LAWS 312 Equity, Trusts, and Successions

Introduction to Equity

What is Equity?

- A system of law separate from statute and common law, capable of achieving fairness where the common law cannot.
- A court of morality and conscience.
- Equity responds to exceptional cases where the letter of the law does not provide an equitable remedy.
- 'In 1993, English law has one single law of property made up of legal and equitable interests' – Lord Browne-Wilkinson.
- The trust is a crucial equitable construction. It can be a deeply personal relationship through to a commercial one, and cover everything from succession, to the family farm, through to corporate interests.
- Critical concept in the ownership of Maori land.

History of Equity

- Equity is a body of principles, doctrines, and rules developed originally by the old Court of Chancery in constructive competition with the principles, doctrines, and rules developed by the common law courts.
    - In New Zealand, courts were always 'courts of common law and equity'.
    - This only occurred in England and Wales during the unification process (1873 – 75).
- Prior to Norman Conquest (1066), no unified English law.
- 12th C: Development of the notion of justice residing in the king.
    - *Curia Regis* – King's Courts.
        - Action required the purchase of a 'writ'.
- 13th C: Forms of action (writs) became inflexible.
- Very difficult to bring novel claims.
- Residual justice in the King, despite rise of the King's Courts.
    - Direct appeals to the monarch were possible.
- 14th C: Appeals designated to the Lord Chancellor.
- 15th C: Chancellor issued decrees in his own name.
    - Accusations of injustice and inconsistency in these decrees.

- The principles developed in the Chancery were meant to remedy the defects of common law;
    - Rigidity of legal rules.
    - Strict rules of evidence and procedure.

Why Equity?

- 'Equity is just, but not what is legally just: it is a rectification of legal justice'.
- 'The law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made'.
- Equity's rules and principles became systemised and precedent-based.
- The common law no longer uses such rigid forms of action, and can develop according to moral/social mores.

The Structure of Trusts

What is a Trust?

- Family trusts are used to set up a trust through which the home can be protected.
- Family or non-family can hold property in a trust, with the children as beneficiaries.
- Solicitor's trust account can act as a deposit to secure payment.
- The person with the legal right to the property holds it for someone else, and equity ensures the property is only used for the benefit of the beneficiary.
- Charitable trusts are set up to serve a purpose; to benefit people.
    - Eg: In a superannuation fund, you lose the legal ownership of the money, but retain an equitable right to it.

- 'An equitable obligation, binding a person, called a trustee, to deal with property (called the trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, *cestuis que trust*)…' – D Hayton et al.
    - Arises only in equity.

- Settlor: Person who originally owned the property.
- Settlor transfers property to T (trustee).
- T hold the property for the benefit of B (beneficiary).
    - Equity forces the trustee to conduct themselves in a positive manner. It will not permit the trustee to act unconscionably.
    - Equity considers it unconscionable for T to assert his (legal) title against B's (equitable) interest. S trusted T to hold the property for B.
    - Equity will uphold the trusts, even though the trust is not reflected on the legal title of the property.
    - Equity will also impose strict duties on T.
- Despite T's absolute ownership of the property at common law, B is beneficially entitled to the property *in equity.*
- 'Equitable title'.

Types of Trust

1. Express (Implied) Trusts
    - A trust created intentionally by the settlor, who will make some form of trust deed, or show good evidence of the intention to create a trust.
        - Test is based off a settlor's objectively determined intention to create a trust.
    - Some come into effect only after settlor's death (testamentary trusts – nearly always created by a will) and some during the settlor's lifetime (known as an *inter vivos* trust).
    - Express trusts are either fixed or discretionary:
        - Fixed: Trustee has no discretion about which beneficiaries will receive trust property and in what shares.
        - Discretionary: Trustee can decide which beneficiaries will receive trust property and/or in what shares.
    - The settlor holds legal title to their property at common law; they use their proprietary rights to alienate themselves from their property through a trust.
    - Two options for the settlor:

- Either declare themselves as trustee over the property, so that they retain the legal title but give away beneficial ownership to the beneficiaries;
- OR can transfer the legal title to someone else entirely – a trustee, who is given the property on the condition that they agree to hold it for someone else; the beneficiary.

2. Resulting and Constructive (Imposed) Trusts (TABOLs)
    - Occurs when the law looks at a situation where it's not obvious a trust relationship was intended, but because of either the way the trust situation was intended, or because of the events occurring around what happened, the person who holds legal title must hold it for the benefit of someone else.
    - The law will then force them to act according to their conscious in the interests of another.
    - This is done tentatively, as the person holding the property may wish to retain their beneficial interest, and this may have been the settlor's intention.

TABOL: Trusts Arising By Operation of Law

- Equity will create a trust, though no trust deed exists in circumstances of:
    - Unconscionable behaviour.
    - To give effect to presumed intentions.
- These are constructive, or resulting, trusts.

Steps in the Creation of the Trust

1. The settlor declares a trust.
2. Legal title is transferred to the trustee. The trustee thus acquires all of the common law rights in the property. From the perspective of an observer, the trustee appears to be the owner of the property, though the beneficiary has the beneficial interest in the trust property.
3. The equitable interest in the property is vested in the beneficiary. The beneficiary acquires equitable proprietary rights in the trust fund, and a set of personal claims against the trustee to ensure that the trustee carries out the terms of the trust.

- Equitable title means that the person who owns the property at common law has a duty to hold the property for the benefit of the person who holds the equitable title.

Process and Obligations in Creating a Trust

1. Settlor → Trustee
    - Settlor: Owns the property at common law, and holds the legal title. Settlor transfers legal tittle to the trustee, who now owns it at common law.
    - Trustee: Once given the title, now owns the property at common law.

2. Settlor → Beneficiary
    - The settlor is giving an equitable interest to the beneficiary.
    - If the settlor is also a trustee, that interest is 'created', if the settlor is also giving away the legal title, he 'transfers' the equitable interest.
    - When the settlor owns the property at common law, no equitable obligation exists, as he possesses both the legal and beneficiary interest.

3. Trustee → Beneficiary (obligations)
    - Transfer/creation of equitable interests.

- The settlor's decision to transfer common law legal title to the trustee creates this equitable interest for the first time. As soon as the obligation is create, the trustee owes obligations to the beneficiary, and the beneficiary has rights against the trustee in equity.
- At common law, the trustee is the absolute owner.

4. Trustee → Beneficiary (relationship)
    - The relationship is bilateral (only between the trustee and the beneficiary).
    - Although the settlor is no longer relevant as the settlor, they could still be a beneficiary or trustee of the trust, and thus retain rights or obligations.

