers given to them under the Act. However, Court has procedural role only.

Trust Act 2019.

Act is not a code, to be complemented and readT alongside common law.

Mandatory duties: ss 22–27. cannot be modified or excluded.

- 23: know terms of the trust;
- 24: act in accordance with terms of the trust;
    - *Clement v Lucas:* purpose of establishing the trust should be given effect too.
- 25: act honestly and in good faith;
    - what does good faith mean?
- 26: act for beneficiaries or some further permitted purpose of the trust;
- 27: exercise trustee's powers for a proper purpose.
    - cannot commit fraud on a power.
        - *Kain v Hutton:* if purpose was object to benefit still, OK if non-object benefits.

Default duties: ss 28–38. can be modified or excluded.

- 29: general duty of care;
- 30: duty to invest prudently;
- 31: duty not to exercise power for own benefit;
- 32: duty to consider the exercise of power
    - power not compulsory to exercise but must actively / regularly consider if should be exercised.
        - *McLaren v McLaren:* B had to exercise power only after considering parents expectations in good faith
- 33: do not fetter future exercise of discretion
- 34: avoid conflict of interest
- 35: impartiality between the beneficiaries.
    - this is particularly relevant in the context of income / capital beneficiaries
        - *Enright v Enright:* settlor's intention override trustee.
        - *Re Mulligan*: decided to keep all the trust capital for the income beneficiary. Capital beneficiaries lost equity – choosing to keep the asset which generates little capital appreciation but lots of income.
    - but this duty does not = equal treatment (tension).
        - *Penson v Forbes*: legitimate reason was dislike of her daughter.
        - *Masters v Stewart*: legitimate outcome but reason missed a mandatory relevant consideration.
- 36: duty not to profit
- 37: duty to not act for no reward
- 38: duty to act unanimously

Note also the exemption & indemnity clauses. Can exclude the liability for breach of trust, but cannot exclude for a wilful deliberate breach (negligence vs. intention).

- s43: if drafter, have to tell settlor such an exemption clause is being included.

Information provisions: ss 49–55.

- s 51 & 52: Presumption that trustee will give basic trust information & give trust information as requested, but must consider the factors in s 53.
- s 53 factors / *Erceg v Erceg* –
    - nature of the interest held by the beneficiary, including the degree & extent of beneficiary's interest in the trust & likelihood of B receiving trust property in future;
        - immediate family vs some charitable institution as one DB of many
    - whether the information confidential;
        - *Breakspear:* letter of wishes very confidential
        - not appropriate to disclose trustees' reasons in decision-making.
    - settlor expectations & intention at the time of the creation of the trust;
        - what did the settlor contemplate the beneficiary knowing?
    - age & circumstances of the beneficiary requesting, and the age & circumstances of the other beneficiaries;
    - effect on giving everyone re: giving the information, in a family trust, effect on the relationships;
        - harassment / breach of privacy?
    - practicality of imposing restrictions on the information;
    - practicality of giving redacted form;
        - i.e. can we safeguard the more confidential information through redaction
    - nature & context of request;
        - What documents are being sought? basic information or something more remote.
        - Why did they request? Meaningful monitoring, or more spiteful re other beneficiaries?
    - any other fact trustee reasonably considers is relevant
- s 54: if you go through all the factors and then decide to withhold information (even most basic info), you have to tell the Court. Court will then figure out a different way to enforce. This may mean you no longer have to give the most basic information.
    - s 53 are essentially a codification of *Erceg* – s 54 therefore the only substantive change to the common law?

***Erceg v Erceg* 2017 NZSC**

information provisions.

Whether a request of information by DB for list of beneficiaries who had received distribution was a legitimate request?

Held that it was not. While Court had a supervisory role in reviewing trustee discretion in giving information, there were clear issues in giving this information, namely that other beneficiaries would be at risk of harassment and that P was unlikely to have ever receive $ under the trust in the first place as had received a substantial amount of money under the will.

Can question this outcome – the Court had not even seen the deed – so how could they know if the distributions had been made correctly? Assume they do based on fact P being problematic.

- brother (plaintiff) of settlor (M) made a DB of trust
- M dies, brother (plaintiff) receives substantial $ under the will
- P goes bankrupt
- trusts wound up, P does not get anything
- Requests for extensive list of documents relating to the management of the trust & actions of the trustees

Court's role in reviewing trustee discretion -

Is the court confined to merely procedural review, i.e. only intervening if satisfied the trustee erred in law or principle, overlooked a relevant point, factored in irrelevant point or made a decision plainly wrong? (confined to this in other duties).

