Proprietary claims for breach of fiduciary duty

How does equity respond to breaches of fiduciary duties?

Breach of obligation =

- Compensation for loss OR
- Disgorgement of Gains
    - Constructive Trust OR
    - Account of profits

How do constructive trusts give rise to proprietary claims?

- Where a fiduciary has breached their duty by taking a profit or opportunities from the trust (Bribe), the principal have a personal right AND proprietary right to the fiduciaries benefit gained from the profit
- Personal liability = Account of profits AND
- They hold the profit on constructive trust for the principal as beneficiary
    - *Lancoe v Rose:* a person taking bribe wasn't intentionally setting up a trust, but we will construe you as holding property on trust.
    - Can still hold profit on constructive trust even where fiduciaries actions benefited the principal.

Types of breaches of fiduciary duty and what claims they give rise to?

Institutional constructive trust = proprietary claim arises because of actions taken = pre existing categories of constructive trust. (1 and 2)

1. Where breach of FD involves actually **using trust property** to make unauthorised gains
    a. Gives rise to personal (Account of Profits) and Proprietary (Constructive trust) claim
2. Where breach of FD involves using **opportunities arising out of fiduciary position:** *Keech v Sandford, Regal v Gulliver, Boardman v Phipps*
    a. Gives rise to personal (Account of Profits) and Proprietary (Constructive trust) claim

Remedial constructive trust = doesn't fall within pre existing categories of constructive trust but we should say there is one = proprietary right made by court order. (Maybe 3)

3. Unclear - where breach of FD **gains profit or opportunities due to fiduciary role, but not through** using trust property or opportunities in a way that should have been **exploited for principal** e.g. fraud, bribery, other kinds of secret profits.
    - Maybe this only gives rise to a personal liability claim (account of profits), BUT the court can say that there is a constructive trust/proprietary right.
        - The court can perfect an imperfect gift so property is held by trustee on constructive trust (where there is no trust or the property has not been transferred in common law)
        - Mutual wills between partners - we might say there is a constructive trust?
    - *Chodar* - Glazebrook J: ordered constructive trust as a remedy.
    - UK: they don't like the idea of a remedial trust because we shouldn't alter property rights as a remedy.

Why would a claimant want to assert a proprietary claim?

a) Person you are claiming against is insolvent. You will only get a portion of their remaining assets split amongst other unsecured creditors under a personal right, proprietary right will allow reward of full property.
b) Equitable tracing = can trace proprietary right into other property to account for increased value. May allow better value remedy e.g. $1 mil to pay for house, worth $2.5 mil later on, you get return of $2.5 mil house vs $1 mil damages.
    i) But *FHR:* insolvency may be a negative for court in recognising constructive trusts as it takes property out of the pool for unsecured creditors.

AG for Hong Kong v Reid (PC)

Facts

- Reid as DPP of HK takes bribes in exchange for not pursuing prosecutions.
- Invests in houses in Tauranga, which increased in value.
- AG HK lodges caveats in NZ against houses. AG doesn't want Reid to profit from those bribes, and wants bribes to be traced into NZ houses, so AG can get value from them.

Issue

- Can they sustain these caveats? E.g. Was there a breach of fiduciary obligation?
- Can they get compensation for the loss? E.g. Did the bribes go into the houses?

Held

- HC and CA in NZ find no proprietary rights; Reid only has personal duty to account.
- What category of breach of FD is it?
    - Used principal's property to make a profit.
    - Opportunities are within the scope of F's field of endeavour on principal's part.
    - But while the bribes/secret commissions were payments made in the context of being a fiduciary, they weren't opportunities that could have been exploited for the principal, so fits into third category best.
- Question: can bribes or secret commissions (third category) create a constructive trust/proprietary claim?
    - *Lister v Stubbs (*UK COA): Lindley LJ said that there is no constructive trust in relation to a bribe. If an agent takes profit from a bribe, this cannot be held on behalf of the principal because it is just a personal right to not go against your fiduciary duties by accepting bribes, but the money was never something that the principal could have exploited, so cannot hold it on constructive trust.
        - If we allowed a constructive trust to be created then if fiduciary went bankrupt property would be withdrawn from the pool for creditors and given to the principal and principal could compel fiduciary to account not only for the money with interest, but all the profits they have made through that money via tracing. Offensive if they could trace the bribe.
        - Lord Templemen in *Reid:* principal ought to have the right to trace and to follow a bribe.
    - Judge finds that *Lister v Stubbs* is not consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it.
    - Under these principles, a bribe and the property representing the bribe are held on constructive trust for the principal, and the fiduciary remains personally liable if the value of the property recovered is less than the amount they are liable for.
        - Bribery threatens foundations of civilised society..
- Note: Other cases presume that there is a constructive trust or an account of profit, so it can go either way.

***Sinclair v Versailles* (EWCA)**

Facts

- Ponzi scheme makes business seem more valuable and shares are sold for a huge profit.
- Principal claims proprietary rights in proceeds of share sale, as profits were gained in breach of FD.

Held

- There is no proprietary right to assets obtained in breach of FD unless (1) obtained through funds previously owned by principal or (2) derived from opportunities that should ahve been taken up for the principal.
- Bribe cannot be held on a constructive trust.
- Bribes were never trust property, fiduciary should never have taken the bribe for the principal as if it was their property, so can't say they held it on constructive trust.
- You can have a personal claim to the amount they received under the bribe, but can't get an advantage of a proprietary claim through tracing.
- They note that this means the fiduciary gets to keep the profit of the bribe if they have invested it, which may suggest it should be held on a constructive trust (policy: seems bad to let them benefit here). BUT they say that the court could award damages that take into account the increased value of the bribe.

FHR v Cedar Capital (SC)

Facts

- Agent for purchaser takes secret/undisclosed commission from vendor.

Held

- SC overturn all arguments that say a bribe can't be held on constructive trust.
- They reiterate the effect that a proprietary claim would have, and why it matters, and that it is undoubted that a bribe gives rise to equitable compensation which is the quantum of the bribe or commission (personal claim - duty to account), but then distinguishes the two options which give rise to a proprietary claim.
- [10]: Bribes should be treated differently because no proprietary interest arises where benefits are derived from opportunities outside the scope of those endeavors (being benefits derived from the principal's property or derived from opportunities in the scope of agent's endeavours on behalf of the principal). Bribes aren't something you are trying to get for the principal, so we shouldn't treat them as the principal's property.

- They recognise that there is a huge academic debate and you can argue either way. [32] As a matter of pure legal authority there is no clear right answer. But say that while legal authority is divided, argument against proprietary remedy is not well founded.
- FIND: while there is some force in the argument that a bribe or secret commission cannot be said to be benefits which the agent should have obtained from the principal, they don't want to draw the distinction around whether property should have been obtained.
- **They prefer a simple formulation that all 3 types of breaches can allow claims for constructive trust, as well as personal claims.** A strict conflict of interest rule should be applied to such cases of bribery. If there is a conflict of interest, any profit is held on constructive trust.
- This rule is good as a matter of principle:
    - It is not attractive that the rule should not apply to a bribe or secret commissions received by an agent because it was not received on behalf of the principal. The whole reason they should not have accepted the bribe is because it puts them in conflict with their duty as a principal.
    - It will likely have disadvantaged the principal.
    - More consistent with the fundamental rules of agency.
    - Bribery is bad, don't want fiduciary to benefit. [but neither should the principal?]
    - Follows Templeman's view from *Reid* that principal ought to have a right to tracing.
    - Fiduciary must disgorge the whole benefit - it wouldn't make sense if a principal was worse off just because the fiduciary obtained the profit by a bribe, when that may be far less dodgy circumstances e.g. boardman v phipps.
    - It ensures simplicity rather than uncertainty.
    - Harmonises the common law with other jurisdictions.
- Policy driven reasoning.

Trusts arising by operation of law

Typology of Trusts

- Express trust = when settlor exercises their powers of ownership to create it.
- Resulting trust = based on presumptions about the settlor's intention to create a trust.
- Constructive trust = the law itself imposes constructive trusts in circumstances where it would be unconscionable for the owner of the property to not recognise someone else's rights to the property.
    - *Re Rose, Choithram:* transfer of property not valid at law, but given effect to in equity
    - *Walsh v Lonsdale:* contracts for the sale of land (and for other property interests in land)
    - *Lankow v Rose, Murrell, Vervoort:* defendant unconscientiously asserts legal ownership of property to which another has contributed.
    - *Keech v Sandford, Regal v Gulliver, Boardman v Phipps, Chirnside:* fiduciary improperly profits from his or her fiduciary position.
    - *Avondale Printers v Haggie:* property obtained by fraud.

Resulting trusts

Generally

- A has transferred property to B gratuitously. Equity may presume that B is holding the property for A on trust. Even though it seems they have lost their beneficial interest, the interest actually 'jumps back' to A.

Two Types

1. Presumed - *Westdeutsche Bank v Islington*
    a. Historical foundations: the 'norms' of feudal landholding. All land was held on trust, so if land was transferred to someone else without payment it was presumed to be held for someone else.
    b. There is a presumption of resulting if:
        i. There is a gratuitous transfer of property
        ii. Payment of the purchase price of property is seen to be owned beneficially by the person providing the property or value.
        iii. Unless nature of transaction rebuts this
            1. Gift?
            2. Loan?
            3. [onus is on the party who receives property to prove this]

c. There is a presumption of advancement where (*Wolf v Kay)*
    i. There is a gratuitous transfer of property
    ii. And A is a parent or spouse.
        1. This is based on underlying social reality.
        2. Could argue do we need this presumption, could easily rebut the normal presumption by saying it was a gift to a family member.
d. Should we have this presumption?
    i. It's just a baseline to start from, creates an onus.
    ii. But normally if you give property gratuitously you will indicate what it is for, so do we need the presumption? Maybe it doesn't really coincide with what is likely to occur, if someone gives property gratuitously they mean it to be a gift if they didn't specify it should be a trust.
e. Exception: PRA 1976, s 4.

2. 'Automatic' - *Re Vandervell (No. 2)*
    a. The resulting trust does not depend on any intentions or presumptions, but is the automatic consequence of A's failure to dispose of what is vested in him/failure to set up a trust.
        i. This could be because of uncertainty of objects, non-charitable purposes etc.
    b. This doesn't establish the trust, but just carries back the beneficial interest to A that has not been disposed of.
    c. E.G. if property is transferred to trustees, but a trust is failed to set up because the beneficiaries aren't clear enough, the trustee holds the property for the settlor (A) as the beneficiary, not for themselves (beneficial ownership goes back to A).
    d. Cases: *McPhail v Doulton, Morice v Bishop of Durham, Choithram.*

Woolf v Kay (HC)

Facts

- Kay buys property and moves to Canada. His sister, Wolf, lives in property and pays (arguably) rent, as well as flatmates. She lived there for 30 years, but over this time eventually stops paying rent.
- Kay comes back and says the property is his.
- The sister argues that the property is supposed to be held on trust by him for the benefit of her.

Arguments

- Woolf:
    - It wasn't a house that was originally owned by sister or her parents BUT parents, kay and wolf paid for house. Parents paid $13,000, kay paid for the bulk, wolf paid for part.
    - There is a presumption of resulting trust where each person who contributed to the house get a portion of a share in accordance with how much they paid for it.
    - Wolf argues her claim = inherited the $13,000 share from parents + her share + payments she made for the house directly each week.
    - Her claim is about $20,000 out of $89,000. Amount contributed has now gone up to $399,000 (inflation), but property itself is now worth $2 million, so owed a portion worth $500,000.
- Kay
    - Presumption of advancement/gift applies - the initial position must be that it was a gift because the parents gave him the property.
        - Issue: Only $3,500 was shown to be contributed by the parents and can rule apply to gifts to adult children? Legally you don't have to provide for children anymore once they are 18.

Held

- Should we keep presumption of advancement to adult children?
    - *Pecore* (SC Canada) - there is no presumption of advancement for adult children (counter-presumption).
        - In Canada, there is no obligation to continue to support your adult child and it is common for adults to transfer assets to children so they can manage their affairs. Beneficially property is owned by parents and children are trustees. So the rule should reflect this social reality, it isn't more likely to be a gift, it is more likely to be resulting trust.
        - SC Canada say reason for the rule was about legal obligation to children and that ebbs when you are adults, not that you have affection for your children.
    - There is no suggestion from recent NZ judgements that this presumption doesn't apply.
    - Court prefers dissenting judgment of *Pecore.*

    - [176-178]: NZ HC find
        - This is not just about financial dependency or obligations, it is about affection. Nothing changes about this when you get older.
        - Canada decision focuses around adult children managing their parents affairs, but they could just give them a power or attorney or use other mechanisms to help children manage their affairs.
- What presumption applies in this case?
    - Parent's didn't retain their interest in the money put towards the house. We presume this was a gift because they are parents.
    - There is some evidence that it was not a gift, but this is not strong enough to rebut the presumption on the balance of probabilities. At most we could say it was a loan that they expected Kay to pay back, but they did not retain beneficial ownership.
    - Further, Wolf cannot argue that there is a presumption of resulting trust because Wolf paid the mortgage off, therefore Kay was holding it beneficially for her. You have to contribute to the purchase price of the property to show beneficial interest.
        - In some cases, this has been awarded where a husband bought the house but the wife paid off the mortgage. However, this line of argument has been superseded in NZ by the constructive trust mechanism to ensure equal sharing between couples.
- This case casts doubt on how much evidence you need to rebut the presumption.

Quistclose Trusts

What is a quistclose trust?

- C lends money to D.
    - *Twinsectra v Yardley* - money advanced by way of loan normally becomes the property of the borrower. They are free to do with the money as they choose. Lender takes the risk of the borrower insolvency.
- D holds money on trust for C.
    - Trust property belongs in equity to the beneficiary (C), so that it cannot be used to pay D's creditors on insolvency.
    - If D breaches the trust, C can follow and trace the trust property.
    - Even if the trust property cannot be found, C will have personal claims against third parties (as well as D) if they have assisted in or received the property in breach of trust.

Quistclose (HOL)

Facts

- A company, Role Razor, seemed to be making a profit and decided to pay a dividend to shareholders. Board of director has signed off on this plan, but they didn't have enough liquid assets to make the payment. If they do not make the payment it will look like they are insolvent.
- Quistclose will loan R liquid assets to pay dividends, by sending loan to the bank and opening up a new bank account for the sole purpose of paying the dividend on July 19th.
- R goes insolvent, and bank wants to set off some of what R owed them against what they owed (taking the $200,000 in the bank account they owe to R and using it to satisfy the debt).
- Q argues that they only put the money in the account on direction that it would be used to pay the dividend, and it can't be used for any other purpose. Thus, it was never part of R's assets and they held the cash for the benefit of the shareholders (not their own beneficial interest despite legal ownership). If cash is not going to pay shareholders, it should go back to Q, it can't be used by the bank to set off the debt owed.