5. Self- declared trust: Settlor is a trustee
    - The settlor 'changes hats' once the trust is established.
    - Nothing preventing this. The only rule is that the trustee and the beneficiary cannot be the same person.

<u>What is a Trust?</u>

- 'The imposition of an equitable obligation on a person who is the legal owner of property, which requires that person to act in good conscience when dealing with that property in favour of any person who has a beneficial interest recognised by equity in the property.' – Thomas and Hudson.
- Four significant elements to a trust:
    1. That it is equitable.
    2. That it provides the beneficiary with rights in property.
        - Personal and proprietary remedies, against the trustee and third parties.
    3. That it imposes obligations on the trustee (trust instruments, fiduciary, statute);
    4. And that those obligations are fiduciary in nature.

<u>Why create a Trust?</u>

- If the trustee went insolvent, the beneficiary are not just one of many creditors fighting for the property, because as beneficiary you actually own those assets and you will get them back. The trust property cannot be used to pay off third party obligations.
- The property is ring fenced off from other creditors, and cannot be used to pay them.
- Property rights are enforceable against third parties, the best situation to be in if someone owes you a debt is to have proprietary rights in some of their assets.
- Flexibility in wealth management;
    - Succession planning, gifts over time.
    - Tax
    - Creditors
    - Family provisions
    - Pension funds, investment schemes, or unit trusts.
    - Commerce; trading trusts, taking security.
- Legally splitting ownership in the property.

<u>The Three Certainties</u>

1. <u>Intention</u>: It must be clear that the testator wishes to create a trust.

- General rule: When a property is given absolutely to any person, and the same person is recommended by the giver of that property to dispose of that property in favour of another, the recommendation shall be held to create a trust.
    - The wish/recommendation shall be held to create a trust, because there was an intention to create a trust by having the person receiving the property being bound to hold it for another.
- A written document is not necessarily required, one can declare a trust orally (*Paul v Constance*).
- The intention of the settlor is generally determined objectively; 'we are not concerned with what the settlor subjectively intended, but what a reasonable person would think the settlor intended given the words and actions used' (*Twinsectra v Yardley [2000]*).
- A trust can be inferred from the circumstances.

2. Object: It must be clear who the beneficiaries of the trust are.

3. Subject Matter: The property which is and is not part of the trust must be clear.
    - A trust can be declared over things like assets, contractual rights, and other personal rights. Trust property does not necessarily have to be real property.

Why?

- A trust is binding upon third parties, equity should not intrude where it is not wanted.
- The taking of beneficial interest in a property is no small matter, especially when the subject matter of trusts are very often of considerable value. Where is cannot be seen that the settlor did not intend for the alleged trustees to be bound to their wishes, it would be unconscionable of equity to nevertheless bind them.

Knight v Knight [1840]
Lord Langdale MR

Facts

- Richard Knight (grandfather) had left his lands to descend along the male line of his family.
- Richard P Knight (the testator (RPK)) stopped this from happening and broke the hold on the land. He owned the property outright.
- RPK wrote a will leaving the property to his brother, Thomas A Knight (TAK) and his male descendants.
- If there was no male descendants, the property was to pass to the 'next descendent in the direct male line of my late grandfather, RK'.
    - 'I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather'.
- TAK's sons died early, and TAK died intestate.
- TAK's daughter, Charlotte (deceased) married William Broughton (WB).
- John Knight (grandson) brought a claim alleging that TAK had been bound to make a strict settlement in favour of the male line.
    - They claimed RPK had made a trust which held the property for the benefit of the male heirs.
- WB argued that no such trust had been created and the property had gone to TAK absolutely, and thus onto Charlotte and his family.

Issue

- Whether there was a trust in favour of the male descendants of RK that was formed by the will of RPK.
    - Did he create a trust to give effect to the intentions of his grandfather (line to descend males); or did he create a trust in his will which replicated what he did during his life; put the same obligation which he'd removed from himself?
    - Had he enabled his successors to own the estate absolutely, or was it required that the property be held only along the male family line?

Held

- The plaintiffs have failed to show any title. Case dismissed.

1. Intention

- There is insufficient certainty that the words of the trust were intended to be imperative.
- Also insufficient certainty over the subject matter of the trust.
- It was held there was no certainty of intention.
    - The language used wasn't imperative, there was no imperative to create a trust. Instead, RPK was saying 'I think you are good people, I believe you will do what is right'. He is not binding them.
        - 'It does not appear to me that he intended to subject them, *as trustees*, to the power of this Court, so that they were to be *compelled* to do the same thing which he states he trusted their own sense of justice would induce them to do.'
    - It's unclear the RPK intended to burden the property with a trust.

2. Subject Matter

- Insufficient subject matter as it was unclear whether 'the estate' was limited to the original estate given to RPK by the grandfather, or included the property RPK acquired himself.
- Not a substantive issue.

3. Object

- No real question over the alleged intended beneficiaries of the trust; the male heirs of Richard Knight.
- 'The objects do appear to me to have been indicated with sufficient certainty'.

- With cumulative uncertainty of intention and subject matter, it raises serious question of whether or not a trust was actually created.
- The creation of a trust should be viewed holistically, taking into account the language, and all other circumstances.

Paul v Constance [1977]

Scarman LJ and Bridge LJ

Facts

- Mr Constance's marriage broke down, and he moved in with Ms Paul. They lived together 'as husband and wife'.
- Following a workplace accident, he received £950 in damages, and following discussions with a bank manager, put it into an account intended to be for both Ms Paul and Mr Constance.
- As P and C were unmarried, the account was only put in Mr C's name.
- He repeatedly said 'the money is as much yours as mine'.

- They also put joint bingo winnings into the account, and made a split withdrawal of £150.
- After 13 months, Mr C died, leaving no will.
- Mr P claimed the money was hers, and Mrs Constance appeared, also claiming the money.
- *If you don't have a will, then the money is dispensed according to the state rules.*

Issue: Was there an express declaration of a trust?

Subject Matter: The bank account (including the money within it).
Object: Ms Paul.
Certainty of intention?

Held

- Mr C's living arrangement, and repeated statement amounted to sufficient proof that he intended to hold the bank account on trust for himself, and Ms P as beneficiaries. Consequently, Mrs C could not assert any right in the property by virtue of being Mr C's widow, as the property was held on trust for Ms P.

- **The court inferred an intention to create a trust from the circumstances, despite the fact that P and C didn't know what they were creating.**

    - Drawn from:
        - Statements of 'this money is as much yours as mine';
        - The nature of the relationship between Mr C and Ms P;
        - The interview with the bank manager about getting both names on the account;
        - The depositing of the couples bingo winnings and;
        - The joint withdrawal/utilisation of the money.

Why was their certainty in this situation?