- SC considered exercise of supervisory jurisdiction means Court must exercise its jurisdiction as a court of equity, exercising its own judgment as to whether disclosure ought to be made at all and, if so, to what extent or on what conditions.

What is the jurisdiction required of the beneficiary to enable disclosure.

Previously had been described as the beneficiary have a proprietary interest in the information. *Schmidt* rejected this: the more principled & correct approach is to regard the right to seek disclosure as an aspect of the Court's inherent jurisdiction to supervise.

- Therefore a discretionary beneficiary (who arguably does not have proprietary interest per se) can still seek disclosure.

Disclosure of information nevertheless requires a delicate balancing of two principles:

- entitlement of beneficiaries to disclosure of trust documents pursuant to the fundamental obligation of trustee to be accountable; vs
- the need for trustees to be autonomous in the exercise of discretions under the trust instrument.

How important is confidentiality?

- *Foreman v Kingstone (HC)* advocated for a less confidentiality-centric approach, saying that the "fundamental duty is to be accountable to all beneficiaries. That cannot be compromised by a settlor's desire for confidentiality … unless there exist **exceptional** circumstances.
- CA in *Erceg* does not like this – emphasise *Breakspear* in the importance of confidentiality and considered there could no "presumption favouring disclosure"
    - c.f. s 51& 52 presumptions,
    - SC emphasise that CA's reliance on *Breakspear* a little bit misfounded: involved a wish letter, something non-binding on the trustees but very personal in nature – i.e. usefulness v confidentiality clear on those facts.

Starting point for the SC is the obligation of a trustee to administer the trust in accordance with the trust deed and the duty to account to beneficiaries. The course of action identified should not just consider the individual beneficiary but the action that is most consistent with the purpose of the trust and the interests of all beneficiaries.

- To be sure, confidentiality is important – particularly when there is question around the trustees' giving reasons for their decisions.
- But it will, not in and of itself "ordinarily warrant a refusal to disclose documents".

Application:

Here, obligations of the trust to benefit beneficiaries, and in particular P, must be seen in the context of P already receiving $ under the will, the fact DBs are never entitled to gain $ out of a DT, fact P could pursure claims against other DBs (threatened trustee in the past) – clear harassment concerns.

The issue with strictly applying the information provisions is that the only person who is going to enforce a trust is the / a beneficiary. And how can beneficiary enforce a trust if they do not have the requisite information to know what a trustee is supposed to be doing. ***Gavin v Powell*** illustrates this: it was not revealed until discovery phase of proceedings why trustees decided to remove a beneficiary, clear breach of obligation. Shouldn't the beneficiary be entitled in law to this information pursuant to the time and cost re discovery entails.

Law com: there cannot be any obligation, and hence there cannot be any trust, if the trustee does not owe a duty to account to any beneficiary. To be able to hold a trustee to account, bene need to know they are beneficiary – no one else will enforce the trust against them.

Enright v Enright 2019 (HC).

duty of unanimity / impartiality.

Whether the trustees' failure to consider the granting of income under the relevant clause breach their duty of impartiality / unanimity / relevant considerations?

Held that the trustee's reservation decisions breached their duties.

- trust of capital & income
  - Jack: settlor (never a trustee).
  - Tony: sole capital beneficiary (T also a trustee at some point along with Mr Thomas)
  - other 5 children: discretionary income beneficiaries.
- trust deed –
  - cl 13 empowered trustees to divide the income how they pleased (i.e. unequally) between the income beneficiaries
  - cl 12 & 14 empowered trustees to reserve any of the income to improve the capital
    - but cl 13 said that if they did not decide to do, then it was assumed to be divided equally
    - i.e. equal division the default position.
- T gets everything as sole capital beneficiary, DB's as income, get nothing.

(1) did the trustees reserve income unanimously each year by the time required?

J finds Mr T did not sufficiently consider & exercise the discretionary power of whether to reserve income each year.

- Mr T & Jack are friends – evidence that T would usually just agree with J
- discretion fettered by Jack's overriding intention
- Mr T did not even attend account meetings.

Thus Mr T did not really contribute to the decision-making process: no unanimity.