Held

- The money was advanced for the purpose of paying dividends and it couldn't be used for any other person. Therefore, interpreting the transaction, there was a mutual intention that the sum advance should not be part of the assets of roles razor. [even though legally they have a K with bank that the bank owes RR that amount].
- It is commonly accepted in the courts that arrangements of this character for the payment of a person's creditors by a third person gives rise to a fiduciary relationship or trust, in favour, as a primary trust of the creditors and secondarily, if primary trust fails, of the third person (someone else who paid the money).
- One conceptualisation: TWO TRUSTS
    1. Creditors trust - when money is paid for a specific purpose, the money is held by R on trust for that purpose, creditors are beneficiaries.

2. Lender trust - If you can't pay creditors (first trust fails) then money is held on trust by R for the lenders and goes back to them.

- Second conceptualisation: When money is advanced the lender has an equitable right to see that money applied for primary designated purpose. If primary purpose cannot be carried out, lender can use remedies in equity to get money back. Borrower does not own money beneficially.
    - Thus, there is just ONE trust where lender is beneficiary and property will be given to creditors as the primary purposes of use for the trust property for beneficiaries. If that purpose cannot be fulfilled, it remains in lenders beneficial ownership.
    - Issue: this purpose effectively allows the trustee to destroy the trust property, meaning there is only a personal obligation left to the lender (e.g. to pay interest?).
- HOL adopt the second conceptualisation.
- *Twinsectra v Yardley*: Usually the borrower can do whatever they want with their money and no equitable obligation….
    - This suggest transaction was just a loan, not a trust. It can't be both.
    - HOL says that you can have a loan and a trust situation where the money is loaned in a way that can only be used for a certain purpose.
- Thus, the bank can't take the money to set off debts.

Twinsectra v Yardley

Held

- Usually the borrower can do whatever they want with their money and no equitable obligation…. But it is well established that a **loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations** on the part of the borrower which equity will enforce.
    - In earlier cases, the purpose was to enable the borrower to pay his creditors, but this principle is not limited to this. It is about whether it was lent for some specific purpose.
- How does Quistclose fit into the landscape of trusts?/
    - **A trust in favour of the lender arises when the lender parts with the money on terms which do not exhaust the beneficial interest.** Default trust that fills the gap when some part of the beneficial interest is undisposed of and prevents it from being "in suspense".
    - It is not a continent reversionary, future interest, not a second trust that comes into being when original trust fails.
    - Basically this is the second analysis in Quistclose, there is one trust and lender is beneficiary from the start.

What is the effect of a Quistclose trust being a resulting trust?

- Breach of trust if you don't spend money for the specific purpose, could trace money into what it was used for as lender has a proprietary claim.
- There is no intention to create a trust here, but we will construe action as a trust because otherwise the result is unconscionable.
- If we say that there is a mutual intention between parties that lender will be beneficiary, and borrower will hold money on trust, this seems more like **an express trust.**
    - While you give over property and then beneficial ownership jumps back, there is no failed trust here or a presumption because you have gifted property gratuitously, it is about actual intentions of what people did.

Why do we allow Quistclose to effectively take security interest in this money when they didn't do anything e.g. register it under PPSA?

- In the UK, they have a complicated scheme of personal property security interests, so HOL said a lender creates a trust when lending for a specific purpose which effectively gives lender security over the property.
- In NZ, we have the PPSA which codifies what a security interest is and what interest have priority- you need to come under s 17 and register your interest.
- When you've intended to set up a quistclose trust it does seem to fall within s 17, so maybe we don't need quistclose trusts as a stand alone mechanism anymore.
- Quistclose trust may not have priority over other security interests registered on the PPSA, so you would need to register it.

Forming an express trusts

General

Three requirements for a trust

1. Intention to create a trust
2. Certainty of subject matter of the trust
3. Certainty of objects (for persons/beneficiaries or for purposes e.g. charitable)

What motivates the assertion of a trust?

- To defeat competing claims e.g. *Paul v Constance* - de facto partner wants to stop legal wife taking property under the applicable intestacy rules by asserting the property was held on trust for her.
- Trust claims are often invoked where the alternative position is that the claimant is (only) an ordinary creditor of a person who is insolvent(personal claim worth less)e.g. *Korda, Goldcorp*

What are two variations of express trust that can be created?

1. Transfer property to trustees to act as trustees and who accept it as such.
    a. [More likely to write this down as courts and trustees need to know they are bound]
2. Manifestation of intention by owner of property to hold it as a trustee for beneficiaries (*Paul v Constance)*
    a. This is by declaration, either oral or written OR
    b. We can impute/infer declaration from context e.g. acts showing the person constituted themselves as the trustee.

Certainty of Intention

Summary

- Has to be certain that the settlor intended to create a binding obligation on the trustee.
    - Can be found in informal arrangements, even where it may seem the settlor did not understand the exact nature of the trust
    - Normally it is unquestionable because settlor has drawn up formal trust deed detailing intention and terms of the trust.
- Did they intend to create legal obligations? Did they intend a trust?
    - objective test = what would a reasonable person think the settlor intended given the words and actions used (*Pearson/Twinsectra)*
- Why should it be that "where a transaction objectively appears to be a trust, it will be held out to be a trust, even if it is unclear whether the settlor actually intended there to be a trust? (*Official Assignee v Wilson)*

Paul v Constance

Facts

- Mr. C is a wage earner who is married to Mrs. C. They separate but stay married and Mr. C starts dating Paul - de facto partners.
- Mr. C is injured, gets a payout of 950 pounds and puts it into a bank account. He says at many points "the money is as much mine as it is yours".
- They had a plan to open bank account together; allows Mrs. Paul to draw money from bank account. They wanted to set it up in her name but they couldn't because they weren't married. Pay joint bingo winnings into bank account and only used the money in the account for joint purposes.
- Mr. C dies and leaves no will and because Mrs. C is still married to Mr. C she effectively becomes the owner of the money
- P argues that the property was held on trust for the benefit of Mr. C and her.
- C argues that there was no trust deed, and no clear statement that it would be a trust, so there is no intention to create a trust for P.

Held

- Law
    - We have to infer intention from the actions and the context.
    - No particular form of words is necessary, just look at substance of words used.
    - The words have to show an imperative obligation, not just a moral obligation.

        - *Jones v Locke* - man went on a business trip and didn't get baby a present. The wife is mad, so the husband writes a check and gives it to the baby. Held: there was no legal intention to create a trust or gift it to the baby, it was just a moral obligation.
- Application to facts
    - He didn't use the word trust, but by saying it is owned by us, he is essentially saying I hold it on trust for both of us.
    - Mr. C was not trying to gift the money to P, he was trying to give her a beneficial interest in the money as well as him (bingo, ability to take money out, tried to get it in her name, basically like it was both their accounts) = hold trust for P, even if he didn't understand that what he was doing was creating a trust.
    - There is clearly an express declaration of trust.
- Issue: if he is an ordinary person, did he really have an understanding of a trust, or did he only have an understanding of a moral obligation?

Objective approach

To ascertain whether there was an intention to create a trust, we look at evidence to show objective intention - a reasonable person would have thought they had created a trust.

- Focus: what the settlor did, not what they intended to do.

Byrnes v Kendle: Q = "what is the meaning of what the parties have said to an objective person?", not "what did the parties mean to say?"

- Surrounding circumstances are material to extract the objective intention.
- Subjective intention is only relevant in relation to trusts when the transaction is open to some challenge or some application for modification e.g. where a sham is asserted.

Twinsectra Ltd v Yardley: A settlor does not need to appreciate that his arrangements have the effect of creating a trust. Just need:

- Settlor intended to enter in these arrangements
- These arrangements have the effect of creating a trust.

Korda v AET (HC AUS)

Facts

- Forestry investment are investing in forestry companies and enter into covenants with F.
    - Forestry Co (F) = owns and manages forests
    - Milling Co (M) = fells, mills, markets and sells trees.
- AET is a corporate trustee for the investors (executive trustee company) that holds money, paid from time to time by F and M, on trust for the investors.
- F and M are taken over by Gunn Ltd (G), who grants security interests over all their assets to ANZ for debts that it owes (and other financiers).
- Assets of F and M got split up to benefit the parent company.
- ANZ calls in a security for debts owed by G, with Porters as receivers, to get assets to satisfy the debt.
- They say that they own assets in F and M, which includes the money that M got from selling the trees and F from selling the land.
- Investors were entitled to interests in relation to areas and plantings, net proceeds form sales of timber and payments reflecting increase in land value under the covenants/provisions.
- Under covenants, F promised to not sell land, or encumber without consent, deposit certificates of title with AET, pay into a maintenance fund and indemnify AET and CH against claims and outgoings.

Issue

- Breach of the tripartite agreement between the trustee, F and M.
- Breach of the covenants - contractual obligations that F had to the investors (trustees comes in because of regulation).
- Is there a second trust, held for the investors by F and M, made up of F and M assets that they have invested in that would take priority to ANZ's security interest? [AET trust property is clearly their property].

Held

- In this commercial transaction, was there an intention for the assets of the companies to be held on trust in the trust deed for the AET trust?
    - The trust deed does not say explicitly that F and M are trustees, but we need to look at contextual clues.
- SC/COA - A trust existed because

- Regulation about how the proceeds of timber sales are going to be made. There is an intention to create and preserve a fund, which suggests there is a trust.
- AET argued this means there is an obligation to pay money and maintain a fund for investors that is segregated from the general pool of money/bank accounts of these companies.
- The judge acknowledged there was no specific obligation on F or M to set aside funds in a separate account and that contractual obligation to deal with funds does not necessarily determine their proprietary character, but said that there was a trust bec.
    1. The nature of the transaction and relationship between the parties suggests a relationship of trustee and beneficiary.
        a. We can consider concepts that we would traditionally find in trusts, as indicators of their being a trust.
        b. **HC AUS:** A trust wasn't inconsistent with the obligations of the potential trustee but does this show that it is a trust or that it isn't not a trust?
    2. Relevant documents were required pursuant to the relevant legislation under the division dealing with interests other than shares and debentures. Division was directed towards the protection of investors.
        a. Purpose of the whole transaction and the legislation that regulated it was the protection of investors.
        b. We would protect investors best by requiring management companies to hold certain assets on trust, not just have a trust in the hands of statutory trustees.
    3. Detailed provisions of documents were directed to managing other people's funds. Obligations imposed of F and M were covenants and undertaking to act in the interest of identified others at all stages.
        a. E.g. tripartite agreement between investors, companies and AET.
        b. All these covenants/undertakings were things trustees would do to protect investors.
        c. There is a commercial necessity that the investments are not at risk, given the nature of investment and statute.
        d. All sorts of assurances that investors would have a secure interest in sale proceeds in hands of Mill company. [although HC AUS view is it is not part of the K].
        e. **HC AUS:** These obligations don't create binding obligations to set up a fund.

- HC AUS
    - What other arguments could AET make to say there was a trust? (that came out in HC AUS case)
        - FUND = segregated pool of assets = provisions of the trust deed that suggest that a fund is being required and statutory scheme, and tripartite agreement also seems to suggest this.
            - **HC AUS:** No, the obligations about what are going to be made do not create binding obligations to set up a fund.
        - LAND on trust? = Value of land in relation to an interest. "You have an interest in a radiata plantation, entitlement to the proceeds". Interest sounds like you have a proprietary right e.g. you have interest in plantation, therefore interest in value of the land.
            - **HC AUS:** It is clear that the covenants give an interest in the value of the land, but they say this is not an interest in the land. This is just a contractual interest. Language and concepts show this.
        - There were lots of other things used to secure investment for investors e.g. caveats that until the timber was disposed of they would not sell land or encumber the land. This seems like a proprietary interest.
            - The creation of a security interest does not import a creation of a trust.
            - It is debatable whether the arrangements gave rise to a caveatable interest so the caveat provisions in covenants and trust deed does not show an intention to create a trust over land or trees.
    - Did an express trust exist?
        - No. We shouldn't be reluctant to infer a trust. Trust and contracts can coexist. However, **there must be intention from the context and language such that a trust can be inferred, can't just make it up.**

- Just because it is commercially desirable for one party that a trust exists does not mean there is a trust, or even that they will be protected in other capacities. The investors knew they were going to be subject to some risk.

Certainty of objects

General

- Must identify the possible persons who may be beneficiaries of the trust with sufficient certainty so that court can enforce and police the trust.
    - *Re Gulbenkian's Settlements* - Settlor must make their i**ntentions sufficiently plain as to the objects of the trust** and the court cannot give effect to it by misinterpreting his intentions by dividing the fund merely among those present. The court acts in default of trustees, and must know with sufficient certainty the objects to execute the trust.
- The beneficiaries must be people, not abstract purposes. Unless it is a charitable purpose.
- *Crawford v Phillips:* example of where a lack of certainty of objects means that the trust failed and the property went back to him (resulting trust). However, because he was dead it will go to the person who takes residuary assets (intestacy rules), which is his brother, even though he wanted the property to go to anyone but his brother. Important to be certain about objects to ensure testamentary intentions are met.

What is the courts role?

- They police actions of the trust - make sure trustee is doing the right things with property and to benefit the right people/purpose.
- If the trustees default the court needs to be able to carry out the trust somehow.
    - If they cannot enforce the trust, the trustee is just the beneficial owner or there will be a resulting trust (held on trust for the settlor).
    - *Morice v Bishop of Durham* - An uncontrollable power of disposition would just be ownership, not a trust. There must be someone in whose favour the court can decree performance.
- It is preferable for the courts to give effect to the trust because to find otherwise would destroy the trust that was intended by the settlor.

How might objects be expressed?

- Particular named people
    - Give their full name, place they live, might refer to the relationship you have to them.
- A class of people
    - Issue can arise here, need to be certain enough about class of people so that the court can enforce the trust.
- Anyone in the world (general power)
    - Very discretionary
- Anyone except someone named or a class of people (intermediate power)
    - Important when there is a tax consequence of you possibly being a beneficiary of the trust. Just to make sure there can be no argument that you will get property back.

Kinds of uncertainty

- Conceptual uncertainty: Object is uncertain because the term or word itself is uncertain.
    - Example: "on trust for the interesting members of VUW Law faculty" - what does interesting mean, and does law faculty mean lecturers or include tutors etc.
- Evidential uncertainty: We might know what the concept is but there is a lack of evidence for a particular individual about whether they fall within the category.
    - "On trust for my former faculty colleagues" - have to prove you are a former faculty member and where a colleague of mark.
- 'Whereabouts' uncertainty: We know the right person but we don't know where they are.
- "Hopelessly wide" class: administrative workability because the class is too big for trustees to choose between beneficiaries or to know who all the beneficiaries are.
    - Might be able to resolve this with first serve basis.
    - Courts are reluctant to sanction a discretionary trust where the trustee can virtually give the property to anyone because it gives the trustee too much power.
    - Maybe courts shouldn't be too astute in not finding a trust in this case though, better to give effect to the settlor's intention.