- The trustee need not use the phrase 'I declare myself a trustee', there is no formal requirement for certain words, but they must do something equivalent (precatory words). The court should look at the situation as a whole, and require clear evidence.
- There must be an intention to create a binding obligation, not merely a moral obligation, or an expression of a wish.
- The level of legal knowledge of the couple was a relevant consideration.

Gift or Trust?

- A gift is a way of disposing of property, it transfers the legal title at law to give the other person the property. A trust is where you retain the common law rights, but give the equitable/beneficial interest.
- Question of if Mr C intended to make a complete gift (full legal transfer of rights to the other person), however it was incomplete (Mr C died and still owned the property).
- The courts cannot complete an incomplete gift by inferring the existence of a trust (*Jones v Richards*).

Fiduciaries

- Equity will characterise certain people as 'fiduciaries'; people in whom trust resides.
- Fiduciaries owe fiduciary duties to their beneficiaries.
- There are strict obligations not to allow person interests to come into conflict with duties to the beneficiaries of the obligation.

Thexton v Thexton [2001]
Salmond J (HC)

Facts

- David Jr and his father, David Snr, worked together at a company; Rio Beverages Ltd. Jr proposed a 50:50 shareholding arrangement with his father, such that they were partners in the company.
- This was never implemented due to advice received concerning death duties. Instead, Snr lent money to the company secured by debenture, and took 20% of the shares.
- At law, Jr held 80% of the shares.
- After a big deal, Snr wanted to exit the company, and got paid out for his 20% interest, and was released from all obligations. He was paid $250K for the shares, true value would be $790K.
- Jr claimed that despite the legal position, Snr was always thought of as being a 50% shareholder, and co-director of the company.
- Mrs Thexton (plaintiff) claimed that Jr had self-declared a trust and was holding the remaining 30% of the shares on trust for Snr.
- Alleged that such a declaration had occurred through an ordinary language declaration.

Issue

- Does Jr hold 30% of shares in Rio on trust for Snr?
    - P claims that, in equity, Snr owned half the company.

Held

- There is evidence that it was intended for Snr to hold 50% of the shares. Jr acknowledges this, he described his partner as a half partner in his eulogy. But despite this intention, it did not eventuate.
- The burden of establishing an intention to create a trust is on the person who alleges that the trust was created (*Herdegen*).
- Issue is over whether the evidence in its totality is sufficient to constitute the requisite declaration. The intention expressed here does not seem to have resulted in the necessary declaration. Salmond J finds that a trust was intended, but it was never actually created, there was no specific declaration.

- **'The evidence as a whole… is sufficient to constitute the requisite declaration.'**
    - The company accountant (Mr Virtue) recommended a transfer of shares to the father, but this was not acted upon.
    - After a purported creation of a trust, the number of shares increased; new shares were paid for by debiting shareholders' current accounts.
    - Memo send regarding shareholding evidenced son's intention that the father should hold 50% of the shares.
    - The father was treated as if he has amassed half of all liability with debt. He did not legally own the shares due to death duties.
    - Evidence given through Jr's eulogy.

Why was there no intention?

- During the time they held the shares, more were issued. Jr maintained his percentage (80%) in the company. Snr also maintained his percentage, but bought far fewer shares.

    - This means the Jr would essentially have been giving more property to Snr by putting more value into the 30% allegedly held on trust.
    - The fact that this would mean Snr was receiving a huge gift every time more shares were issued, according to Salmond J, increased the desire for a concrete declaration of trust.
- There is no clear statement.
    - 'What is needed is a manifestation of an intention to declare a trust' [52].
    - 'Where no words exhibiting the necessary intent are used, it may in exceptional cases be possible to infer a declaration of trust from acts showing that a person has constituted themselves as a trustee, i.e. from conduct evidencing an intent to deal with his property so that somebody else to his own exclusion acquires the beneficial interest in his property.'
- When the evidence is viewed as a whole, the general intentions, memoranda, etc all seemed to indicate that someone had told the lawyers that there was a trust, but no document had held a declaration of trust.

Section 149 of the Companies Act 1993

- Required that, when buying shares in certain circumstances, the director must pay a fair value for the shares.
- Ultimately, the judge found Jr had breached his fiduciary duty, and hadn't paid Snr what the shares were worth. He ordered Jr to pay more to his mother, however he did not find that a trust had been created.

Two Variations of Declaring a Trust

1. A transfer of property to the trustees to act as trustees, and who accept it as such.
2. Manifestation of an intention by the owner of the property that s/he holds it as trustee for the beneficiaries (*Paul v Constance*). Can manifest as a declaration of trust, or be inferred from acts showing the person has constituted themselves as a trustee.

Re Kayford Ltd [1975]
Megarry J

Facts

- Kayford Ltd was a mail-order business, which sold clothing, bedding, etc.
- Customers would make an order, then either pay the full price in advance, or a deposit.
- During a period of financial difficulty, the company became concerned about customers who were sending in money, with no guarantee that their goods would be delivered.
- The company was advised by its accountants to open a separate bank account called 'Customers Trust Deposit Account', and that all further money for orders should be paid into this account, and only be withdrawn after the goods had been despatched.
    - Although a separate account was opened, and the correct money was deposited, it was not named 'Trust Deposit Account'.
- Kayford claimed the money was held on trust for the customers. Instead of the customers having an ordinary claim in an insolvency, they could claim their property is ring-fenced.
- Kayford Ltd went into voluntary liquidation, the creditors claimed the money in this account.

Issue: Whether the money in the bank account was held on trust for the customers, or whether it formed part of the general assets in the company.

Held

- There was no issue with object or subject matter (the customers who had paid, and all money in the separate bank account respectively).
- Only question was the certainty of intention, had a trust properly been declared?
- Megarry J held that there was no question whether a trust had been intended. From the outset, Kayford had intended to create a trust account.
- Purpose of the trust was to ensure that the customers' money remained in their beneficial ownership.

- By speaking to the accountant, opening the bank account, and putting the money into the account, the intention had been satisfactorily acted upon.
- This was a plan to protect the customers' money, Kayford had no intention of using the money as its own asset.
- There is no trust deed, and the name of the account does not designate it as a trust account, however McGarry J finds a trust does not require this.
    - 'Writing, though desirable, is not essential.'
    - EXCEPTION: Property Law Act 2007 s 25(a) required that a trust *must* be created through a signed written instrument.
        - Exceptions: Resulting and constructive trusts.
- Judge also thinks this conduct on behalf of the business is honourable, and a proper thing to do (*obiter*).