(2) Did the trustee's reservation decision breach their duty of impartiality?

Mr T did not consider & intend to exercise a discretionary power to all relevant considerations.

Kain v Hutton 2008 NZSC.

fraud on the power.

Whether the disposition to an object who then immediately set up a trust (where non-object where to benefit) was a fraud on the power?

Held that if the trustees' purpose in exercising their power / disposition to primarily to benefit an object, and a non-object benefits incidentally to that, that is not a fraud on the power.

- Mr Cooper settles his trust in favour of Mrs Cooper (beneficiary)
- Mrs Cooper (with the knowledge of Mr) then immediately settled the assets on trust (Ponui)
- Ponui trust deed –
  - express provisions under which Mrs Cooper may both appoint & remove trustees and any discretionary beneficiary.
  - two other trustees
  - but non-objects of Cooper's OG trust objects of Ponui trust – daughters and relatives of Mrs Cooper.

Tipping –
Fraud on a power = ultra vires. Trustee must stay within mandate of settlor. If the object is a mere vehicle to benefit the non-object = FoP. But an exercise that secures a benefit for a non-object does not automatically = FOP. If object receives benefit, does not matter if non-object benefits also.

Plaintiff: while distribution to Cooper ex-facie proper, in reality what was being sought to be achieved was to confer a benefit on a non-object.

HC: fraud on the power even if Mr Cooper was not conscious of it being so.

CA: accepted that if Mrs Cooper had been a mere conduit for Mr Cooper's greater purpose in giving to non-objects, that would be fraud on the power. But if the object, in receiving, has genuine freedom of action and wishes to benefit non-objects = OK.

SC: in any fraud on the power case, must consider:

- **whether the inclusion of non-objects has genuinely been done for the benefit of an object of power**
- i.e. was the purpose of the trustee nevertheless in pursuit of benefitting the trustee
  - object approval & co-operation may be a strong indication of this.

Here, the disposition was clearly for object's benefit. Form of the trust – fact she retained this power of appointment / removal of trustees ensured the shares could revert to her.

- "nothing could be done without the concurrence of her as trustee"
- MB: does this ignore the fact there are two other trustees' she would have to make decisions with.
- But does benefit object in sense she is able to assist her daughters and other relatives if needed.

Penson v Forbes 2014 NZHC (strike out).

rationality.

Whether the settlor-trustee's decision to remove her daughter based on the fact she did not like her very much was irrational / unevenhanded?

Held sensible expectations of settlor-trustee in creating a DT plainly include expectations that those who remain in their affections get to stay DBs, and those who fall may be removed from the class. Court is not an appellant body for trustee decisions.

- Mrs Jack sets up a trust for children. Jack = settlor-trustee.
- J decides doesn't like one of her daughters anymore, so removes her as a beneficiary (P).
- J dies, distributions made to other children.

A trustee must not exercise the trustee's discretions in a manner which is irrational, perverse, arbitrary or capricious.

- example: based on an unreasonable concept such as height or complexion.
- Conceptually distinct from bad faith – honest & well-meaning trustee could be acting irrationally.
- DB only ever have a contingent interest – whole point is that can be reconstituted from time to time.

Even-handedness / impartiality in a DT has limited scope in relation to a trustee removing / adding DBs.

Masters v Stewart 2014 NZHC

rationality / failure to consider MRC.

Whether the trustees' (announced) decision to give capital distribution to 3 other beneficiaries based on fact P had received 215k forgiveness of debt had failed to consider fact P had received that 215k in return for work he had completed on the land?

Held that while trustees' perfectly legitimate decision, they failed to consider something that could, or would, have an effect on the outcome.

UNLESS trustees' announce reason for a decision, MRC will be a hard argument because trustees' are not required to give reasons for their decisions. Court intervention a lot less justificable if they don't give a reason.

- Family trust, children of settlors DBs
- One particular property owned by the trust P developed at significant personal cost.
    - It was acknowledged by his father that it would be resold to him at the original purchase price (agreed in writing)
- Thus property sold to P at full price, then trust forgave debt on difference – 215k.
- 250k distribution made to other siblings, recorded as "equalising" the difference between siblings.

MRC? 215k as a result of labour effort P made not because of his position as a B.

HC considered that if trustees exercise a discretion with a relevant consideration being unconsidered and that consideration **would or might** have affected trustee's decisions, Court can intervene.