Different tests for uncertainty of object

There are different tests of certainty of object for different types of trust power, but one trust instrument might contain a combination of these trusts and powers. If there is insufficient certainty of objects, the trust or power will be void.

1. Fixed trust (including bare trusts)
    a. No discretion/power is conferred upon trustee or any other party to vary the class of beneficiaries or the quantum of their interests e.g. divide property equally between objects.
    b. *McPhail v Doulton:* There cannot be equal division among a class unless all the members of the class are known - we have a complete list.
        i. This requires conceptual and evidential certainty.
    c. But you can have a gift with a condition precedent e.g. $1000 to each of my 'good friends' - *Re Barlow's Will Trust*
2. Discretionary trusts ['trust powers']
    a. A power to distribute which the donee must exercise (forced to make a decision)
    b. *IRC v Broadway Cottages* (pre-*Mcphail v Doulton):* The truste can only make distributions after considering all the members of the class. **Complete list test.**
        i. In default of trustees complying with their duties, the court could only make an equal distribution, and could not exercise the dispositive discretion because similarly the court cannot impose an arbitrary limitation on the class by creating a smaller certain class where the settlor has not.
        ii. <u>Issues:</u>
            1. Why apply the same test as fixed trusts here? There is no duty to give out property equally under the trust deed, the whole point is that the trustee can use their discretion. Further, the wider class the harder (and more pointless) it is to split it among everyone.
            2. Discretionary trusts were less common at the time of this judgment.
    c. *Mcphail v Doulton:* the power and trust is valid if it can be said with certainty whether any given individual is or is not a member of the class and does not fail simply because it is impossible to ascertain every member of the class.
        i. Court can appoint new trustees or itself give effect to the settlor's intention.
        ii. The trustee only needs to make a general survey of the field, distinguishing between classes and categories and particular individuals.
        iii. Beneficiaries and the court can still ensure trustees do not dispose of property to non-objects.
3. Powers held as a fiduciary
    a. A power given to "appoint" property to (vest property in) one or more persons, where the donee of the power is under no obligation to appoint the property.
    b. *Re Gulbenkian*: A bare power of appointment among a class is valid if you can with certainty say whether any given individual is or is not a member of the class; you don't have to ascertain every member of the class.
        i. "Is or is not part of the class test" as person turns up to make claim. Don't need to draw up a list.
4. Personal powers

Mcphail v Doulton (HOL)

Facts

- Wealthy man sets up trust and says that beneficiaries are all his employees, and relatives or dependants of employees.
- This trust runs for 25 years. But when he dies his family say they want the money back. They say the trust is invalid because uncertainty of object.

Issue

- What is the nature of the power? Was it a discretionary trust/trust power or a fiduciary power?

Lord Goff - Minority

- It was a fiduciary power because the courts wanted to uphold the trust.

HOL - majority

- It is clearly a discretionary trust because the trust deed says they MUST make a distribution.
    - There is another clause which seems to contract this though and say that there is no obligation to distribute. HOL think this doesn't change the trust to give a fiduciary power.

- They note that the distinction between trust power and fiduciary power is a narrow and artificial distinction, that may not be that useful.
- For express trusts, it should remain that they have to draw up a complete list because they have an obligation to share property equally.
- **But they find that a person with a trust power under a discretionary trust should have the same obligations as someone with a fiduciary power.**
    - Get a sense of who might be in the class, who is out there, examine the field, make diligent inquiries, decide how much they should give away and who should be given what amount given their range of needs.
    - You have to allocate the property, but you don't have to allocate it to everyone, can make a selection within a category.
    - It is still distinct to a fiduciary power because you have to make more exhaustive inquiries to avoid breaching trustee obligations.
- How will courts step in if the trustee breaches obligations e.g. doesn't distribute trust property?
    - All courts have to do is make sure the trustees don't give property to the wrong people. They can do this without requiring a complete list of beneficiaries.
    - They could choose to distribute the property equally between all members of the class
        - Principle of equitable provision is paradoxical though, it would be of benefit to no one, and difficult to ascertain.
    - They could also appoint new trustees to make the distribution.
        - More likely, so basically any distribution that needs to be made can still be made by the court.
        - The court does not have to order a particular distribution because no particular distribution has to be made (same as fiduciary powers).

Result - HOL sends litigation back to the Chancery Division of the High Court, and then on appeal to the CA.

Re Baden (No. 2) (CA)

Facts

- Note: executors of wealthy man's assets had spent a lot of time and money (from the trust) trying to destroy the frustrate and frustrate his intention of man who appointed them as executors. - Factor that definitely puts the court off finding in favour of them.

Held

- How should we apply the 'is or is not' test?
    - Stamp LJ: need both conceptual and evidential certainty to show that any given person is or is not within the class.
    - Megaw LJ: such a trust will be valid if a substantial number of people can be identified as satisfying the terms of the trust/identified as an individual
        - Evidential certainty is not a problem for the court to enforce the trust, only if the concept is uncertain e.g. what the class is.
        - If there is conceptual uncertainty, the trust is void because the trustees cannot give effect to the trust and police can't enforce it.
        - As long as there are some people that are an identified individual of the class, they will just distribute the money to those people who are definitely in that category. Trust shouldn't fail because you can't be certain on all subjects and only some.
        - He disagrees with executors approach - because that is essentially just the complete list test.
            - <u>Can we consider conceptual uncertainty here, as well as evidential?</u>
            - This approach seems to be saying that the focus is on evidential matters, even where there may be some conceptual uncertainty.
            - We can probably have some conceptual certainty in relation to some people e.g. the concept clearly covers some people, but isn't clear if that includes some other people. But this conceptual uncertainty doesn't necessarily mean trust is void as long as some people clearly fit within what we can understand from the concept, we just won't consider the people that are less clear because of evidential uncertainty OR conceptual uncertainty.
            - This understanding is better because in a case where we have all the evidence but we still don't know where they fall within the concept, it doesn't matter as long as we know some people fall within the category as we can understand the concept.

        - Sachs LJ: once the conceptual uncertainty hurdle has been overcome, then the court (if called on) needs enough evidence to be convinced that X is within the class. If not enough evidence of membership, they are not within the class.
            - This is a more orthodox approach.
- Application to the facts: **Dependence**
    - Megaw LJ: In this case, there is enough certainty of object with relative and dependence.
    - Sach LJ:
        - There is no conceptual uncertainty with the word dependence. Dependence = dependent on person for ordinary necessities of life for that person of that class in that position of life.
            - Is this true/clear? Could be other definitions.
    - Brightman J: dependant conjures up a sufficiently distinct picture, anyone wholly or partly dependent on the means of another.
        - But to what degree is this, what does partly mean?
    - Critique:
        - Couldn't we say that you might be able to read a term like dependent with some uncertainty but so long as for most people it is workable, and there is a large enough pool of possible objects that can come within this concept and have property distributed to them, then the courts should be able to enforce it and the trust should not be void.
        - If the trustee gives property to someone who is in the ? category, then the court can say that this was a breach of trustee obligations because it was too ambiguous, or say that it was close enough to come under it. Court discretion.
- Application to facts: **Relatives**
    - Criteria is descent from a common ancestor. This is potentially broad.
    - Judges agree that most of the time you won't be able to prove a very general scientific class through evidence, but this doesn't mean we can't have a trust.
    - Question: who would an employee introduce as a relative rather than a kinsman or a distant relative?
        - This doesn't suggest that the term in itself is conceptually certain. This is more a test of what a reasonable person would consider as a relative. The courts and trustees should use more thinking and make reasonable choices.

Result: Find that the court can enforce the trust.

- But in reality, you can just avoid these issues when you want to make a large group beneficiaries by giving the trustee the power to add anyone that they like as a beneficiary, so the trustees can select people.

Re Beckbessinger

Facts

- Will says that residue to be held on trust by X and Y to be applied "to benefit the interests which deceased has particularly in CHCH"

Held - Tipping J

- Will created a discretionary trust - thus trustee has no choice but to exercise the power to distribute property. However, they have a choice as to the beneficiaries, so the "complete list" test for fixed trusts does not apply.
- Follow *McPhail v Doulton*
- Expression "interests which [deceased] had in christchurch" is so conceptually uncertain as to be void for uncertainty.

Crawford v Phillips

Facts

- Trust over a farm that Mr. C had been managing.
- Phillips sets up a will where there is an interest in the farm for Mr. C for his life so long as he manages the farm.
- Trustees are phillips and a lawyer Wells.
- Phillips didn't want his brother to get the property, changes the will specifically to try to avoid that.
- Mr. C dies, then trustees can dispose of the property and responsibility to get rid of the residuary estate.

Held

- What kind of power is it? Discretionary trust/trust power or fiduciary power?
    - There is no gift over in default of appointment.
    - A distribution has to be made, and they use trust throughout the will.

    - If the property can't be used for his purpose, it says what would happen with the property e.g. trustees can dispose of property and get rid of estate so long as it doesn't go to the brother.
    - Seems like a discretionary trust.
- Who are the objects?
    - It is unclear where Mr. C or Wells can benefit, or whether their relatives or associates can? Objects aren't nominated
    - It is conceptually uncertain issue - it is impossible to discern a conceptually certain person in the group who would benefit.
- What if there is a clear rule that Wells or Mr. C could benefit or not, or that Wells could give property to himself? Does this create certainty of objects?
    - There are no limitations on who you can give the property too - either anybody but them or definitely them.
    - But still void because while such a wide power of appointment is recognised by the court when it is a fiduciary power, for discretionary trusts there is still the idea of administrative workability. Even if it was clear that the property could be given to Mr. Wells or Mr C, or couldn't be, it will still be void because the class is too wide.
        - Critique: why is this the case? The court can police the trust because they can say you can't give it to these people. Maybe it takes away their role because otherwise it can be given to anyone, but why is this an issue really? Seems like an arbitrary distinction from fiduciary power as well.

Certainty of subject matter

General

- The trust fund/property must be identified with sufficient particularity.
- For fungibles: the property must be 'segregated' from the trustee's other property.
- Fungible = some property held in pools where each part is effectively identical to the other party e.g. wheat in a silo, gold in a bank vault, money in a bank account, shares.

What is the risk if the law were not concerned with identifying the property with certainty?

- We may confuse the trust property with other property e.g. wrong piece of land OR you may not be able to tell what fungibles belong to the trust and what doesn't because they aren't segregated.
- What if there is not enough money left in the bank account? Left with beneficiaries fighting over what portion belongs to what person.
- Or if they used money from the account for some benefit, e.g. investing in shares, how do we know if it was personal or trust money that got that benefit. If trust money, then trustees are entitled to the benefit of that investment.
- *Palmer v Simmonds* - "the bulk of my residuary estate"
    - Residuary estate is a valid trust because it is everything left over, but here we don't know what bulk means, so trust is void.
- *Sprange v Barnard* - "the remaining part of what is left, that he does not want"
    - When he dies anything left over will be held on trust for other people, but we don't know what is going to be left when he dies. [Criticism: we will know what is left when he dies though.].
- *Boyce v Boyce* - "one of my three houses of her choosing to Maria, and the other two to Charlotte"
    - Marai didn't make a choice on the house ad she died. So trust is void, because we don't know what the other two homes are.
    - [Criticism: why not assume Maria would have wanted to most valuable house, and leave two less valuable houses to Charlotte, rather than saying trust is void altogether as this frustrates settlor's intention/testamentary wishes].
- Strict TEST: this can be unfair because it frustrates the settlor's intention. But today the courts may be more liberal in trying to uphold the settlor's intention.
    - Should we loosen the rules when it comes to property that is completely fungible?

In Re London Wine Company (Shippers) Ltd

Facts

- Paid for wine, got a certificate to say you owned a certain amount, but the wine company never segregated out bottles of wine to that individual purchase.
- There is no transfer of legal title because there was no appropriation of the goods = property has not passed. Ownership is still with the wine company.

- Purchasers tried to argue that they had equitable/beneficial ownership through a trust.

Held

- There can be no trust because there is no certainty of subject matter as wine was not segregated.
- How can we assert your claim against other security interests when we don't know what wine is yours? Even if the property is fungible.

Re Goldcorp (PC)

Facts

- People want to invest in gold through Goldcorp. The options are to purchase the gold and receive or purchase it and have it stored for you on behalf of Goldcorp in their vaults. Brochures suggested the latter option was more popular because you could store it safely and free of charge.
- They would secure gold on a non-allocated invoice in a bulk storage.
- When receivers are called in to Goldcorp by the bank, the Investors believe that they got a proprietary right to the gold, thus their interest in the gold is protected from other creditors.
- Goldcorp has 2.5 million worth of gold, but has 9 million in claims against them.
- Bank wants to assert their security interest over the gold Goldcorp's assets.
- Investors argue that the gold is held on trust for the investors, and while it is not enough to satisfy all the investors claims, they should get a proportionate amount of the trust property from what is left over depending on what they were owed. BNZ shouldn't get it.

Held

- HC: There is no trust apart from one exceptional case.
- COA: Cannot argue that they have legal ownership because goods have not been ascertained, property has not passed. They also cannot say that there is certainty of subject matter here, so there is no trust. - strict principle.
    - If they had specified the pool from which the goods came from, then you could argue the company held this pool on trust for investors.
    - But here there was no distinction between gold that was trust property and gold that wasn't, there was no particular pool of assets that we could say were held on trust and nothing was done to make it seem like they can't treat the gold as their own property.
    - It is still subject to the security agreement of the bank.
- Exceptional case?
    - Mr. Ligget invested $700,000.
    - 78 coins were specifically maple coins and were initially appropriated to him, but then he decided that they can hold them - the court finds he does have legal title.
    - But the further 1,000 coins he bought were never identified as any coins for him, so for those he is treated like other investors.
    - Ligget argues: When you got the second order you didn't have many maple coins on hand, so they got in extra maple coins for him. This block purchase matches the description of what he bought, so they are separated and are his property.
    - This argument fails because this argument suggests the company could not supply from any other source or deal with coins in any other way. There is also evidence the coins were purchased specifically for his purchase contract. It isn't segregated out as something special to be dealt with in a specific way that is separate from how they would be able to treat their own assets.
    - The company cannot have intended to create an interest in its general stock of gold which would have inhibited any dealings with it otherwise than for the purpose of delivery under the non-allocated sale contracts.
        - Maybe today we would say that there is certainty of subject matter if we could say they regard the coins as part of the trust.
- Walker and Hall claimants?
    - It sold it's bullion business to Goldcorp, and Goldcorp took over the trust obligations W had to their customers. This was meant to be kept as separate assets.
    - The court found there was a trust here. Property was transferred to be held on a trust.
    - Goldcorp had failed to keep trust property distinct, but W + H claimants can say there was a trust and can operate tracing rules.

Re-interpretation of goldcorp

- The courts started to use Goldcorp to say that we can uphold trusts where there is a clear intention, particularly with fungibles.
- They say Goldcorp was a case where there was no clear intention, even though really it is applying the strict legal principle. This introduces more flexibility.