Certainty of Intention

- Distinguishes between the intention to create a trust, and;
    - The creation of a (mere) moral obligation.
    - A 'wish' of the testator (*Knight v Knight*).
    - An idea which was suggested, but not acted upon (*Thexton v Thexton*).
    - Other commercial arrangements which may create personal rights, but not proprietary ones.
- No special words are required to create a trust (exception: *inter vivos* trust; PLA).
- A trust can be inferred from the circumstances (*Paul v Constance; Re Kayford*).
    - Sometimes the facts point away from the inference that a trust was intended (*Thexton*).
- The intention of the settlor is generally determined objectively; it is not of concern what the settlor subjectively intended, but rather what a reasonable person would think the settlor intended given the words and actions used (*Twinsectra v Yardley*).

Sham Trusts

- Exists where there is no genuine intention to do what a trust objectively intends to achieve.
- There usually exists documentation, normally a trust deed, which objectively is valid, however the sham is deduced by examining the actions of the parties.
    - 'It means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations (if any) which the

parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities… that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.' – Diplock LJ (*Snook v London and West Riding Investments Ltd*).

- 'A document will be a sham when it does not evidence the true common intention of the parties… A document which originally records the true common intention of the parties may become a sham if the parties later agree to change their arrangement but leave the original document standing and continue to represent it as an accurate reflection of their arrangement.' – *Ben Nevis Forestry* NZSC.

- The party which asserts that a legal situation is a sham bears the onus of proving it. They will benefit from a court ruling that the true legal situation is not as the objectively interpreted documents presented it. There is caution about – and a presumption against – reading documents as shams. – *Official Assignee v Wilson*.
    - A sham can be a general concept, it is not limited to trusts law.

<u>Does the Intention have to be Mutual? (Do both settlor and trustee need to intend sham?)</u>

<u>Palmer: No</u>

- Test: Whether the settlor gave the objective intention to create a trust; did they ever intend to give effect to the trust?
- Where there is a subjective intention not to give effect to the objectively declared trust, there is no certainty of intention, and no trust exists.
- Because only the settlor's intention matters in determining whether a trust has been declared, only the settlor needs to have the sham intention.
- The settlor's sham intention is enough – the trustee's do not need to be in on it.

<u>Conaglen: Yes</u>

- We look for objective intention. Hidden intentions cannot be taken into account when deciding whether the settlor has declared a trust, because this is the general rule for commercial transactions.
- Objective intention of the settlor determines trust's existence, but subjective intention of settlor AND trustee determines sham.
- The general sham doctrine refers to mutual intentions. The exceptional bypassing the orthodox 'objective' interpretation of legal documents is only warranted where all parties had the sham intention.
- The trustee must have a subjective intention to give effect to whatever the sham intention is. The reason for this is that objective intention is paramount.

<u>Indicators of Sham Intention in Trusts Context</u>

- [110] 'contemporary evidence of the actions (and words) of the relevant parties showing that the trusts was not intended to be genuine.'

- Actions of trustees that show disregard for their trust obligations and the beneficiaries' interests – a breach of the trust.
- The use of the trust property for another's benefit.
- Settlor control ('alter ego' arguments).
- Poor administration: An absence of meetings/resolutions/annual accounts; intermingling of financial arrangements or trust property with other property.

Official Assignee v Wilson [2007]
Glazebrook, O'Reagan, and Robertson JJ

Facts

- Mr Reynolds, a serial bankrupt and property developer, was the settlor of a family trust under which he appointed Wilson and Harvey as trustees. The beneficiaries were his children and grandchildren.
- The trust was created shortly before a property in Invercargill was acquired, the title of which was registered in the names of the trustees.
- The property was occupied by Reynolds and his family.
- Reynolds wanted to carry out renovations, but the trustees were reluctant to commit themselves to further borrowing to finance this, so they sold the property to Mr Reynolds.
- Reynolds then entered into a contract on behalf of the trust to buy a property in Queenstown for residential occupation.
- Mr Reynolds later declared bankruptcy. The Official Assignee wanted to house, and claimed that the Queenstown property should be sold for the benefit of the creditors.
- Trustees objected, stating that the property was held on trust for the beneficiaries (the children).
- The OA claimed that the trust was a sham.

Procedural History

- HC held no sham, because of the absence of a common intention on the behalf of the settlor and the trustees to create a trust which was not genuine. Equally, even if the settlor had been able to exert influence over the trustees, this did not mean that the trust was a sham per se without the existence of a common intention to create a sham.

Three Issues

1. Is a common intention between a settlor and the trustees necessary before a sham can be found?
    - The court agreed with *Conaglen*.
    - **A sham trust arose where there was a common intention between the settlor and the trustees to create something other than a genuine trust,** usually from the inception of the trust. The intentions of the trustees could include recklessness on their own part, or ignorance as to the nature of the transaction.

- If common intention is required, many fewer sham trusts would be set aside, which promotes commercial certainty.
- The **influence of a settlor** over a trust might amount to contributory evidence that the trust was a sham, but it **could not in and of itself extinguish the rights of the beneficiaries nor make the trust a sham**.
- Poor management of the trust in and of itself did not give rise to the intention that it be operated as a sham.

2. Can a valid trust become a sham?
    - Once a trust is created validly, the beneficiaries have an interest in the trust property that cannot easily be undone.
    - Unless the later appearance of a sham can be traced back to the creation of a trust, the trust remains valid.

3. Did the HC judge use the correct method in determining a sham?
    - Found that there is no merit in this argument.

<u>Held</u>

- A sham exists where there is an intention to conceal the true nature of a transaction.
- A trust will be held to be a sham where there is an intention to have an express trust in appearance only.
- **The absence of an intention to create a genuine trust prevents the trust from being valid, because one of the essential ingredients for its creation is missing.**
- The judges decided there wasn't a sham (agreeing with Conaglen). This had the effect of raising the threshold, as both the settlor and the trustees must be in on a sham for one to exist.
- Why was there no sham?
    - The property wasn't going to be treated as trust property; it was going to be owned by someone else.
    - Wouldn't be giving effect to trust obligations and not operating in the beneficiary's best interests.
    - The financial situation was very fluid.
- What is the practical benefit for Reynolds?
    - Even though he is bankrupt, he can still use this house (which is owned by the trust) by claiming that he 'rents it from the trust'.
    - It looks like his house, but it's not. It means his intention to provide for his children has paid off.
- Why is it not a sham despite Reynolds' benefit?
    - The sham test is whether or not the settlor and trustees intended to give effect to the trust. Despite the trustees agreeing with Mr Reynold's a lot of the time, they were not his puppets, and they did not do everything he said.
    - A settlor can have control, as long as this control doesn't go further than the control of the trustees set out in the trust.

Certainty of Subject Matter

- Trust property must be identified with a particular degree of certainty.
- The property must be 'segregated' from the trustee's other property.
- If the court of equity is going to enforce a trust, it must know what property it is specifically enforcing.