- "fundamental mistake" for the trustees to have exercised the discretion to secure equality,
- Explicit reasoning demonstrated a failure to accurately assess the nature of the benefit the P had earlier received.
- To be sure, valid decision. But reasoning / process a but off because the trust explicitly expressed their reasoning: "no question trustees are entitled to make unequal distributions but in this case the trustees did so in order to achieve a desired effect".

McLaren v McLaren 2017 NZHC.

substantive analysis?

Can equity intervene to prevent the parents' exclusion as beneficiaries / relative loss of control as trustees despite the trust deed conferring the power to Bruce to be able to do so.

Held that fiduciary duties are imposed on the powers, therefore Bruce ought to have considered his parents expectations in good faith before deciding to remove them. His response was disproportionate.

- 2 family trusts – BDM trust:
    - parents, Bruce and accountant are trustees.
    - Bruce also has special "appointer" powers.
    - peppercorn settlor? Utilised to protect settlor identity. Parents transferred the substantive assets but are not settlors.
- Parents decide they are going to sell the mussel farm (in the other trust); Bruce gets angry because his business maintains the mussel farm so he will indirectly lose $.
- In response, B appoints two new trustees and removes his parents as DBs of the BDM trust.

(1) Firstly, are Bruce's appointer powers fiduciary or merely personal?

Bruce argues power vested in him personally, distinct from his role as trustee, not constrained. Relies on *Clayton*: "power of this nature [appointer] personal to donee".

- Rejected: *Clayton* is not analogous, close identity between settlor & appointer.
    - In a traditional family trust situation (gives for children), an appointer can be seen as standing 'in the settlor's shoes' – justifies them being personal powers.
- Less clear when the settlor and appointer are two separate people.

HC considers powers here are fiduciary. Cannot look to settlor intention in giving Bruce these powers (Court does not really know how to deal with these peppercorn settlors) but parents had a **clear expectation as providers of a substantial portion** of the assets that they would not contemplate being removed.

- implicit that Bruce should have considered parents expectations.
- So Bruce had to consider the power only after considering the matter in good faith in light of the purpose of the trust.

BUT inevitable in the context of a DT that powers can be exercised discriminately = limited fiduciary?

- it is not an adequate answer to say that any exercise of the power would inevitably be discriminatory.
- circumstances do not justify treating the power as an unfettered.
- Bruce given appointer powers as a matter of operation – distinguishable from being given in order to act out the perceptions of the settlor.

(2) Was the decision of Bruce to remove his parents as beneficiaries in breach of his fiduciary (albeit limited) obligations?

Clear shared expectation that the parents, in being the ones who give the value in the trust, would be considered for distributions of income during their lifetime.

- Bruce's response was therefore 'disproportionate' given the circumstances in which the assets were vested and the shared aspirations of Bruce and his parents falling out.
- Expropriation of trust property entirely in his own interest
- decision taken in regard to improper / irrational factors
- not reasonable.

This decision is inconsistent with other cases, especially the idea that the Court is not an appellant body for trustee decisions. Power he was given allowed him to decide in his self-interest. Dobson J substantially weighing in on the decision – clear, if not explicit, that he thinks it was the wrong decision.

- Could you have argued it on grounds of rationality? i.e. that it was not rational to respond to his parents decision in that way. So, could have said similar to *Masters* – decision right, but how you got to it was wrong.

Clement v Lucas 2017 NZHC

mandatory relevant considerations.

Was the trustees' failure to consider main purpose in establishing the trust – "even the ledger" – evident in the pre-trust correspondence could or would have changed their decision to sell the assets?

- discretionary family trust
- trust set up in order to provide for the children – land to sons, $ to daughter
- lots of evidence around what settlors desired, extensive mem of wishes – reflect on the evolution of wishes
    - i.e. changes so want daughter to get land
    - implicit / evident through these wishes is that they want it to be equal.
- never distribute, die
- new trustees' appointed – complex division of land so decide to sell.
    - Brian: does not want that, as Keith had already been given 160 acres so thinks would be unfair
    - Keith & Deren: want the $

While trustees' familiar with trust deed and mem of wishes, their review did not include the pre-trust correspondence between settlors and lawyers which indicated that a large part of the rationale in establishing the trust was in order to "even up the ledger".