Hunter v Moss

Facts

- Declaration by the principal shareholder of the company that he held 50 of 950 shares on trust for a key employee.

Held

- [Clear intention here for trust].
- This was a valid trust (even though it wasn't technically separated).
- Didn't follow *Re Goldcorp* because:
    - When an estate passes to a personal representative, there is no problem about gifts such as: 25% of my shares in X Ltd to each of my four children.
    - The executor identifies the property to be held on trust.
    - "Intangibles are different" - *Re Harvard Securities*

White v Shortall (NSWSC)

Facts

- Shortall holds 220,000 of my shares in the company on trust for Mrs. White.
- Shortall fails to deliver the shares when White asks him to.
- Shares go down in value, and White argues that Shortall breached the trust because he didn't give effect to the trust and she lost out.
- Shortall argues that the shares are part of a general pool of shares, so you can't be certain what shares are trust property ≠ certainty of subject matter. He says that *Hunter v Moss* was decided incorrectly because it is not enough that there are items which match the trust description, you need to be able to distinguish the trust property from others.

Held

- What are the problems with *Hunter v Moss* considering general legal principle?
    - *Hunter* rejects how the judge decided. Didn't properly deal with issues to say the *Re Goldcorp* was wrong. Still need to show what trust property is and what remains.
    - *Hunter* distinguishes that case to *Re London* as it was concerned with appropriation of chattels and when the property in chattels passes/transfer of title at common law. Hunter concerns a declaration of trust. This court finds that while there is a difference factually, they are still governed by the same common legal principle because in essence both had claims of a trust being made, and both were rejected on the basis of certainty of subject matter.
    - ***Hunter* says that it is fine if X out of Y is held on trust, it doesn't matter that we don't know exactly what X is.** This judge disagrees that this conceptualisation works/fits within the legal principle.
- How could we resolve the legal principle in a better way?
    - We want to get around this strict rule because where there is a clear intention to have a trust, beneficiary shouldn't be denied benefit of express trust because the nature of the trust property is fungibles, so hard to have certainty of subject matter.
    - We can get around the strict rule by saying **that the trust property is the entire pool of assets of which White and Shortall are both beneficiaries of (co-ownership), so some property is held by the Shortall for the benefit of White, other property is held by the Shortall for the benefit of himself.**
    - Once a finding has been made that there was an intention to hold 220,000 shares on trust, that intention needs to be given effect to in a way that is appropriate to the kind of property that is being talked about. Given the types of rights that are involved in holding shares in a company do not need to be identified in terms of holding particular shares etc. there is nothing in the nature of the trust property that is inconsistent with recognizing the validity of the trust.
    - Criticism:
        - Is saying that you hold trust property for yourself just saying that you own the property?

- Does it really resolve issues that arise from uncertainty of subject matter. If some shares were sold at a high price, we still wouldn't know if those shares sold were the beneficiaries or the trustees shares?
    - Maybe rules of tracing could answer this. Beneficiary can choose whatever shares profit them the best because there was a breach of trust.
        - Beneficiary could say whatever is left is mine
        - Or if it was a valuable transaction they can say it was used by their money
- They don't stop the problem of where trust property is, just replicate it and use tracing rule to resolve the issue in a way you could have done under *Hunter v Moss.*

Pearson v Lehman Brothers Finance SA (EWCA)

Facts

- Parent company (LB) is buying securities for its subsidiaries in different countries, but not separating them out to be owned by the subsidiary companies.
- Subsidiaries pay LB to buy securities and shares show up in accounts.
- When LB goes under, issue is whether subsidiary companies get to say that securities were held on trust by LB for them because there was no segregation of trust property and LB assets.

Held

- The HC judge relied on *Hunter v Moss:* A trust of part of a fungible mass can have certainty of subject matter provided that the mass itself is sufficiently identified and provided also that the beneficiary's proportionate share of it is not itself uncertain.
- Preferred the interpretation that the trust worked by creating a beneficial co-ownership in the identified fund - followed *White v Shortall* approach.
- Why is this case even more of an extension of certainty of subject matter?
    - LB was able to use trust property as if it was their own property e.g. sell/dispose of it.
    - Security aspect of a 'trust' is destroyed e.g. they hold it for the benefit of beneficiaries.
    - Also unclear if there was even a pool of trust property like in *hunter* where they were just assets of the trustee.
- They say while this trust is complex, that doesn't mean there is no trust fund.
    - Anything in the pool of assets is held on trust. If there is a shortfall in what the affiliates are owed, ascertain who gets what through tracing.
    - It doesn't matter that LB can use the property for what it wants, there can still be certainty of subject matter as long as whatever is inn the assets matches the description of the agreement/trust deed.
- Could this approach have been applied to *Re Goldcorp*?
    - Say that property is not general assets, but trust property. It is all part of the subject matter.
    - But we could still distinguish that in Goldcorp there was no certainty of intention, so we need to be more certain about subject matter. In this case, there was clear intention to have a trust, and this can override the uncertainties of subject matter.

Proprietors of Wakatu v AG

Facts

- NZ company purported to acquire a vast land mass of land from Māori.
- Promised to reserve 10% of the land - this was effectively a trust, and they could retain the land they currently occupy.
- Crown is the source of legal title. They researched what they did, and validated some of the purchases, and took upon itself the obligation to give effect to the 10th of the land trusts.
- It was going to reserve the land occupied by Māori and it was also going to allocate a 10th of those ballots to Māori to make them legal title holders. This happened for some bits of land, but not all bits of land that is was supposed to. The trust had not been complied with/breach of trust obligations.

Held- HC/COA

- Had to do a lot of research, and make judgments on what their objective intention was?
- There cannot be a private express trust because there is a lack of certainty of subject matter. We don't know what 10% of the land is held under trust.

Held - SC

- Elias: there was a trust because there was an intention to create a trust, and some uncertainty of subject matter doesn't mean we shouldn't recognise the trusts existence.
- She says that all the land is held on trust/pool of property. While we can't point to specific land, we know that 10% of the geographical area/pool was under trust.
    - Kind of like *Wine v Shortall* - seems to be certainty of intention, portion of assets within pool = trust property, but not sure what.
    - Cite *Goldcorp* - if there is a specific bulk that can be held on trust, we can say this is certain enough to be a trust. Distinguishable from Goldcorp where there was no distinction between trust property and assets and no particular pool of assets that we could say were held on trust.
    - *Lehman brothers* - seems like the same as goldcorp, and distinction is really about whether you clearly intended to create a trust/declaration of trust. This case appeared to extend the reaches of certainty of subject matter.
- *Goldcorp* and *London Wine* cast doubt on whether you can have a trust where you can't identify the specific property of the trust, but this case is distinguished from those. We know the area of land to which the trust applies as 10% of the bulk block. In reality, when you exclude all property as part of this bulk that is in private ownership, whatever is left will be 10% so we can ascertain what 10% is.
- How could we counter Elias CJ's argument?
    - Basic principles: it can't be a trust as there is an intention to create a trust but no certainty of subject matter.
    - Here, the uncertainty of subject matter is too uncertain, compared to other cases, because the subject matter is land, not fungibles like money or shares that are interchangeable. Each parcel of land is different and can serve different functions, so it is more necessary to define what particular parts you own.
    - In *Lehman Brothers,* a basis for the argument seems to be that the shares are fungibles/aren't distinguishable from any other share, so it is less important to specifically identify what is trust property. **Court can enforce a trust where there is uncertain subject matter over fungible things**.
    - Elias doesn't really address this distinction.
        - But maybe the distinction between fungible v non-fungible is an error? Court could still enforce the trust by assuming they would have got at the very least 10% of the worst land. Better than no trust at all.
    - Strict rule = if you haven't identified a particular plot of land as subject matter of the trust, you are not going to end up with a proprietary claim, or ability to trace that you would get under a trust. But does this mean the court can in now way recognise that there has been a trust? There is still a personal claim against the crown in private law for loss of land.
- **Where there is clear intention to give effect to a trust even where it seems strange, the court will strive to find that they can enforce the trust.**
    - Counter: You can have a pool of fungibles that make up a trust, and it doesn't really seem like it can be extended to non-fungibles. But SC says it can extend to non-fungibles.
- **Question is: do we know what the trust property is ENOUGH to enforce the trust to give the claimants rights that they want?**
    - *Lamen brothers* - even if it's an odd way of identifying trust property, if it can be done and there is clear intention for a trust that should be enough.

Constitution of trust property

General Principles

Formalities

- Lifetime (inter vivos) trusts of land are unenforceable unless they comply with s 25(2) of the PLA 2007 (in writing, signed)
- They may generally be created orally.
- Wills or testamentary trusts must be a valid will under the Will Act 2007.

Constitution

- A trust is only properly set up or 'constituted' when the trustee has the property to which the trust obligations relate. You have to:
    - The transfer of legal title to the property to another to hold for the benefit of B

    - Make a <u>self-declaration of trust</u>
    - But could also be done by making a gift to B
- A trust can be enforced in a court of equity by enforcing a gift of the trust property to the trustee although it was incomplete at law (legal title has not properly been transferred)
- But *Milroy* says that equity will not perfect an imperfect gift?

Re Rose "exception"

Facts

- In UK, if you die and make a gift you have to pay a tax. So people would give a gift to people before they die to avoid the tax.
- They don't like this tax avoidance, so have a provision that if you want to give a gift without paying estate tax it has to be made a certain amount of time before your death.
- Husband doesn't think he is going to die within that period, he gives a gift to his wife and sets up a trust, but then dies before the period has finished where the law does not apply to the gift.
- At a certain point (30th march) he signed the transfer documents to the company for the gift, and delivered them. Wife had signed a contract saying she will be bound by the obligations of the company. All that had not been done was that the company had not formally registered the transfer.
- The tax agency argue that the initial position (husband was legally and beneficially entitled to shares) was the same up to the 30th of June when it became the final position (wife legally and beneficially entitled to the shares).
- Mrs. Rose argues she doesn't need to pay estate tax because at the relevant date that it would have been made to avoid estate tax (30th March) the husband had divested himself of any beneficial interest in the shares, and wife held the beneficial interest, essentially creating a trust (Even though legal title hadn't transferred yet) - creating an intermediate position.
- Mrs. Rose say the court should give effect to the trust that was intended, while the crown/tax agency say that there was no evidence that a trust was the nature of the transaction.

Held

- *Milroy v Lord:*
    - Facts: transfer to the trustee never occurred, so technically no trust.
    - Held: for a trust to be valid the settlor needs to have done everything, according to the nature of the property, that was necessary to be done to transfer property and render the settlement binding upon him. This can be done by:
        - a transfer or property to the persons - gift
        - Transfer of property to the trustee
        - If you self-declare a trust.
    - Need certainty of intention: what transaction or arrangement was intended?
    - If you don't do any of these things, they cannot give effect to the trust. There is **no equity to perfect an imperfect gift.**
- The court finds that the wife has a beneficial interest at this intermediate stage.
    - The settlor did everything, which according to the nature of the property, was necessary to be done **by him** to transfer the property.
    - They interpret *Milroy* to mean that the gift giver has to everything *they can do* to make a gift valid, but if other things that haven't been done yet stop the gift being given, the equity will step in to enforce the gift/perfect and imperfect gift at law.

Curtis v Pullbrook

Another way that we can get property in the hands of a trustee is by benevolent construction of the documents.

- Equity will perfect and imperfect gift when
    1. The donor has done everything necessary to enable the recipient to enforce the gift without further action from the donor
    2. Detrimental reliance by recipient [estoppel]
    3. Benevolent construction of the documents [trust]

*Choithram v Pagarani (*PC)

Facts

- Mr Pagarani (TCP), a wealthy businessman, wished to set up a foundation in Jersey. The foundation [trust] property was accounts and shares of BVI companies.
- At an elaborate ceremony, a trust deed was signed.
- Then TCP stated something like "I give my property to the trust"
- TCP told the company accountant to transfer the accounts and shares to the trust; the accountant altered the books of one company, but the shares were not legally transferred before C's death.
- Some of Mr. Pagarani's family challenged the validity of the trust, as 8 trustees don't have legal title.

Held - lower courts

- His statement wasn't sufficient to transfer title to the trustees, he hasn't taken action to validly transfer legal title to trustees.

Held - PC

- They try to apply *Re Rose* but we can't because he hadn't done everything he needed to do to transfer the property.
- *Milroy v Lord,* we cannot give effect to the trust some other way just because he wasn't able to do it in one of the 3 ways.
- They say that there was a self-declaration of trust, you declare yourself as a trustee over your own property for the beneficiaries.
    - There was a self-declaration of trust by TCP. issue where other 7 trustees don't have trust property because no legal transfer, but so long as one trustee owns the trust property the court can enforce the trust by saying trustee must make arrangements to transfer property in co-ownership of all the trustees.
    - This is possible because we can interpret the words that seem like a gift or transfer of property to the trustees as a self-declaration of trust.
        - But isn't the words being used by TCP suggest it was a gift to the other 7 trustees? Is this a benevolent consideration of the arrangement.
        - But this relies on TCP having a sophisticated understanding of trust law. You could argue he had no such understanding.
    - PC says no this is what was intended. This could be suggested by evidence that he didn't normally like to sign documents. He signed the trust documents but was clear that he didn't think it was necessary to sign documents that would legally transfer the company account and share ownership to the trustees. This suggests transaction was more about self-declaration of trust than a creation of trust through a transfer of property, he thought he had already self-declared a trust and made it valid.
        - Analysis = he meant to do this.

Trusts Act 2019

- S 15 - an express trust may be created by or under an enactment; or by a person who clearly and with reasonable certainty (subject to any formalities prescribed by any enhancement)
        - indicates an intention to create a trust and
        - identifies the beneficiaries or the permitted purpose of the trust and
        - identifies the trust property.
    - The trust commences when the trustee holds property of the trust.
- S 16 - maximum duration of trust is 125 years, unless a trust specifies how long it will last.
    - If you didn't specify the trust would be void, but now it just goes to the default rule of 125 years, and then it will return to the person with original legal ownership.

Trustee duties and information obligations

Mandatory Duties

Section 22: Mandatory duties are the duties that must be performed by the trustee and may not be modified or excluded by the terms of the trust (part of the irreducible core of the trust)

- Section 23: duty to know terms of trust
    - This is important because if you don't know the terms of the trust, you may act ina way that doesn't comply with them.

- Section 24: duty to act in accordance with the terms of trust
- Section 25: duty to act honestly and in good faith
    - To define what this means we fall back on case law
    - S 5: this act is not an exhaustive code of law, it is meant to be complemented by the rules of common law and equity relating to trusts.
    - Might involve letting settlor make decisions, telling lies about what you are doing etc.
- Section 26: duty to act (hold or deal with property) for the benefit of beneficiaries or to further permitted purpose, in accordance with the terms of the trust.
    - Have to use power for a purpose that is within the scope of that power, links with good faith.
- Section 27: duty to exercise powers for proper purpose

Default Duties

Section 28: default duties are duties that must be performed by the trustee unless modified or excluded in accordance with s 5(4) and (5).