Why?

- In order to create a trust, it must be possible to ascertain with certainty not only what the interest of the beneficiary is to be, but to what property it is to attach.
- When a trustee has multiple assets, it can be hard to identify which property is concerned/which assets belong to the trustee or beneficiary.
- It determines in an insolvency what can be taken from the trustee and sold to his creditors, and what is ring fenced by a trust for the beneficiaries.

The Goldcorp Problem

- What happens when there is a large amount of indistinguishable property (eg gold bullions, money in a bank account etc) and it appears a trust has been declared, but it cannot be ascertained what property belongs to which person?
- In *Re Goldcorp* there were two classes of claimants. The first had proprietary rights in specifically identifiable holdings of bullion which the exchange had actually acquired (Walker Ltd claimants). These claimants satisfied the 'certainty of subject matter' requirement. The second class did not have their bullion segregated from the 'bulk' held by the exchange. Thus legal title did not pass.

Re London Wine Company (Shippers) Ltd [1986]

Oliver J

- Customers place an order for a bottle of wine, and receive a certificate of title.
- The bottles are held in the company's cellars to age until the customer request the wine.
- The company goes insolvent, the customers try to claim the wine. They claim they were the beneficiaries in a trust, and the wine was the trust property.
- Court finds uncertainty of subject matter, as the bottle the customer bought could have been any one of many bottles fitting that label. It is not found to be a property right, because that bottle is part of a homogenous mass.
- To satisfy this requirement, there would need to reference to a specific, individual bottle of wine.

Re Goldcorp Exchange Ltd (In Receivership) [1995]

Lords Templeman, Mustill, and Lloyd of Berwick, and Sir Thomas Eichelbaum (PC)

Facts

- Goldcorp Exchange ran a business where customers would buy bullion.

- Advertisement set out that customers could have their bullion stored in the Goldcorp vault, at no cost. Customers were encouraged by the company to do this, and the majority of them did.
- Company promised that there would always be sufficient bullion to cover every customer, however this was not in reality the case. The company only held enough bullion to meet the usual requirements of its customers on any working day, it did not hold the entirety of its customers' orders.
- When the company went insolvent, customers demanded their gold, and the company could not satisfy their requests.

Three Classes of Claimant

1. Non-allocated claimants: Customers who bought the standard gold bullion, and had it stored en masse in the company's vault.
2. Mr Liggett: The second respondent, who initially purchased specific hold maple coins from the company, then agreed to buy a further 1000 coins on a non-allocated basis and store all of them with the company.
3. Walker Ltd claimants: The third group of respondents, represented a category of claimants who had brought bullion from Walker Ltd. There was sufficient ascertainment and appropriation of bullion by Walker Ltd to transfer title to each of them, thereafter they had a shared interest in the pooled bullion stored separately on their behalf.

Procedural History

High Court: Judge rejected the claims of the non-allocated claimants, and the second respondents of proprietary interests in the bullion, but found the Walker Ltd claimants had shown a trust to be superimposed over the bank's proprietary right.

Court of Appeal: Allowed the appeals of the first and second respondents, holding that although they had no proprietary rights in the bullion, they had retained a beneficial interest in the purchase monies under the contracts of sale, which could be traced into the company's general assets in priority to the banks charge.

Held

- Only those customers who could prove that their order of bullion was in fact held separately from the general store of bullion would be entitled to enforce a trust against the exchange, and take their bullion as secured creditors.
    - In practise, this was only the Walker Ltd claimants.
- The customers who could not demonstrate that their orders had been segregated from the general store of bullion could not demonstrate that they were beneficiaries under a trust, **because the subject matter was uncertain**.
    - The non-allocated claimants.
    - Mr Liggett. Even though it appeared the maple coins were earmarked for him, because everyone else had bought gold, not coins, the company treated the coins as 'their' assets. They did not segregate his coins from the general assets of the company.

- Because the non-allocated claimants and the second respondent had contracted to purchase unascertained generic goods, no property in the bullion passed to them in law or equity upon purchase, because they could not know which bullion specifically the title related to.
- As the pile of gold was always too small to satisfy the claims, the company cannot be said to have held the customers' bullion in its vault. It was always just assets of the company.
- There was no specific identification of the gold (eg the gold being put in a box with the customer's name on it) **therefore there was no identification of the subject matter of the trust**.

Why can't there be a pooled claim over all the gold?

- Customers bought specific pules of gold. No individual identification occurred, and similarly, no pooled or bulk identification occurred.
- Although it didn't occur in this case, the judges acknowledge that it is theoretically possible.
- But this never would have happened. The company would not have held the bullion on trust, because the implication would be that the company could not use the gold as its own assets. They would not be able to use the gold. Goldcorp would have to take their own rights away.
    - 'What was the subject matter of the trust? The only possible answer is that the trust related to the company's current stock of bullion answering the contractual description; for there was no other bullion to which the trust could relate. Their Lordships do not doubt that the vendor of goods sold ex-bulk can effectively declare himself trustee of the bulk in favour of the buyer, so as to confer an equitable title. But the present transaction was not of this type. 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 sales contracts.'

- 'Approaching these situations, a priori common sense dictates **that the buyer cannot acquire title until it is known to what goods the title relates**.'
- **'Any attempt by the non-allocated claimants to assert that a legal title passed by virtue of the sale would have been defeated**, not by some arid legal technicality but by… "the very nature of things".

This judgement forms the orthodox theory on certainty of subject matter.

Hunter v Moss [1994]

'There is no need for certainty of subject matter in circumstances in which the property in question is intangible.' This was the argument accepted in *Re Harvard Securities*, that there should be a distinction between tangible and intangible property, following *Hunter*.

Facts

- Employer (Moss) had agreed that employee (Hunter) was entitled to 50 shares out of 950 shares held by the employer, as part of the employees remuneration package.
- Relationship broke down; H argued that M was required to hold 50 shares on trust for Hunter. M argued that no shares had ever been segregated from the general fund of 950 shares, and therefore there could be no valid trust in favour of Hunter.
- Moss later sold the 950 shares and kept the proceeds for himself.
- Hunter is claiming a proportion of those proceeds.

Orthodox Approach

- If *Re Goldcorp* is applied, the outcome will be against Hunter (the employee), for want of certainty of subject matter. It would have been impossible to determine which 50 shares of the 950 were the subject matter of the trust.

Held

- The CA found a valid trust.
- They reasoned that **because the shares were identical and indistinguishable any 50 shares in the company were capable of forming the subject matter of the trust**.
    - Provided the example of an estate; if a testator stated '25% of my shares in x company go to y', there would be no issue of certainty.
- Hunter v Moss was distinguished from *Goldcorp* and *Re London Wine Co* because those cases were concerned with title in chattel, whereas *Hunter* was concerned with whether or not there had been a declaration of trust over intangible property in the form of identical shares in the property.