- trustees acknowledge they did not even know the pre-trust correspondence existed
- while cannot be faulted it is very relevant information – trustees had an understanding this was a relevant concern but did not know it was the main purpose in establishing the trust
- "there can be no doubt the trustees here are under a duty to consider the purposes for which the trust was established & the intention of the settlors even if there's a wide discretion conferred to the trustees'".

TRUSTEE DUTIES SUMMARY.

TRACING.
Where trust property has been transferred away from the trustee to another person, the beneficiaries may follow that property into the hands of the person who currently legally owns it, and then may claim it. The logic of tracing lies in finding the particular B's property wherever it may be.

- not following the trust property, but tracing the **value of the beneficiaries property in the hands of the recipient.**
- it is not a claim, or a remedy, but merely a process that proves you have a proprietary interest in this thing.

mixtures?
As between beneficiary & trustee –

- wrongdoer's rights are subordinated. Therefore we assume any money spent, is the money of the trustee.
- However, this is subject to the **lowest intermediate balance rule.**
- This is the idea that the beneficiary can only claim on the lowest intermediate balance from the time of the mixing and the bringing of the claims.
    - This is because the legitimacy of finding a proprietary interest in something has to be based on the notion – whether abstract or in fact – that is actually yours.
    - The lowest intermediate balance rule seeks to recognize that at some point in time, because of earlier misappropriations, an earlier beneficiary's money **has unquestionably left the fund and therefore cannot physically still be in the fund.**
    - Accordingly, it cannot be 'traced' to any subsequent versions of the fund that have been swollen by the contributions of others, beyond the lowest intermediate balance in the fund.

As between beneficiaries – 3 options:

- *Clayton's rule:* first in, first out.
    - *Re Registered Securities:* this is a mere presumption.
        - *YF:* Unworkable, arbitrary, complicated, undermines settlor intention?
        - *Priest:* applies only to money in a bank account.
- Pro rata / parri passu: this is where the assets are merely divided equally among the beneficiaries.
    - *Re Registered Securities / YF:* **is the system / process so tainted that the only rational outcome is to divide proportionally?**
        - the mortgage certificate in *RRS*, and money in investment accounts in *YF,* were at best personal rights. Because we cannot prove your property was actually used in giving you that thing.
        - In *RRS,* there was clear evidence that in most cases, money of the allocated contributors was not advanced to the mortgagor to whom it was credited.
    - In both *RRS* & *YF* the only choice was to divide PP: realism. inadequate accounting records, impossible to know who received what.
    - Clifford J in *Priest:* those are examples of PP as a result of a "common misfortune" suffered.
- **strict tracing rule -** Rolling charge / north American method: figures out what money is coming in & out – a running column, that calculates a proportionate share depending on what money was coming in & out. **The value of each investor's interest at the time of each transaction.**
    - Existence of the lowest intermediate balance rule gives us the idea that PP does not reflect actual proprietary rights in things.
    - This is the approach that best gives effect to legitimate property right, as it enables the most realistic look at who's money could have gone on what.
        - Realism: we are often tracing in the context of insolvent claims – usually means the company was not that well-managed. To be sure a nice idea in the abstract but *RRS/YF* both illustrate how in practice, insolvent companies usually kept bad books.
    - Perhaps there is an argument in *YF* that IF YF had been operating property and kept proper account books, then we could have done the proportion.

Clifford J reasoning in *Priest*:
There was clear intention from RAM to hold the PH shares on bare trust for Priest. Tracing is a process which proves a proprietary interest in something. Therefore Priest has a clear proprietary interest in PH predicated on the existence of a trust, and do not need to 'trace' into PH by proving their money was spent on the shares.

- BUT *nemo dat*: RAM cannot 'give' the shares to Priest if Other Investors' monies was used to pay for them.
- However, perhaps a better approach could be on *RRS:* that if it is possible that RAM used the Priest money to pay for the PH shares – a
- So we could create a new exception for mixed accounts: **where the trustee designates a payment from a particular beneficiary.**

SUCCESSION.

Intestacy.
Intestacy arises when you have no made a will. The Admin Act determines who gets your property: s 77. If partner, relevant if there are children or parents involved.

Wills.
A will is any material on which there is writing which records how you want to dispose of your property.
s 11 formalities –

- in writing
- signed
- witnesses

But note s 14: HC can declare a will valid despite failure to comply w formalities so long as gives effect to testamentary capacity.