- Section 29: General duty of care
    - When administering a trust, a trustee must exercise reasonable skill and care in the circumstances, having regard to
        - any special knowledge or experience the trustee has or holds out to have and
        - if the person acts as a trustee in the course of a business or profession, to any special knowledge or experience we would reasonably expect a person acting in that business or profession to have.
- Section 30: Duty to invest prudently
    - When exercising any power to invest trust property, a trustee must take skill and care of a prudent person of business would exercise having regard to special knowledge of experience of trustee etc. (as above).
    - We specify this because we used to have separate rules for investment to ensure safe investments.
- Section 31: duty to not exercise power directly or indirectly for trustee's own benefit.
- Section 32: duty to consider actively and regularly whether the trustee should be exercising trustee powers.
    - You don't always have to make a decision (depends on decision/trust), but you should think about it.
- Section 33: duty to not bind or commit trustees to future exercise of discretion
    - Can't feter discretion by a general rule
- Section 34: duty to avoid conflict of interest
- Section 35: duty of impartiality
    - Between the beneficiaries, you can't be impartial to one group or be unfairly partial to another group.
    - This is important where different beneficiaries have different classes of interests (e.g. where you have the ability to reserve the capital or change the nature of the capital which affects the amount of income or capital appreciation/depreciation)
    - *Re Mulligan:* trustees and one beneficiary decided to keep trust capital that was creating lots of income. This caused a problem for capital beneficiaries because the trust ended up being worth a lot less at the end. The trustee was being impartial because they were preferring the interests of the income beneficiary by keeping the capital that has a high income but low capital appreciation.
    - This DOESN'T mean you have to treat all trustees equally under a discretionary trust, you can still pick and choose who to distribute capital or income to.
    - **Operational running of the trust = impartial. Distribution under discretionary trust = can be impartial as long as it accords with the terms of the trust.**
- Section 36: duty not to profit from the trusteeship.
- Section 37: duty to act for no reward
    - This does not affect the right of the trustee to be reimbursed for the trustee's legitimate expenses and disbursements in acting as a trustee.
    - Normally, if you are acting as a trustee as a job you would write in trust deed how much you would get paid, you can't just take a salary for yourself.
- Section 38: Duty for trustees to act unanimously
- Section 39: adviser must alert settlor to modification or exclusion of default duty.

Exemption and indemnity clauses

Definition

An exemption and indemnity clause are clauses which mean trustees will not be liable for breaches of trust. In some ways it does seem to defeat the purpose of the trust, but it is the settlor's choice to write it into the trust deed.

- Section 40: you cannot exclude liability for wilful misconduct, dishonesty or gross negligence.
- Section 43: adviser must alter settlor to liability exclusion or indemnity clause.

Enright v Enright (NZHC)

Facts

- Company that holds all sorts of business is set up by Jack for all his children.
- Jack (settlor) creates a trust where capital is distributed to the youngest child, Tony.
- When trust is wound up Tony get $7 Million.
- Other siblings are upset that they are beneficiaries and get nothing. They were income beneficiaries of the trust. Income from the trust was divided amongst them, unless trustee decided to give the income to one beneficiary orr decided to reserve the income and plough it back into trust capital. There was around $1 million in income.

Issue

- Did the trustees comply with their obligations and exercise power to make an unequal distribution of power or plough it back into the trust capital?

Held

- No, the trustee did not properly make these decisions.
- One trustee was the settlor, he didn't know legal obligations.
- Other settlor was a lawyer.
    - He didn't work out with other trustee what was the right approach if they weren't going to make decisions every year.
    - He didn't make any decisions on this obligation each year, he only exercised this power in a way that fettered his decision to Jack who wanted to put income back into the capital - not a proper decision.

Information duties

Why do we need information duties?

- Trusts are supposed to be private institutions, but there should be some accountability and transparency for beneficiaries.
- Beneficiaries need some grounds/knowledge to help them enforce the trust, or at least need courts to help them do this who also needs some knowledge of trustee decisions.
- How and when can the court intervene in trustee decisions, particularly when the trustee isn't required to make a decision or give reasons for a decision?

What is the rationale for disclosure duties?

- Duty to account to any beneficiary.
- Law Commission: there cannot be any obligation or trust, if the trustee doesn't owe a duty to account to any beneficiary. Beneficiaries need to know that they are beneficiaries of the trust and need to be able to be provided with trust information on request. A trust can never completely dispense of the duty to account to a beneficiary, what is required will depend on the trust.
- If beneficiaries don't know about the trust, the trustee is just holding property because there is no one to enforce the duty against them, they can do what they want with the property. Seems to be a duty that is part of the irreducible core of a trust.

Schmidt v Rosewood

- Is a beneficiary's right or claim to disclosure of trust documents a proprietary right?
    - Mr Brownbill argued that this was the case, which means only those with fixed entitlements could ask for disclosure of trust information, objects of a mere power do not have such a proprietary interest.
    - Court finds that the right to seek disclosure of trust documents is one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. Thus, the right to seek court intervention does not depend on entitlement to a fixed or transmissible beneficial interest. Therefore, objects of discretion can have protection from court of equity, but circ. In which they can do this and nature of protection depend on circumstances.

    - There is no reason to draw a dividing line between transmissible and non-transmissible (discretionary interests) or between objects of a discretionary trust and objects of a mere power (fiduciary character).
- No beneficiary has any entitlement as of right to disclosure of anything like a trust document. Court has to balance competing interests of different beneficiaries, trustees and third parties (personal or commercial) to decide where disclosure should be awarded, limited or denied.

Ercerg v Ercerg (SC)

Facts

- Ivan Erceg was a discretionary and final beneficiary of trusts settled by his brother Michael, although he was not a named beneficiary.
- He was not provided with any property from the trusts.
- Asked for trust information: trust deed and any variations, trustee resolutions and minutes, financial dealings, debts. Said he would keep confidential to himself and advisors.
    - He sent threats to the family, was given $95 million outside of the trust.

Held

LAW

- Agree with *Rosewood.*
- Court's role is not to review the trustee's discretionary decision (in a differential way), it is to exercise it's inherent jurisdiction and it's own judgement as to whether disclosure ought to be made at all and if so, to what extent and on what conditions.
- There is no right to disclosure based on proprietary right to property because of the essentially confidential nature of trusts.
- **Starting point**
    - obligation of trustee to administer the trust in accordance with the trust deed and the duty to account to beneficiaries e.g. tell the beneficiary that they are a beneficiary and think about what information they should disclose without request?
    - But a beneficiary who seeks an account may seek access to documentation necessary to assess whether the trustee has acted in accordance with the trust deed.
- **How should courts decide if trustees should give beneficiary information?**
    - Things to ask:
        - Are there confidentiality issues?
        - What is the nature of the interest you hold?
        - How might this impact other beneficiaries/trustees?
            - Might want to protect trustees from onerous obligations.
        - Can we give you documents in redacted from?
        - Is the disclosure requested likely to embitter family feelings?
            - *Re Londonderry* - may want to redact/non-disclose for family reasons.
    - SC agrees with *Kingston* that generally the trustee has to make a decision about what information it gives to its beneficiaries, and that is similar to a discretionary decision.
    - BUT trustees are not required to give reasons to discretionary beneficiaries for how they exercise their discretions, so trustees could decline to give beneficiary documents that set out their reasons.
- **Factors for court to weigh on whether documents should be disclosed? [**This is a new decision on whether it is appropriate to give beneficiary info, not with reference to trustee].
    - What documents are sought?
        - Each document may need to be evaluated separately.
        - Basic document may be more accessible e.g. trust deed vs. more remote documents like settlor's memorandum of wishes.
    - What is the context of the request and objective of the beneficiary in making the request?
        - E.g. is it necessary for monitoring trustee compliance? Stronger.
        - If there has been previous disclosure that wouldn't be a decisive factor against disclosure.
    - What are the nature of the interests held by the beneficiary seeking access?
        - The degree of proximity of the beneficiary to the trust (or likelihood of the requesting beneficiary or others in the same class of beneficiaries benefiting from the trust)
    - Are there issues of personal or commercial confidentiality?

        - Can consider indications in the trust deed itself about need for confidentiality.
    - Practical difficulties
        - Difficult or expensive to obtain or collate?
    - It would not normally be appropriate to disclose the trustees reasons for particular decisions.
    - Effect on trustee and other beneficiaries
        - Would disclosure have an adverse effect on beneficiaries as a whole that would outweigh the benefit to one beneficiary who obtains info.
        - Would it embitter family feelings or relationship between trustees and beneficiaries to the detriment of beneficiaries as a whole (or non disclosure)
    - Effect on settlor and 3Ps
    - Can disclosure be made while still protecting confidentiality?
    - Can safeguards be imposed?
- Close beneficiaries e.g. those who are named or are a member of the family, who can be expected to get distribution versus others, will have a strong case for disclosure where they seek a trust deed and trust accounts. Normally they will be given this information, so there is a "presumption" of disclosure, although court prefers expectation. Court will likely require disclosure unless exceptional circumstances are present. Room for debate about who is a close beneficiary.
- There is also an expectation that basic trust information will be disclosed, compared to more specific information, like a trust deed, financial statement, trustee minutes and resolution. These provide the strongest case for disclosure. But there could also be exceptional circumstances which mean parts may be redacted.
- <u>The greater the scope of the request and the remoter the interest of the beneficiary, the more room there will be for argument about the appropriateness of disclosure.</u>

APPLICATION

- SC says that he can't get the trust deed.
- The court hasn't seen the deed and don't know whether people who got given property were legitimate objects of the trust or if distributions were made in a proper manner. Court can't really police this.
- But given his behaviour, that he had already received $95 million (and lost it all), that he is undischarged so any property he receives would just go to his creditors, it makes sense that the trustees wouldn't give him any benefit from the trust, whether or not distribution was done properly.

Could lawyer have just seen the trust deed, and worked out whether it was a breach of trust? Can beneficiaries themselves enforce a trust?

Trust Act

Trustee's obligations to keep or give trust information

- Section 15: trustee must keep core document e.g. trust deed, records of trust property, trustee decisions, written contracts, memorandum of wishes from settlor etc.
- Section 51: presumption that the trustee must notify basic trust information.
    - Basic information = that person is a beneficiary, the name and contact details of trustee, occurence of, and details of each appointment, removal and retirement of a trustee as it occurs, and beneficiary can request a copy of the terms of the trust or <u>trust information.</u>
        - Section 49: Trust information = any information regarding the terms of the trust, the administration of the trust, or the trust property, that is reasonably necessary for the beneficiary to have to enable the trust to be enforced, but does not include reasons for trustee's decisions.
    - Must consider whether the make the information available under this section at reasonable intervals.
- Section 52: presumption that the trustee must give information on request within a reasonable time
- **Exception:** for both presumptions the trustee must first consider factors in s 53 before giving info.
    - If considering these factors the trustee reasonably believes that the information should not be made available to the beneficiary the presumption does not apply and the trustee can withhold some or all of the basic trust info.
- Section 50: the purpose for having these presumptions is to ensure that beneficiaries have sufficient information to enable the term of the trust and the trustees' duties to be enforced against the trustees (does not apply to charitable trusts).
- Section 53: list of factors
    - Similar to Erceg. Probably can just use erceg factors.

- Section 54: procedure when trustee decides to give no information.
    - Where no beneficiary has any trust information because the trustee cannot identify any beneficiary to give info or the trustee decides to withhold all basic trust info or refuse a request for info under s 51 or 52.
    - The trustee must apply to the court for directions in relation to whether the trustee's determination is reasonable and the alternative means by which trustee can be enforced/accountable.
    - Trustee does not have to apply to the court if the period where beneficiary has no info is less than 12 months and at the end of the period, the trustee gives at least one beneficiary the basic information.
        - This is a loophole to normal rule that if no trustees have basic information the trust is void.
        - Possible unintended loophole: settlor could draft a trust to make them one of the beneficiaries. The settlor receives the information, so you don't need to go to court, but you don't need to tell any of the other beneficiaires. But then there is always risk that people could say it is a sham or illusory trust.
    - Court must consider principles:
        - Trust info should only be withheld from all beneficiaries in exceptional circumstances.
        - Alternative means of enforcing a trust pending disclosure of info to beneficiaries must be consistent with the objectives of the trust and not adversely affect it's administration.

Are these obligations a big change to the common law?

- Does it mean trustees have to give all their info to beneficiaries when we didn't have to before?
- But before the Trust Act you still had to give basic info to at least on beneficiary and trustees had to think about these factors to decide whether to give information to the beneficiaries. Act just clarifies these obligations.

Disclosure in litigation: *Gavin v Powell*

The court are beginning to learn that reasons for trustees decisions are crucial to figure out whether trustees are fulfilling their obligations and the court can replace the trustee if necessary.

- *Hartigan v Ridge* - the old approach doesn't make sense. Trust decisions shouldn't be confidential. Part of enforcing a trust is questioning the reason for the trustees decisions. Why are we waiting till after the beneficiary has gone to court, before they can figure out whether there was a good basis for the trustees decision. It creates a strange situation where beneficiaries get more information in the context of litigation challenging trustee decisions than before they decide to enter litigation.
- It makes it harder for beneficiaries to even know whether they should challenge the decision in court, or whether they don't need to as well?
- Are we just putting a price on the ability of beneficiaires to monitor trustee decisions?

Trustee discretion

General

- Trust deed provides trustees a number of powers and court can enforce how they exercise them when called to do so. But courts do not have much control over dispositive discretions (*Kain v Hutton),* and they don't tend to get involved in crucial trustee decisions like power of appointment.
- Generally:
    - A trustee must follow scope of trust deed, not use power excessively or fraud on a power,
    - They must actually exercise the power or discretion they have been given under the trust deed, not just follow instructions - *Turner v Turner*
    - They must not delegate the exercise of the power or fetter it in advance.
- Trustees must act in accordance with the powers given to them under the trust deed:
    - 1. Make dispositions outside of the objects of their dispositive powers - FRAUD ON THE POWER
    - 2. Make dispositions for an unauthorised purpose e.g. to benefit themselves or where there is a conflict of interest, unless the trust deed allows them to do so - POWER AS FIDUCIARY
    - 3. Make irrational decisions - rationality (relates to unreasonableness) or make irrelevant consideration or fail to consider mandatory relevant decisions. [difficult to enforce where reasons for decisions aren't given].
        - Need to be careful with this one drawing the line between saying the decision was wrong and saying the decision was decided in a bad way (process).
- Bounds of legitimacy court will apply = rationality, reasonableness, irrelevant considerations.
    - But courts will not say that the decision was good or bad (substantive calls) but just that they should have done something while making the decision, or failed to consider it (police procedure).
    - The courts just control the way the power is used but don't exercise it themselves.