White v Shortall [2006]
Campbell J NSWSC

Explicitly rejected the approach taken by Dillon LJ in *Hunter v Moss* in a carefully argued judgement, primarily on the basis that the purported distinction between chattels and other forms of property was unconvincing.

Facts

- Defendant (Shortall) was contractually obliged to declare a trust over 1.5m shares so that the claimant (Ms White) would acquire an equitable interest in 222,000 of those shares. White is Shortall's ex-wife.
- No question of certainty of intention (trust deed exists) or object (White and other).
- Ms White asked repeatedly for her share of the shares, because she wanted to sell them at a high price.
- The shares in the company at the time of the case have plummeted, and are worthless, so she is suing Shortall for her loss as seen in the value of the shares.
- White argued that like *Hunter* a trust could exist over just the 222K of shares.
- Shortall argues the trust property is not adequately identified. Before one is able to identify the property with certainty, it is necessary to be able to state which 222K shares were held on trust out of the 1.5m, and which were the shares not held on trust (*Goldcorp*/orthodox approach).

- No segregation of the 222K shares took place.

Issue: Whether this purported trust of 222K shares of the 1.5m fails due to want of certainty of subject matter.

- No doubt that shares can be held on trust, the defendant submits in the present case the trust property is not adequately identified.

Held

- **The Court upheld the validity of the trust, but explicitly disavowed the rationale in Hunter.**
- The Court inferred from the facts that the intention was that a single trust would be declared over all 1.5m shares in favour of the claimant and the defendant, and that the claimant's share in that trust was the 222k shares.
- There is a large single trust with two beneficiaries, who each own the trust property in their own proportion.
    - Not one smaller trust as held in *Hunter*.
- This avoided the issue of certainty of subject matter, because the trust took effect over the identified fund of 1.5m shares, and there was no need to segregate out the 222k shares under a separate trust if the trustees were to have a power to split that number of shares from the total trust fund.
- In effect, the claimant and defendant were seen as beneficiaries under one trust in the ratio 1500:222.

Why was there sufficient certainty of subject matter?

- Because all the shares were held on trust, they are all trust property. All the shares are Shortall's property, but he only has beneficial title to a proportion of them. The rest belong to White in equity.
- This means there is certainty in the trust.
- Followed by the CA in *Lehman Brothers International*.

Criticism of *Hunter v Moss*

- In *Hunter*, Dillon J justified granting a trust on the basis that most of the authorities had concerned chattels and on the basis that executors of a will trust do not know the property which they are to hold on trust, yet such trusts are valid.
- This approach was rejected in *White*. Neither argument holds water in that executors know that they hold on trust any property owned by the testator at the time of death, and that there is no reason in principle for distinguishing between tangible and intangible property except that it led to the conclusion Dillon LJ wanted.

Differentiation with *Goldcorp*

- In *Goldcorp* the tangible assets were not identical, and the company did not treat the gold as if it was held on trust.
- In Shortall, the shares are identical and it was very clear who they were brought for, and who they were owed to. The judges hold there is a pool, and that all are held on trust.

- If distinction is that there is a tangible which is not fungible, apply *Goldcorp*. If the things are identical, and which one you got wouldn't matter, apply *Shortall*.

Lehman Brothers International (Europe) v Person et al. [2001]

Lloyd, Patten, and Tomlinson LJJ

Facts

- Regulations obliged investment banks to segregate their clients' assets into separate accounts so as to protect those clients against the insolvency of the banks.
- Lehman Bros had breached their regulatory obligation, and no segregated their clients' money. Instead, all the assets were held in a large pool, with LB's own assets.
    - LBIE held securities purchased by other Lehman affiliates. LBIE didn't segregate securities into different accounts for each affiliate.
    - LBIE was able to deal with the securities by selling them and making profits; the securities it held are not those it was provided with by the affiliate, and they may not even have existed.
- Trust deed did exist, and was deliberately created, contract with customers clearly stated LBIE could use trust assets as it wished.
- LBIE and its affiliates go insolvent.
- Creditors want all securities, the customers argue that the securities were held on trust for them.

Issue

- Similar to *Goldcorp*, whether or not there had been sufficient certainty of subject matter such as to find trust in favour of those customers.
    - There was no differentiating, no separate account for each affiliate or customer. Thus the issue is over certainty of subject matter.

Held

- CA held one large trust fund constituting the entire pool of property in favour of all the clients as beneficiaries, which each client having a share in the trust property in accordance to their rights in the bank. Thus the clients have valid proprietary rights in the LBIE insolvency.
- In essence, a single *White v Shortall* style trust took effect over all the clients' assets.

Why was there certainty of subject matter?

- There was no segregation, and there could have been. Contradictory to the orthodox view.
    - 'Proprietary rights do not attach to an unappropriated part of a larger mass' [69].
    - Some say it appears *Hunter* was applied, others that the case resembles *White*.
- Here, the courts turn to fungibility; if the contents of the trust property are identical things, they are fungible goods.

- The fact they have not been split off from each other doesn't matter, as long as the larger pool exists.
    - Similar to *White*. It's not necessary to show which shares are held on trust, just show the pool was held on trust, and the Court will calculate who it goes to.
- *Lehman Bros* say you **do not need to know what in a pool of property belongs to this or that beneficiary, it is only necessary to know what proportion each beneficiary is entitled to**.

- The regulations are clear that there for there to be a trust, there must be clear intention to create a trust. Court's decision seems to contradict that principle.
- The court is potentially being more lenient as they think that, in some situations, a trust should exist as it is achieving something which is practically convenient, even if applying trust laws strictly would result in no trust.
- Hard cases make bad law.

<u>How can it be ascertained that the trustees are taking good care of the trust?</u>

- They have an obligation to put back and make back the trust property.
- Not much use if the company is insolvent.
- When there is a big mix of trust property, there is a major concern.

<u>Criticism: There's not really a big pool of trust property, is there</u>

- LBIE use the property as they wish, selling them etc. They are in no way segregating out the property in a way that prevents them from dealing with the property as they wish.
- Court doesn't object (for some reason) to LBIE using the property as they wish, instead of only for the beneficiary.
- Courts say that, after the dust settles, the court will find a way to assign the shares. The tracing rules will be applied.
    - Tracing is where, after a valid trust is found, the courts will trace the trust property. The assets can be located, and returned to the beneficiary. If assets are mixed, they can be traced.
    - Only relevant after a valid trust has been found.