LIMITS ON TESTAMENTARY FREEDOM.

Family Protection Act
moral duty to provide for / more.
Who can make the claim?
s 3(1): spouse; partner who lived with; children; grandchildren; stepchildren wholly or partly maintained.
What is required for the claim?
s 4(1): if deceased estate does not provide adequate provision for the proper maintenance & support of A.

- *Williams v Aucutt:* support does not just mean maintenance – includes sustenance and provisions of comfort.
  - Test is **whether a reasonable will-maker in the shoes of the will-maker will feel they were breaching their moral duty?**
  - moral & ethical considerations can be taken into account – these include:
    - recognition of belonging to the family
    - having been an important part in the life of the deceased
- *Black v Black* factors –
  - nature of the relationship
  - financial need of the claimant
  - recognition of familial connection & belonging
  - inter vivos contributions (gifts made during life)
  - entitling & disentitling conduct
  - repair of parental abuse & neglect
  - size of the estate
- general quantification will be around 10–20% of the estate
  - *Williams*: 5% OK (nb: gave her another 5% because mum did not know how much the shares were worth)

Law Com: too much discrimination. Discriminately applies a sole conception of family (c.f. who can apply) and moral duties are inherently subjective: purpose, meaning and effect of the law unclear. Frustrates will-makers freedom & autonomy.

- BUT *Kinney*: neglectful father, caused mental health harm. Son accepts 50% claim, she argues for 80, J gives 70.

Law Reform (Testamentary Promises) Act 1949
Claimants can seek provision from an estate if a deceased promised to reward them for a service undertaken while they were alive, but failed to record this in their will.

(1) rendered services or performed work for the deceased in the deceased lifetime (irrespective of whether before or after)
   - *Byrne v Bishop*: service must be beyond the normal expectation of family life or social interaction. Does not have to include doing things for the deceased, can also include companionship, affection & emotional support.
(2) promise by the deceased to reward the claimant
   - *Kite v May*: promise need not be a K / binding promise. Promise can include a statement of intention. But there must a **nexus** between the promise and the work / service.
(3) link between services and the promise
(4) deceased failed to make good on the promise to reward the claimant.

Re Welch

- stepson – stepfather indicated he was often going to give most of his property to him.

Failed –

- work alleged was largely "natural incidents & consequences of life within a close family group". Lived with him but there were reciprocal advantages. Balance of gifts & benefits to each other.
- promise not connected to the 'work' – stepfather made the representation as affection for the stepson and ordinary family expectations.

Relationship property act
Equal sharing under the PRA is A merely securing what is legally theirs, then leaves the rest for the estate.

Prior to the amendments to the PRA, the principle of equal sharing did not apply to marriages in which death had parted the spouses. Strange anomaly when you had much more of a claim if you sep during lifetime, then if you made a claim when your partner died. 2001 amendments: same rights whether relationship terminated through separation or death.

Under s 61 of the Act, surviving spouse / partner gets to choice A or B
Option A – procedural.

- s 62 time limit – 6 months
- s 65 must lodge a written notice; s 67 cannot change mind (unless you were compelled into one option).

Option A – substantive.

- ss 81–82: presumption that all property owned is relationship property.
- s 77: can still order to receive gifts under will if unjust.
    - BUT s 83: survivorship excluded. What would have been yours automatically you can only get a 50% share in.

Option B – procedural.

- s 68: default choice.

Option B – substantive.

- s 77A – children or parents in the picture?
- survivorship – get 100% if shared property.
    - BUT *Weaver*: other claims (FPA, TPA).

If SHORT-TERM (less than 3 years, de facto = need a child or have made a substantial contribution).
Option A –

- if marriage / civil union and appl of ss 11–12 would be unjust, Court can, under s 14 (any asset wholly / substanticially owned by deceased before, or any asset through succession / survivorship / gift / beneficiary) after marriage.
- if de facto – need child or to have made a substantial contribution

Option B –

- will = allgoods
- if de facto – not entitled to receive unless child / substantial contribution.

If SEPARATED / DIVORCED.
Option A –

- s 55(2): Part 8 applies before Part 7 proceedings underway. s 64: automatically option A.

Option B –

- will? s 19: as if claimant had died first. will void unless will-maker makes express provisions otherwise.
- Intestacy: as if claimant had died first. gets nothing