(1) Make dispositions outside of the objects of their dispositive powers

***Kain v Hutton* (SC)**

Facts

- In this case, the property was given to the beneficiary from TRUST 1 on the understanding that she was going to use it to set up TRUST 2, which would make her and her children, of whom weren't discretionary beneficiaries of TRUST 1, beneficiaries of TRUST 2. She was also one of the trustees, could appoint and remove trustees, and it was a discretionary trust.

Argument

- The beneficiaries of TRUST 1 argued this was a fraud on the power situation.
    - The basic way a court is going to control trustees discretion = **No distribution that is ultra vires/goes beyond what is allowed**
        - can't distribute to people who are not objects of trust or
        - Where the distribution in prima facie ultra vires, but substantively you are just giving property in a way that ultimately benefits non-objects e.g. property only distributed to object for the purpose of giving property for someone else. [**Fraud on the power].**

Held

- SC said that the beneficiary who received the property can determine what happens to the property once she is given legal ownership. Because she is one of the beneficiaries of TRUST 2, as well as the trustee and it is a discretionary trust, she could take the full benefit, so not necessarily benefiting non-objects (at all or only), it is for an objects benefit.
- It is impossible to say that the resettlement was forced on her for the benefit of non-objects because she still essentially has complete control over the trust property.
    - Criticism: there are other trustees who have to decide how to allocate the funds, and there is no clause in the trust deed saying one particular trustee can benefit themselves to the exclusion of other beneficiaries, so how likely is it that she would receive the full benefit? Most family trusts are set up like this, so any trust could do this? Seems to be a loophole in the rule,
- Courts will step in where people give property to other people in a secret way.

(3) Rationality/Irrelevant or relevant considerations

***Penson v Forbes* (HC)**

Facts

- A mother sets up a discretionary trust for her children. She is a trustee, and with other trustee she exercises power to remove on child that she doesn't like.
- She dies and her distribution is made to other children.
- Settlor-trustee perspective = why shouldn't the fact that you don't like your child anymore be a reason to remove them from the trust? Other trustee also had to agree.
- Child perspective = there wasn't any reason why the mother should dislike me, and even if there was, that isn't a good reason to remove a beneficiary.

Arguments

- Is this trustee decisions challengeable by the court?
    - The child argues that the **trustee must not exercise trustee discretion in a manner that is perverse, arbitrary, irrational or capricious= (3) rationality** (*Re Manisty's Settlement*)
    - **Trustee cannot make decisions based on reasons that are irrelevant to any reasonable expectation of the settlor [or without consideration of mandatory considerations] = (3) irrelevant/relevant considerations** (*Re Manisty's Settlement*)
        - E.g. height or complexion.

Held

- Take from *Re Manisty's Settlement:* the fact that the settlor has taken a dislike to the beneficiary cannot be outside the settlor's sensible expectations about what a trustee might consider. It is a relevant consideration and rational decision.
- Obiter: maybe the trustees should have considered the beneficiaries financial circumstances before they removed them e.g. mandatory consideration.

        - But this wasn't a distribution of property, so it is not a mandatory relevant consideration. It is just about the settlor's view of the beneficiary.
            - Issue: isn't removal a beneficiary something that would affect financial circumstances so it should be considered, as it materially affects that property the beneficiary will get.
- Whether court thinks this is fair or a good decision is not the question for assessment.
- Factor: it is a discretionary trust, they have given power to add and remove beneficiaries for a reason, that is the point of a discretionary trust that you don't have to split it evenly.

***Masters v Stewart* (HC)**

Facts

- On settlor's advice, trustees decide to make distributions of $250,000 to 3 of the children, but give nothing to Phillp.
- 12 years earlier, a property had been bought by the trust for $150,000 that Phillip would do work on and improve. He made monetary contributions in addition to labour. It improved the value of the land and trust. Deal was that trust would buy property and he could later buy the property back for the original purchase price, but this was represented to phillip by the settlor, who wasn't allowed to that since it is not their property, but trustees give effect to this intention.
- When they sell the house back to Phillip for $150,000, the market value is $215,000 more than this, so he is essentially given this much.

Argument

- Phillip argues that while the trustees can make these distributions under their powers, they made the decision in an **irrational way (3)**
- Trust argues that Phillip received over $200,000 from the trust, so the distribution to the other children just evens things out.
    - Issue: Phillip did work on the house to increase the value (labour and cash), so it wasn't just a $215,000 gift for nothing in exchange, what he gained was less value.
        - Kind of more like a contract. But he can't make any argument on contract because it wasn't with trustees but settlor.

Held

- The trustees are allowed to say you don't get anything, this is a discretionary trust. Thus, they don't have to consider the financial circumstances of Phillip or the contributions he has made to the trust.
- HOWEVER, once you announce that the reason for the distribution is to even things up between what the children get out of the trust, and are taking into account the sale of the property back at an undervalue to do this, this creates more scope for saying that they didn't take into account relevant considerations or considered irrelevant considerations that made the decision irrational.
    - Mandatory considerations:
        - He bought the house for under value of $215k
        - He did a lot of work on the house and put money into improving the house.
    - Because they did not consider all the mandatory considerations, the court will step in and say they have to make the decision again.
- **A trustees reason for a decision will affect considerations you must and must not consider.**

Powers held as a fiduciary

- Powers held by persons other than the trustee will be seen a fiduciary unless otherwise state - *Carmine v Ritchie*
- The power to appoint new trustees is of a fiduciary nature because the subject matter of the power is the office of the trustee. In this respect it doesn't matter that the trustee itself is not exercising this power, it is the object and purpose of the power, taken from the deed, that is decisive. - *NZ Māori Council v Foulkes*

***McLaren v McLaren (*HC)**

Facts

- M set up TRUST 1to separate business assets from personal assets.
- Parents, son and accountant are the trustees. Discretionary beneficiaries are parents, son and people related to son e.g. spouse and children. (Highly discretionary trust)
- Settlor is technically the accountant clerk, but this is dummy settlor for secrecy purposes or to get it running quickly.
- Son was also the appointer = can appoint new trustees, nominate successor as appointer, and he could remove discretionary beneficiaries.

- Parents decide to sell their mussel farm that was owned in a separate trust and take the benefit of sale for themselves. Bruce got mad at this because a lot of the work he did under TRUST 1 involved working in mussel farms, and by selling the farm there was a danger he would lose business.
- Bruce decides to appoint two new trustees and remove his parents as beneficiary trustees.
- The parents were upset because the had envisioned that the trust assets would be divided between them and bruce, but this idea was not reflected in the way they had set up the trust, especially the large powers given to Bruce (maybe it was so he could remove former wives, but they never thought he would remove them so didn't safeguard against that).

Issue

- Not fraud on power because he was allowed to remove beneficiaries.

1. Can the court step in to say the decision made as an appointer was wrong, like we could this trustees/are there constraints on the appointers power e.g. it was a fiduciary obligation?
2. And if so can the court step in here, has there been a breach of fiduciary power? **(2)**

Held

- Son argues that his power as a appointer is a personal power for his own benefit, like in *Clayton*, so he isn't subject to fiduciary obligations that he has to exercise in the interest of the beneficiaries and shouldn't be subject to court jurisdiction.
- The court considers the trust deed and tries to ascertain the intention for powers of appointer.
    - Is settlor's subjective intention relevant or do we need to ascertain the objective intention based on the documents as a whole?
    - There isn't much in previous cases about how to interpret this role? Is it like a principal family member in *Clayton* or a protector in *Pugachev?*
        - *Carmine v Ritchie:* power to remove a trustee is almost always viewed to be a discretionary power.
        - *Pugachev:* role of protector was a personal power because the whole trust was just for Pugachev. The nature of the trust seems to make this the exception to the rule though.
    - What were the expectations of the parties?
        - Bruce = Parents have given him the property as a gift, essentially like a living will, and he has done most of the work with the assets under the trust. The trust is essentially held by him personally, so it should be within his rights to remove his parents as beneficiaries when they have done something that will impact the value of the trust estate.
        - Parents = the trust was never set up in a way that contemplated they would be removed as beneficiaires. Assumed he would be considerate of their interests when exercising his powers..
        - Court finds that the parents expectation gave rise to reliance on Bruce to not remove them as beneficiaries and to act as a fiduciary when exercising his powers as appointer.
        - Bruce should have appreciated that they were vulnerable because they trusted him. Although there was an idea of succession planning through the trust, there was still an understanding that the parents would remain involved in the trust and have a beneficial interest.
    - Therefore, we can impute a fiduciary obligations to Bruce as appointer. The scope of these duties include
        - To act in the best interests of beneficiaries, to not act in bad faith, to act responsibility and reasonably, to treat all beneficiaries fairly and impartially, to not take into account irrelevant, improper or irrational factors, not act where his own interest and beneficiaries is in conflict etc.
- Has there been a breach of the fiduciary power, so that the court can step in?
    - Bruce argues that by selling their mussel farm this was bad for the trust business. There was an expectation that the mussel farm would stay owned by them to help improve the trust as they were trustees/part of decision making. By selling the farm, the succession plan for the trust kicks in and they no longer need a stake in the trust.
    - Court says this argument ignores the shared expectation when setting up the trust that they would get a distribution from the trust over their lifetime though being beneficiaries. However, this wasn't written into the trust deed and contradicts the existence of Bruce's appointer power.
    - They find that Bruce's response to remove his parents was disproportionate. Leaving him asa the only beneficiaries given the circumstances in which assets were vested to the trust and the shared aspirations of the parents and Bruce about the trust, amounted to an expropriation of trust property in his own interest and

disproportionately punitive to the parents. Thus, he took regard of improper or irrational factors, and it was an unreasonable decision.

- What does this mean? This sounds like fairness rather than consideration of irrelevant factors that he couldn't take into account, because they don't expand on how his process was wrong. Could have made arguments on this but they don't engage with this.

Clement v Lucas (HC)

Facts

- Trust property includes farm, land and house. It is worth $3 million. This was a succession planning tool, they don't want to specify who gets what, but when they die trustees can divide it.
- Parents are settlors and trustees. Beneficiaries are three children.
- The parents made many memoranda of settlor wishes as to who should get what, but they never actually distribute any of the property according to these when they are alive.
- When they die, unrelated trustees (a lawyer and accountant) come in and have to decide who gets what.
- After reading memorandum of wishes, they decide the best and easiest course is to sell the land, so that they can for fairly split the trust property between the children. While two children agree to the sale, one does not.
- Bryan is annoyed because he wants to retain farming the land, and he doesn't think the distribution of sale will be equal because Keith was given 160 acres of land earlier. Dividing what is left in the trust equally, Keith would get a lot more than the other children. Keith is also a hobby farmer, while Bryan has been farming the land for his work for a long time and has a connection to that specific land.

Argument

- Bryan argues that the trustees ignored the relevant consideration of gift of land outside of the trust context to Keith, and ignored the purpose of trust that never expressly contemplated an even split between the children. The whole point of it being discretionary was to take into account different circumstances, like the gift to Keith and Bryan's connection to the land.

Held

- The court finds for Bryan.
- Both the purposes of the trust and the pre-trust sale to Keith were mandatory considerations.
- The purpose of the trust according to the trust deed or the memorandum of wishes never suggested there needed to be an even split.
    - How do the courts find that the purpose of the trust was not to even things up? This was not in the trust deed or memorandum.
    - Here it seems the court expect the trustees to consider background understandings that they couldn't have ascertained from the trust deed or memorandum.
- Is it too harsh that they expect the trustees to know about the pre-trust gift?
    - The court says they can't be faulted because the pre-trust gift hadn't been brought to their attention, but they still think it is a mandatory consideration.
    - Does this mean trustees have to investigate all the previous possible situations outside the trust, rather than just base their decision of the trust deed and history itself?

Can we avoid courts stepping in and saying decision was wrong?

- Overall, these cases show that while the law looks hands-off, in reality it requires the trustees to make a lot of backgrounds considerations or consideration that aren't clear from the trust deed orr trust history or are just obvious considerations, which sets a high bar for discretionary decision making.
- Write into trust to say you can act in a conflict of interest say or that it is implicit that the decision to distribute property is going to be one where discretionary beneficiaries will win or lose (*Fenwick v Diana* - there was a credible argument that because of the structure of the trust/clause, a conflict of interest does not allow the court to step in and control what the trustee does)

Equitable Tracing

What is tracing?

When there is a breach of trust by a trustee you could have three different claims

1. A personal right against the trustee to put property back (specific restitution), to restore trust fund in cash, equitable compensation or account of profits (if trustee takes their own profit)

2. A personal right against a third party who dishonestly assisted in helping a trustee breach their duty or knowingly received trust property in breach of trust.
3. Or a proprietary claim
    a. Where you follow the original trust property and exercise a proprietary claim to get it back. [wouldn't LTA affect this though/indefeasibility?]
    b. Where you trace the trust property into substitute property that the trust property has been used for, and make a proprietary claim over that substitute property.

- You would likely make a proprietary claim where the trustee or third party is not able to be sued or does not have many assets.

Following

- You see your property moving through space into the ownership of other people, can maybe make a claim against those people (if their conscience was affected), or make a proprietary claim?

Tracing

- It is the ability to trace where the trust property went through what it was exchanged with, so that the beneficiary can get proprietary rights to that exchanged property (focus is on what a person has done with the property).
- This is useful because when you only have an equitable property rights, normally you can lose out to a person who owns the property and has a proprietary right. Through tracing you can say you also have a proprietary right.
- It isn't natural to all legal systems.
- Tracing process will normally include following and tracing.

Why do we have tracing?

- The claimant is identifying property that they never previously had any right in and saying that it is theirs. How can we do this?
- Some theorists explain it through the idea of unjust enrichment
- In *Foskett,* they say that this is about property and how property works. Tracing is an aspect of your property rights. The traced property represents the value / transactional proceeds of the original property, so belongs to the claimant.

When is tracing useful?

- Where a personal claim against the trustee isn't useful because they don't have any money.
- When the original trust property cannot be claimed by substitute property can be.
- When the substitute property is more valuable than the original property.
- As part of a personal or proprietary claim against third party
    - Tracing is part of many claims for proprietary relief. If we didn't hve this it would be virtually impossible to get a proprietary claim.

Process

1. Beneficiary of trust = beneficial ownership and trustee is legal owner
2. Legal owner sell property in breach of trust or swaps property for other property.
3. FOLLOWING - Does B have a claim against a third party who has the property- either proprietary or personal?
    a. A claim is frustrated if third party knew nothing about breach of trust and bought property for value.
    b. Can make a claim if a third party was given property as a gift (proprietary) or if they knew the sale was a breach of the trust (personal and proprietary).
4. TRACING - does B have a proprietary claim to the exchange property now in the trustees hands?
    a. Go through all exchanges until they find property that we can claim.
    b. If the trustee gives <u>exchange property</u> away to someone else as a gift or if that third party knew about the trust, the beneficiary can make a proprietary claim against the third party over exchange property.
    c. They could also assert any equitable claims as they could with trust property against trustee or knowing third party.