Certainty of Object

- The persons who may be beneficiaries of the trust must be identified with sufficient certainty.

Why?

- The trustees must know to whom they must conform to their duties.
- The court must be able to 'police' and ultimately enforce the trust if a beneficiary should bring an action against the trustee.
- The beneficiaries must be people (or legal people; companies etc), not abstract purposes (with the exception of charities).

Different tests apply to different forms of trust power. One trust instrument may contain a combination of these trusts and powers. If there is insufficient certainty of object, the trust or power will be void. Historically, all trusts required a **complete list** of beneficiaries to be drawn up, but as time progressed, courts became more generous.

Fixed Trusts (including bare trusts)

- An express trust where the trustee has a fixed set of rights. We know who the beneficiaries are, and how much each will get.
- No discretion/power is conferred upon the trustee or any other party to vary the class of the beneficiaries, or how much property they are to receive.
- Problem arises where there is a class of people specified; if we don't know how many beneficiaries there are to divide the property between, then we don't know how much each beneficiary should get.
- Hence, the trustee must be able to name or identify members of the appropriate class.
- Satisfied with the **complete list test**, which requires that a complete list of beneficiaries is capable of being drawn up.
    - All the beneficiaries must be ascertainable (*Re Beckbessinger*).
    - 'There cannot be equal division among a class unless all members of the class are known' (*McPhail v Doulton*).
- Includes bare trusts, where there are no active duties to perform with only one beneficiary. That beneficiary must be identified; otherwise the trust will fail for uncertainty.

Discretionary Trusts/Trust Powers

- Trust in which the trustees are obliged to make a distribution of property to any persons drawn from a general class of beneficiaries.
- The trust is discretionary as the trustees have the discretion to decide which class of beneficiary is to benefit.
    - Eg: "My trustees shall pay $1000 annually to any of my good friends" – while they have the discretion to choose, the problem of certainty here is that it is not possible to know what is meant by 'good friends'.
- More lenient test. Does not apply 'complete list test', instead applies the **is or is not test** to determine whether a party is a party of the trust (*McPhail v Doulton*).

    - Requires that for a discretionary trust to be valid, it must be possible to say of any given claimant to the trust that that person either is or is not within the class of beneficiaries. If in any event a person cannot be said with certainty to be either within or outside the class designated in the trust, the trust is fails.
- However, following *Re Baden*, a trust will not be uncertain as to object merely because there is not enough evidence to show whether a particular person is or is not within the class. In this case, the person is excluded unless new evidence eventuates.
    - Burden of proof is on the person claiming to fall within the bounds of a beneficiary.

Fiduciary (mere) Powers

- A power given to the trustees, which enables them to act, but does not oblige them to do so.
- The trustees are able to act on their own decisions, but must be able to justify them, and not act capriciously in the decisions they make.
- The test is also the **is or is not test** outlined in *Re Gulbenkian*: the power is valid if it could be said with certainty whether an individual was or was not a member of the class and 'does not fail simply because it is impossible to ascertain every member of the class.'

Distinctions between Powers

- Mere power/bare power/power collateral: 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.
    - 'A mere or 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 do not have to ascertain every member of the class' (*Re Gulbenkian*).
- Trust power (discretionary trust): A power to distribute which the donee must exercise.
    - *McPhail v Doulton [1971]*: 'The power 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'.

Difference between a discretionary trust and fiduciary power

- Discretionary trust is something you have to do, whereas a fiduciary power you don't have to do.
    - Where there is a discretionary trust, you still have a duty to give it away, but you have discretion about to whom it is going.
    - With a fiduciary power, there is no duty to give it away.
- In the context of a trust, there are still fiduciary obligations of good faith and partiality between beneficiaries.
    - A person might be given a power (who is not a trustee) to appoint property, to dispose of trust property – but from the context it is clear they are not subject to fiduciary obligations.
    - Trustee won't be given such a power, trustee will have fiduciary power.

- Fixed trusts are inflexible, but discretionary trusts and fiduciary powers give different kinds of flexibility to people – they have the discretion to do what they think is best in the circumstances.

Beneficiaries Interests

Fixed Trust

- Where the capital is to be divided equally between three, one beneficiary could claim a third of the trust property as theirs.
- No discretion means no danger that the trustee wouldn't give you something. The beneficiary can regard that thing as theirs, and so on creditors of that beneficiary can regard the thing as theirs.
- Where there is a fixed trust, the interest the beneficiary has under the trust is theirs.
- If a person has all the interest under a fixed trust, and they are of age (notwithstanding the rights, obligations, and limitations on the beneficiary's ability to access the trust), and they have the entire beneficial interest, they can go to court and say 'give it to me now' and collapse the trust. The trustee has to pass onto them the property. (*Saunders v Vautier*)
    - Compare this with a beneficiary in a discretionary trust – individual discretionary beneficiary cannot do this. In a fixed trust where someone else has all the interest, they can call for the property to be given to them.
    - 'We as a group have called to have it given to us' – if it is possible to designate a share without prejudicing other beneficiaries, it may be possible to do this.

Discretionary Trust

- The rights of the discretionary beneficiary is just a hope/ "spes"/ an expectancy.
- A discretionary beneficiary doesn't have any particular claim to the trust fund, just a hope that some of that trust fund will be given to them.
- No vested interest that has been distributed to them. That means that they can't claim to have any particular interest to creditors/trustees.
- When it's a discretionary trust, all you have is a 'mere hope' of getting some of the trust property, you do not own it the same way you would in a fixed trust.

Saunders v Vautier [1841]

- Gives the beneficiaries the right to instruct the trustees to transfer the property to themselves absolutely.
- They can exercise this power only if they hold between them the entirety of the equitable interest and if they are all legally competent to act.
- The beneficiaries under a trust have proprietary rights in the trust fund, not merely personal rights against the trustees.

- Applies only if all the beneficiaries agree to the direction. The objection of one would veto.
- All the beneficiaries must be action *sui juris* (they must all be of sound mind and the age of majority).

McPhail v Doulton (Re Baden's Deed Trusts) [1971]

- Created the 'is or is not' test for discretionary trusts.

Pros of the test

- There should be a lower level of certainty, as the court can appoint new trustees or give effect to the settlor's intention itself.
- The trustee can make a general survey of the field, distinguishing between classes and categories and particular individuals.
- Discretionary trust carries with it the implication that you can select from a smaller subset, if you do so rationally.
- The beneficiaries and the court can ensure that no property is disposed of to non-beneficiaries.