Distinction in tracing in equity and common law

Common law:

- It is more limited, haas to be a clean swap between original property and exchange property/product.
- Where trust property is put into a bank account that already has separate property in it, and exchange property is accredited to the bank account it is not a clean swap as trust property is intermixed with others.
- Works best with tangible assets.

Equity:

- It requires a pre-existing equitable interest or fiduciary relationship.

- Has more tools to get different kinds of remedies.
- *Foskett* suggests there shouldn't be a distinction.
    - It is just an evidential process now, rather than about a common law or equitable claim. Can have these rules for common law too.

What can the claimant get?

1. Either assert a constructive trust = legal owner holds property on trust for them, they own the exchange product beneficially
2. You have a security right in the property (equitable lien or charge) = you don't own the property outright but you have a claim against that asset to satisfy some obligation that you are owed. In case of default, you can sell it and satisfy the claim.
    a. Here, you can't elect to then also have an ownership interest.
    b. These are proprietary rights as it provides insolvency protection and increases in value/secondary profits.
    c. Will depend on initial equitable property right? - *Foskett*

Loss of the 'right to trace' in equity

- Traced property is destroyed, or can no longer be found e.g. it has been dissipated by trustee (untraceable).
- Traced property is in the hands of a bona fide purchaser for value without notice.
    - But personal claims for the breach of trust are still possible, although they are unsecured

How do you trace into mixtures?

Similar issue to certainty of subject matter, where the property is held in a pool with other property and is fungible, how can we identify what trust property is to trace how it is used?

No mixture

- Just as with common law tracing, you can make claims to money in a bank account or assets purchased with money that is exclusively derived from the original trust property. The beneficiaries can adopt the new asset as if it was an authorised investment.
- It doesn't matter whether it is a constructive trust or lien because they take the whole asset.

Mixture

1. As between B and other innocent contributors = they will own new property in proportionate shares depending on contribution to the pool (neutrality).
2. As between wrongdoer and B: wrongdoer's rights are subordinated. We can presumed wrongdoer acted as they should have or B can identify value in any place it could possibly be found.
    a. The beneficiary can assert whatever the most valuable claim possible is. They can choose which fungibles e.g cash is trust property and which was wrongdoers.
    b. *Re Hallets* - money remaining that hasn't been spent is B's.
    c. *Re Hallets* - BUT beneficiaries claim cannot be more than the lowest intermediate balance of the bank account. If the bank account becomes overdrawn AFTER the trust money is put in, and then the money is subsequently put in, this clearly cannot be the trust money and we can't trace any purchases made with new money (unless the wrongdoer intended to restore the beneficiaries money).
        i. Also subsequent deposits are T's, they cannot be B's.
    d. Money spent on valuable property was B's - *Re Oatway*

Foskett v Mckeown (HOL)

Facts

- Trustee takes money that is held on trust and uses it for their own purposes - including 2 out of 5 insurance policy premium payments, the benefit of which he had settled on trust for his children.
- Murphy commits suicide and insurance payment kicks in of $1 million to the children.
- The investor beneficiaries of the trust want to trace the payments made for the insurance policy premiums, into the benefits of the premiums of $1 million.
- It doesn't matter that benefits were worth much more than the original trust property, they still have a proprietary claim.

Arguments

- Beneficiaries claim a proportionate share of the life insurance payment (2/5) because trust property paid for 2 policy premiums of 5.
- Children argue that only the premium amounts are repayable that makes up the misappropriated funds $20,000.

Held

- The HOL held in favour of the beneficiaries.
- Where there are innocent volunteers who contributed their property to the mixture, they hold proportionately the exchange property without subordination.
- The children stand in the position of Mr. Murphy, their rights to the fund are determined on the basis of the mixture of *errant trustee*'s property and wrongly used trust property.
- Criticism COA judgment:
    - The CA said that the final payments were not causally responsible for the payout
        - This is incorrect. All of the money paid to the insurance company was part of a mixed fund that paid off the units; we look at the transaction where the rights are exchanged.
    - They also said that the beneficiaries could get the money back through a lien, but not a share of the profits.
        - This option would only be good for the beneficiaries if the interest had gone down. For example, if as the premiums were paid, the value of the property decreased (e.g. maybe only be 2 premiums left). Then the value of the policy is only worth $40,000. Because that is less than what they were owed, they would say it is a lien, when it is sold for value they get everything and wrongdoer gets nothing.
        - Here, it is gone up so they want to say it is a constructive trust.
        - HOL says that this proved too much. If there is a proprietary claim, it should be a constructive trust.

Where the trustee mixes their money and the beneficiaries money in purchasing another asset

- The beneficiary is entitled at their option to a <u>proportionate share in the new asset</u> OR <u>a lien over the asset</u> to secure the full extent of his personal claim against the trustee. (*Foskett)*
    - If there is a rise in value - would take proportionate share
    - If there is a dip in value - take a lien.

Where the trustee mixes their property with the beneficiaries property in a mixed fund (fluctuating, payments in and out)

- Trustee's claims are subordinated to the beneficiaries claims, the beneficiary can chose what was their property, and say whether it was a constructive trust or lien (*Foskett)*
- Property left in fund is beneficiaries (*Re Hallet)* because trustee is assumed to spend their own money first
- UNLESS *Re Oatway* applies: beneficiary can claim their money was used for valuable investments.

Where trustee uses trust money to repay a debt

- The payment of the debt discharges an obligation
- 'Backwards tracing' into asset bought earlier that created the loan debt ? [Orthodox theory is that B's money did not pay for T's asset]
- BUT PC recently stated that such claims should be allowed - *Brazil v Durant International*

Trustee mixes funds from two beneficiaries

- Beneficiaries get a proportionate share in the fund (under constructive trust). No one beneficiary is subordinate.
- If funds are mixed with trustee property then "subordinating" rules apply. Trustees claims are subordinated to beneficiaries etc.
- *Clayton* rule*:* first money in is the first money out.
    - Money paid into account earliest is spent on asset acquired earliest.
    - If $100 from beneficiary 1 is paid first, and then $100 from beneficiary 2, and then the first debit is $100 to apple shares, and then $100 on dinner, B1 would get valuable investment while B2 would get nothing.
    - This seemed unfair, so it was modified - *Pari pasu:* just treat the beneficiaries as equally entitled to a share in apple funds.

Finnegan v Yuan Fu (HC)

Facts

- Investors are investing in derivatives through Yuan Fu. They get access to a Saxobank internet platform where they can access accounts that Yuan Fu has put money into and make trades with the money.
- Yuan Fu goes insolvent with $1 million in assets, and $1.7 million in claims against them. Liquidators need to work about whether they should honour the accounts Yuan Fu made, or whether they remain part of Y's assets?
- Australian documentation shows that money's ae held on trust for the investors, they are beneficial owners.
- Liquidators want to say the shares are held in a trust pool for all investors, so that they would get a proportionate share of what they were owed pari passu.

- But investors argue that they have a proprietary right to the shares in their individual account, as shown by the fact they could make individual decisions about where the money went (they will get more this way)

Held

- Whatever percentage of money the beneficiaries put in is the percentage of money you get back?
    - This doesn't work if the lowest intermediate balance rule applies - the beneficiary can only claim up to the lowest balance.
    - If B1 and B2's money is deposited and the account goes to zero, and then B3's money is later put in and money is spent buying apple shares, there is no way we can say that the money to buy apple shares was B1 and B2's, so it would be unfair to do a proportionate split to B3.
    - Adopt the **Rolling charge approach = beneficiaries can get money where it can possibly be.**
        - Issue: does this work for a discretionary trust? If it is a pension or investment scheme, or fixed trust, you know how much each beneficiary is owed or what is owed. Under a discretionary trust, unless the different beneficiaries have claims to property from different trusts, we don't know what trust property belongs to which discretionary beneficiary.
- The money of the investors were pooled in an investor account that was Y's account. Tracing rules are going to say we apply pari pasu or rolling charge approach.
- If Y subsequently uses those moneys and designates payment to be for A's share, this must mean that A's money went out to pay for the shares and it is legitimate to say A paid for the shares and they belong to A (property right).
- But in reality, the accounts were opened by Saxobank in Y's direction and Y didn't pay any money over Saxobank. The accounts were opened on credit and Y was in debt. They would sometimes pay money to settle debts but it was never specifically for investor A or B.
- We also can't trace through the bank account payments and say that investors funds were de-pooled to make a payment in shares (and therefore, they have a proprietary interest in the shares) because there aren't enough records to do individual tracing.
- Also the contract said they were going to mix up funds into a pool and if they went insolvent they may not be protected, so it was part of the deal that money would be pooled and then paid to saxo bank.
- Thus, all the assets are equally owned by beneficiaries as amongst a pool and should be split pari passu.

Priest v Ross Asset Management **(HC)**

Facts

- SCHEME: Investors put money into RAM bank account. Ram buys shares through share broker BM, and then they get in asses and securities for the investors.
- This is a ponzi scheme, BM is fictional.
- Mr. Ross spent all money that RAM had ($430 million), so there was only 3% left to pay the creditors and interest payments.
- Priest wanted to own certain stocks to a company that they worked for, MSL. Instead of going to MSL outright, he asked RAM to buy shares from MSL on behalf of him (RAM holds shares on trust for priest).
- When RAM goes insolvent/goes bust, liquidators turn up. They want to include MSL assets as part of the assets of RAM left over the payback all investors.

Arguments

- Priest argues that his transaction with RAM stands outside the fraud, he was dealing with MSL essentially (he told Ross what shares to buy etc.) and never made investments to RAM., so they aren't RAM's, they are held on trust for him.
- Liquidator argues that the money for shares went through the common bank account of RAM. If there is a mixture of beneficiaries money into trustee's bank account, we do rolling bank or pari pasu approach - *Yuan Fu.*
    - This applies to whatever is left but also what is purchased from the bank account.
    - Every beneficiary owns property out of the pool equally.

Held

- If the money had gone straight to MSL, no issues because tracing rules couldn't apply.
- Priest paid for the shares, and the payment to RAM was attributed by Mr. Ross to Priest.
- If it is possible that Priest's money was used for the shares, it is ight to credit the shares to priests.
- Even though it was credited to the mixed account, RAM said this payment was not just a payment made up of proportionate shares money but Priest's money.

- **Where is it possible to show that the beneficiaries money was used to pay for specific shares, and the trustee intended this to be the case, we can say the beneficiary paid for the shares.**

Wills

What happens to a person's property when they die?

If you have property people want any legal system will have rules about who gets what.

- You need to get a grant of administration for large estates = go to high court and fill out a public document to show who gets the estate
    - This is because transparency and publicity is good.
- A small estate does not need the will to be probated or a grant of administration (s 64 and 65 Administration Act 1969)
    - If it is less than $15,000 can just go to the bank or financial institution that has to be dealt with to access the property and satisfy them that you are the person who should get the property or are the executor meant to distribute trust property.
- TTWMA: Purpose of the act is to try retaian Māori land in Māori hands, so it places restrictions on testamentary freedom to give land via a will, especially not beyond a class of people. Introduces idea of preferred class of alienees, so only certain people can inherit land.
    - Part 4 - introduced by the TTWM (succession, dispute resolution, and related matters) amendment bill.

Intestacy

What is intestacy?

- When a person who dies has not set out their testamentary intentions (either no will or some property is not disposed of under the will). We need a process for working out who the administrator is and who should get what.
    - Partial intestacy - s 79

Where did we get intestacy rules

- Early 20th century - legislators came up with rules based on what the majority of people did with their property under their wills. It was most common that property would be first given the spouse, then children, then other family members.

Rules - s 77 Administration Act 1969.

1. If you have a wife or de facto partner etc, but no issue and no parents, then personal chattel go to them and residue of estate goes to them (legal ownership or held on trust),
    a. Personal chattels s 2 = chattels that are not primarily for business, money or securities for money.
2. If they have a partner and issue (lineal descendants), personal chattels go to partner and $155,000 of residue estate goes to the partner. Anything left over is held on trust ⅓ for the partner and ⅔ for issue.
    a. S 78 - has complicated rules of what issues get what under the ⅔.
3. If they have a partner, and no issue, but one or both parents, partner gets personal chattels and gets ⅔ of residue estate on trust, parents get ⅓ of residue estate.
4. If they have an issue but no partner, all estate will go to the issue.
5. If they have no partner or issue, but have one or both parent, all estate will go to parents.
6. If they have no partner, issue or parents, but one for more siblings (either full or half blood), all estate will go to siblings.
7. If they have no partner, children, parents or siblings then estate may go to grandparents or other family members.
8. If there is no one to give it to on this list, then the crown gets the property.
    a. But the crown will likely determine whether there is some independent (like a friend) that would get the property.

Other weird familial relationships that aren't explicitly covered

- Adoptive children are counted as children under the intestacy rules if the adoption order was in place when the person died.
- Illegitimate children will be treated as children under intestacy rules.
- If there are multiple people that can claim to be the partner of the intestate, s 70(c) of Administration act says they divide the share for partners among partners.
- Step-siblings or parents?

Formalities of Wills

What is a will?

- S 8 of the Wills Act = a will is a document (any material on which there is writing), where they have recorded how they want to dispose of their property when they die.
    - If they just appoint a testamentary guardian that can also be part of the will but focus is more on property.

Why do we have formalities?

Wills Act 1837 - specified formalities you had to comply with for a will to be valid.

- We have formalities to makes sure that the will wasn't fraudulent. But if a small formality is not met but it is the genuine testamentary intentions of the intestate, then the people who get the property under the will may be very different from what the intestate intended - no good.
- In response, lawyers came up with crazy arguments to try and fit will's that lacked formality requirements within these formalities.
- Wills Act 2007 - altered the requirements, it does away with specific formalities, and also creates high court jurisdiction for saying a will is valid despite lack of formality.

How do we make a valid will? - S 11 Wills Act

- It has to be in writing.
- It has to be signed.
    - (3) This can be by signing it themselves or directing another person who is present to sign it on their behalf.
- It has to be witnessed.
    - (4) At least two witnesses must be together in the will-makers presence when the willmaker signs or acknowledge that they have signed the document earlier and the signature is their own or another person directed by them has signed document earrlie on their behalf.
    - Section 13 - Witnesses shouldn't be people who are receiving property or people who are in a relationship with the person receiving property because then the disposition will be void.
        - Unless there are two other witnesses who aren't under this description, or orr disposition is a repayment of a debt to them or all the people who would benefit directly from the avoidance of the disposition consent in writing and have legal capacity to consent or <u>high court is satisfied the will maker knew and approved to the disposition and it was voluntary.</u>
    - Section 12 - It can be your executor though and validity of will will not be affected if the witness did not know they were signing a will.
- (5) As evidence of compliance with (4), at least 2 witnesses may state on the document that they were present with the other witness when the willmaker signed etc. and they signed the document in the will-makers presence.
- Exceptions: s 12 and 13

Validation and correction of Wills

Section 14 Wills Act - Declaration of validity despite informality

- If the document appears to be a will and does not comply with s 11, the high court may make an order declaring the document valid, if it satisfied that the document expresses the deceased person's testamentary intentions.
- The court may consider
    - The document
    - Evidence on the signing and witnessing of the document
    - Evidence of the intestates testamentary intentions (subjective + objective)
    - Evidence of states made by the intestate.
    - This list is not limited, can look at all circumstances/extrinsic evidence
- *Re Brundall*
- Court can validate multiple documents - *Re Kronfeld*

Correction of mistakes - s 31

Interpretation of external evidence - s 32

Changes to Wills

- The will maker may dispose of the property before they die, nullifying anny gift of that property under the will.

- You can change the will by doing an inconsistent later will (s 16(a)), or saying the old will is invalid or destroying the document. (s 16, 18, 19)
- Or just make changes to the will (s 15)
- If you get married or your marriage ends your will as before will be revoked
    - UNLESS something different to this result is evident in the text of the will or if the will was made in contemplation of the end of the marriage/new marriage.

Limits on testamentary freedom

Options for challenging a will

Challenges to the will-makers decision

- Did testator have capacity to make the decision?
- Were they subject to undue influence?

Restrictions of testamentary freedom

- Testamentary promises
- Family protection
- Relationship property

Testamentary freedom and restriction

Freedoms

1. Person can use property as they wish during their lifetime. Intra viros.
2. You can decide what happens to your property when you die.

Restrictions

1. More common in continental and asian jurisdictions
    a. Compulsory intestacy rules/"Forced heirship" over the deceased property - you must give this much of your estate to your partner, your children, etc.
2. When there is no will, intestacy rules will apply.
3. Where there is a will, a claimant can step forward and say I am owed this.
    a. Courts have a lot of discretion to say that person should get property and how much.
    b. This tends to involve family protection.
    c. What is necessary to say the testator lived up to the moral duty to that person?
4. Family property claim is the right of the partner that they are entitled to during the deceased's lifetime under the RPA 1976. Other family members don't have this same claim.
    a. Under new amendments, partner can choose to make an FPA claim, rather than have a claim under the will.

Law Reform (Testamentary promises) Act 1949

Did the deceased make promises about providing for an individual out of their estate?

- If there is a valid contract taking the benefit of services in return for provision under the will. this is enforceable. Will = both the liability and assets of the estate when someone dies.
    - There may be other kinds of claim available e.g. unjust enrichment/estoppel.
- However, some promises might seem contractual but are not necessarily binding.

Is there a contractual promise?

- S 3(2) Testamentary Promises Act
    - Provides a legal remedy where an enforceable contract was not concluded, but the services were provided on the basis that provision would be made in the recipient's will.
    - Anyone can make a claim - including former partners, children.
    - Family court and HC have concurrent jurisdiction.
- S 24 PLA Formality rules in relation to land
    - There may be a lack of certainty as to what the consideration of the K is (what they are going to get) - need certainty of subject matter to.
- S 3(1) Testamentary Promises Act
    - Where a claim is made against the estate founded upon the rendering of services or the performance of work for the deceased in their lifetime...

        - Claimant has to prove an express or implied promise that they will reward their work by making a testamentary provision for them
        - It doesn't have to be for a specific amount in relation to specified property.
    - Court has power to enforce that promise against the deceased estate (executor) to enforce the testamentary promise as if it were to the same manor and the same extent to be a reasonable amount that would be given to the claimant.
        - Consider the circumstances, including the circumstances in which the promise was made, services were rendered or the work was performed, the value of the services, the value of the testamentary provision promised, the amount of the estate, the nature and amounts of the claim of other person in respect of the estate.
- *Kite v May:* Courts have taken a liberal approach to what amounts to a promise, which includes a statement of intention. But our courts have stressed that the rmust be a nexus between the promise on one hadna the work or service on the other.

Testamentary promise for services?

- There must be a promise to make testamentary provision for the claimant in return for the rendering of services ('nexus').
    - It does not need to have been made before services or to a person performing services.
- To qualify as 'services' under the Act, what has been done for the deceased must have been beyond the normal expectations of family life or social interaction.
- *Byrne v Bishop:* This can include things done for the deceased, or companionship, affection and emotional support exceeding what is normally expected of a relative, neighbour, friend etc.
- *Samuels v Atkinson:* something extra than normal family relationships and help is needed.

***Re Welch* (PC)**

Facts

- Father died intestate and so stepchild of the deceased didn't have a claim under intestacy rules.
- Father had told people that his step son was going to get his property, so intestacy rules frustrate intestate's intentions.
- The step son claimed he was the executor of the mothers will, so he could take claim to half the estate on her behalf under the RPA.

Held

- HC: gave him the other 50% to the estate through a testamentary promises claim.
    - He did normal things that a son of the family does for their parents. Spent time together, interacted with grandchildren.
- COA: they gave him $200,000.
    - It has to be more than normal things a child would do in relation to their parents.
    - They doubt whether it is an appropriate case for claim to be given at all.
    - There was a clear intention, but there isn't a clear nexus that this decision was in relation to something the step done had done for him.
    - Don't need to do precise accounting of how much son did for his father, just make a decision.
- PC: refuses to overrule the COA, but says he didn't really meet the test so shouldn't have gotten anything.
- Criticism:
    - Shouldn't it be enough if there is really clear intention?

Family Protection Act 1955

Section 3(1) - Who can make a claim?

- Spouse, partner (at least living with deceased) , children, grandchildren, step children wholly or partly maintained, parents (conditionally)

Section 4(1) - Claims against the estate of deceased person for maintenance

- If the deceased state does not provide adequate provision for the proper maintenance and support of the applicant.

Factors for court's consideration

Black v Black

a) The nature of the relationship of the testator and the claimant
b) The financial need of the claimant

c) Recognition of familial connection and belonging
d) Inter vivos contributions
e) Entitlign and disentitling conduct
f) Repair and parental abuse and neglect
g) Size of the estate

Quantum

- *Warboy v Jones:* it is not a mathematical or scientific calculation, but there are general norms of quantity that courts usually apply (and can consider whether they are adult children who don't have a particular need).
    - Small estate - up to around 10%
    - Large estates - 12%-20%
- *William v Aucutt:* 5% was probably enough. Other daughter got 95%.

***Williams v Aucutt* (CA)**

Facts

- Child who got 5% of income had assets around a million in central auckland, pretty well off.
- Other child got who 95% of the income, only had assets of $78,000.
- Will said that they had made great provision for second child, not because I don't love my other daughter, but because cHrisitnne is in a more poor financial situation.

Issue

- Did this decision satisfy the duty of the moral testator? (this goes beyond just financial need considerations)

Held

- **LAW**
- *Little v Angus:* breach of moral duty judge by the standard of a wise and just willmaker - sets out guidelines for family protection claims in COA size of estate or other moral claims.
- Proper maintenance and support = has there been a breach of a moral duty that a wise and just will maker would think themselves bound by in making their will. That they didn't make provision or it wasn't large enough means they were in breach of their moral duty.
    - Not just a 'need' or maintenance - it can relate to recognition of belonging and role the person had in the deceased's life.
- Moral duty = depends on morals of the time and depends on the circumstances e.g. you have a moral and legal duty over a child under 18, but if they are adults, only moral claim, not a legal claim, so maybe moral duty is also less.
    - Just because people are reasonably well off does not necessarily bar the argument that they owed them a moral duty.
    - Just because the claim is made by an adult child does not bar family protection order, but the amount they can claim may be less.
- **HC:** 25% should have been given to child.
- **COA**
- If all the children were treated well during the deceased's lifetime, and the child is a well-off adult, 5% may not be a breach of moral duty, particularly because of how much thought had been put in surrounding who would get what and this was clear from the will.
- Because the will maker thought about the situation, 5% is enough. She still got something, as part of the family, but a small amount is fine.
- However, because the will maker was confused about how much the daughters estate was worth (it was double than what she thought it was) they will award 10% to ensure moral duty.

Kinney v Pardington (HC)

Facts

- Daughter of deceased was unknown to the deceased's wife and children, but he admitted paternity and paid child support.
- Estate was worth 600k, daughter was given nothing but claims 80%.
- Sons of deceased accept that there was a breach of moral duty but say she should get a 50% award.
- Deceased refused public contact or acknowledgement of his daughter, even after social workers told him that he was causing her serious mental health problems by rejecting her.

Held

- They award her 70% to account for the harm he did to her, clearly did not enact his moral duty during his lifetime.

- In this case the existence of family protection laws is good.

Is this a good law to have?

- Given all the money spent on litigation to sort this, maybe we should make intestacy rules an entitlement. Maybe not so far as forced heirship but make it can right the child can claim.
- Law commission critique
    - The courts powers are broad and discretionary. Today families are all different and should not be treated in the same way. Thus, it may be less appropriate for the courts to have such a broad power, where they are applying value systems of a prevailing culture or type of family that should not be indiscriminately applied to all families.
    - The present law clashes with the principle of will-maker autonomy to do what they want with their property during their lifetime and it makes it more difficult for the will-maker to give effect to family expectations. The extensive powers essentially allow them to remake the will.
    - Enforcing "moral duties" that will-makers owe to family is not a good objective of laws of succession. These duties vary according to the views of individual judges. Judicial practice ceases to be transparent.
    - Moral duties are personal to each willmaker and difficult to generalise. They shouldn't have to pass their property to family if they don't want to.
    - The concept of moral duty to family is too vague to ensure that the purpose, meaning and effect of the law are clearly communicated. It is sort of a cop out because they don't need to refer to express uniform and certain reasons why freedom of testation should be restricted. This makes it hard for will-makers to ascertain and comply with these duties and it isn't clear for courts either.
- Law commission views are quite extreme, most people in NZ still think we should have this limitation on rights despite law commission criticism.

How can you avoid court interference with freedom of testation under family protection

- Reduce the estate value by using mechanisms like:
    - Joint tenancy
    - Family trust
    - Gift before death

Relationship Property Act 1976

General rules for relationship property and how they are impacted on death?

- S 8 - Property that is the product of the relationship, or held jointly, is subject to the RPA.
- S 11 - provides for equal sharing of relationship property.
- S 85 - short term relationship rules
    - Relationship of short duration = less than three years.
    - If it is a marriage, civil union of short duration - usual PRA sharing applies, unless court thinks in the circumstances it would be unjust.
    - If it is a defacto relationship of short duration the court cannot make an order under this act for the division of relationship property unless there is a child of the de facto relationship or that the surviving de facto partner made a substantial contribution to the relationship or it would be unjust not to.
- Before 2001: you could get a bigger claim to partners property if separated before death
- After 2001 amendments - the scheme can now operate in succession contexts.
- Part 8: You can assert a claim to 50% of any relationship property, even if your partners will said something else, OR you can elect to take under the Will.
- It restricts testamentary freedom because a partner may choose to receive their partners assets in a way that does not comply with their will.

Section 61 - What are the options for the spouse/partner when their partner dies?

1. OPTION A - RPA Claim
    a. Position
        i. Determine what is the relationship property pool?
        ii. Presumption: partner has an automatic right to 50% of relationship property.
        iii. S 57: Can still make a family protection claim or testamentary promises claim.
    b. Process
        i. Survivor must make a claim, if no choice is made it will be presumed that option B is the choice.
        ii. S 65: Must give notice, signed and written, of choice made to administrator or HC registry

iii. S 62: time limit for choice
1. 6 months after grant of administration for large estates
2. Within 6 months of death or 6 months of grant administration if that is made within 6 months of death for small estates
3. Court mya grant extension if final distribution is not made.

iv. S 67: the choice is irrevocable.

c. Result
i. Survivor takes their equal share of the property, unless special provisions
1. S 79: relationship property share is determined at the date of death or when relationship ended.
2. S 81: all the deceased property is presumed to be relationship property, except gifts, inheritances, beneficial rights under a trust and survivorship.
3. S 83: if you jointly own property and on the death of the partner the person who is surviving becomes the ownership by survivorship, then that property is not automatically to be treated at the separate property of the surviving partner and the status of the property as relationship property or separate pro[ertu is to be determined according to the status it would have had if the deceased partner had not died.
a. This means the RPA option only allows you to say you own 50% of the house, whereas under intestacy rules/normal property rules you would be the sole owners of the house because the will maker is not able to give away the house, or 50% may be less than what you get through joint ownership.

ii. S 76 - Any gift to the claimant under the will is treated as revoked, unless the contrary is expressly stated in the will.
iii. S 78 - this share takes priority over the interests under the will or intestacy and over family protection or testamentary promises claims
iv. S 77 - the court can, to "avoid injustice" and order that the survivor should receive the gifts under the will.

2. OPTION B - No RPA claim
a. What you get under the will?
b. What you get under intestacy rules?
c. What will you get through survivorship or basic property law rules?
d. Make a family protection claim or a testamentary promises claim.
i. S 69/70: the choice of option B may be set aside so long as the estate has not been finally distributed
1. If choice was not freely made; or
2. The survivor did not understand the effect of the choice; or
3. The survivor has new information relevant to the choice; or
4. An FPA or TP claims has been made; AND
a. It would be unjust in the circumstances to enforce option B.

3. You cannot have both, so you need to calculate which claim would be more beneficial, taking into account transaction costs of a PRA claim.

Loosley v Powell

Facts

- Extramarital child was born in England to the deceased.
- The deceased dies and leaves his property (family home and loans to a trust worth $800,000) to the family trust, which has beneficiaries of his son and grandchildren.
- The widow is not a beneficiary of the trust, but she also doesn't take a relationship property claim. She received essentially nothing under the will.
- The biological daughter decides to make a claim under the family protection act, and she gives notice to the son's and widow.
- It can be ascertained that the deceased testamentary intentions did consider the daughter. However, he felt that given he was closer with his sons, the daughter was relatively well off, particularly compared to one of his sons, and he had given her around $16,000 in gifts over his lifetime, he had fulfilled his moral duty to her. Thus, he put the property in a trust to prevent a family protection claim against it.

- However, the trust does not protect against a family protection claim because he didn't set up the trust during his lifetime, outside of his will, it was set up using his estate assets.
- The widow feels uneasy about the daughters claim because she was living in the trust property even though she wasn't a beneficiary, and had money owing to her under the trust. She was worried a big award to the daughter would affect her ability to stay in the house. So the widow decides to exercise her RPA rights. [No issue of timing argued], and also a family protection claim.

Held

- What is the relationship property pool?
    - Family home, bank accounts, debt owed to her and deceased, furniture, car. About $1 million, so she has a claim to $550,000.
    - RPA claim is a right.
- Can she successfully assert a family protection claim as well?
    - Widow's claim is more paramount that the daughters, the judge wants to make sure the widow is comfortable. She should be able to buy the family home, through the value given to her.
    - She gets the home, the car and the house chattels.
- They award $90,000 to repair moral duty to the daughter.