Cons of the test

- Higher level of certainty is necessary, as if a trustee fails to comply with their duties, the court can only order an equal distribution amongst all possible beneficiaries. In order to do this, the court requires a complete list.
- The trustee must make a distribution after considering all members of the class, not a mere subset.
    - Idea aired by dissenting judges in *Baden*: the trustees must consider everybody who is a beneficiary.
- The court cannot impose an arbitrary limitation on the class by creating a smaller certain class where the settlor has not.

In Re Baden's Deed Trust (No. 2) [1973]
Sachs LJ, Megaw LJ

Facts

- By a deed, Mr Baden established a personal gift of shares 'The Matthew Hall Staff Trust Fund", intended to further the welfare of the employees and those connected with them.
- "The settlor wishes to establish a fund for providing benefits for the staff of the company and their **relatives and dependants**.

Issue: Whether there is uncertainty of object caused by using the words 'relatives' and 'dependents'.

Held

- Sachs J upheld the literal application of the 'is or is not' test, but held that the burden of proof should be reversed.
    - Onus would be on those claiming to be beneficiaries to prove that they were, not on the trustees to prove they were not within the class of objects.
    - If the claimant could not prove that she lay within the class, they are excluded from the trust property.

Application of 'is or is not test'

- Megaw LJ:
    - Such a trust will be valid if a substantial amount of people can be identified as satisfying the terms of the trust.
- Sachs LJ:
    - Once the conceptual uncertainty hurdle has been overcome, then the court (if called on) needs to be convinced that X is within the class.
- Stamp LJ: Both conceptual and evidential certainty is needed to show whether any given person is or is not within a class.

Re Beckbessinger [1993]
Tipping J

Facts

- Will: Residue to be held on trust be X and Y to be applied 'to benefit the **interests… in Christchurch**'.

Issue: Hasn't named any people, is it administratively workable?

Held

- The will created a discretionary trust.
    - There was no choice but to exercise the power.
- Where there is a choice as to beneficiaries, the 'complete list' test (for fixed trusts) does not apply. Followed *McPhail v Doulton*.
- Expression 'interests which [deceased] had in Christchurch is so conceptually uncertain as to be void for uncertainty.

Kinds of Uncertainty

Where there is vagueness/uncertainty, can we make it certain?

Conceptual Uncertainty

- When the group of people may be defined or described in such vague terms that its meaning could be interpreted a number of different ways.
- When you set a class up, you need to be able to know for certain who belongs to the class/who these people are.
- The words describing the class cannot be too vague. There must be sufficient certainty so that anyone who turns up (with sufficient evidence) can be said to be or not to be a member of the class.

Evidential Uncertainty

- Exists in circumstances where people can't prove that they belong to the class due to lack of evidence.
- **This does not defeat a discretionary trust, but would defeat a fixed trust.**
    - Discretionary Trust: Provided there is conceptual certainty, the court is not defeated by evidentiary uncertainty. Conceptual certainty allows the court to ascertain whether a person is or is not in the class.
    - Fixed Trust: All members must be known (complete list test). Evidentiary uncertainty would defeat this trust.
- May also be the case that, if there is any evidence needed to show who is actually in the class of people, the evidence is unavailable.

Whereabouts Uncertainty

- Eg: Adam and Ben are beneficiaries, but we don't know where Conrad is – but you do know that he is entitled to something, so you merely hold his share back.
- There are ways of dealing with this uncertainty, it's not a problem.

'Hopelessly Wide': Administrative Unworkability

- Occurs where the meaning of the words used in the trust document are clear, but the definition of who the beneficiaries are is so wide that it is practically impossible to establish the group of beneficiaries.
    - Example: 'This is held on trust for the residents of Greater London'. There is no way of establishing exactly who would come into this category of people.

Constitution of Trust Property

- In addition to the three certainties, for there to be a valid trust, the settlor must dispose of her property.
- They must make an effective transfer of their property, and/or make an effective declaration of trust.
- If the property cannot be effectively transferred, then the trust is not valid, and cannot be given effect.

- The person who would have benefitted from the trust cannot enforce it, there are merely a volunteer – someone who has not provided consideration in return for a promise or gift.
- **The trust is not binding until the property is in the hands of the trustee.**

Three Methods of Transferring the Property

1. Transfer it legally to them at law. The person now owns all right to the property.
2. Properly transferring the property to the trustee according to whatever legal rules regulate however such property is effected (a transfer of legal title to the property).
    - This gives the beneficiary the proprietary right.
3. Where the settlor is herself going to be a trustee, the property is already in her legal title, so nothing further needs to be done (self-declaration of trust).
    - Gives an equitable title to the beneficiary.

- If you want to beneficially transfer property, you must do one of these three things.
- There is an exception however. An alternate equitable doctrine allows a trust to be constituted relating to the general circumstances in which equity will enforce gifts (to 'volunteers' how have paid) that are incomplete at law (legal title has not been transferred).

When will Equity Perfect and Imperfect Gift?

- Equity doesn't perfect imperfect gifts in general.
- Equity will enforce a properly constituted trust, but won't enforce legal gifts that were imperfectly done (*Milroy v Lord*).

Milroy v Lord [1862]
Turner LJ

Facts

- Milroy wanted to benefit his niece.
- A deed was created that purported to transfer 50 shares in Louisiana Railway Company to Mr Lord for him to hold on trust for Milroy's benefit.
- Transfer was to be carried out through an agent.
- Requirement of the applicable company law that there could not be a transfer of those shares unless the transfer was registered in the company's register.
- There had been no re-registration of any transfer, and therefore Milroy had no rights in the shares.
    - What Milroy had done was ineffective to transfer legal title.
- Trustee had no legal right to the property, therefore, no trust.
- Milroy tried to argue that the intention to transfer the shares to Lord ought to mean that the current owner ought to be considered to be a trustee of the property.

Held

- The court held they will not give effect to a transfer that is imperfect: an imperfect gift will not be made effective through interpreting the situation as the donor declaring that they hold the property on trust for the donee.
- The settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.
    - **If you want to transfer the property, the settlor has to do everything that's necessary to transfer the property**.
- But because the trust to transfer the property to a trustee (option B) failed, what if Milroy intended to self-declare a trust (option C); here there is no movement of legal title.
    - *Milroy* says no. If the facts and intentions expressed show that the person intended to use their property in one of the three ways, and it didn't work out, then we are not going to say he intended to do something entirely different (like self-declare a trust) and give effect to it.
    - **You either self-declare a trust, or do what's required to make someone else a trustee**.
- An ineffective gift does not constitute a declaration of trust without their being a clear intention to create a trust in that way.

The *Re Rose* Exception

What if the transferor had done everything necessary to transfer the shares?

- In *Milroy*, it was said that one cannot intend to make a gift, fail to make that gift properly, and then simply call it a trust so as to give effect to it.
- However, in *Re Rose*, the court found that in a situation where the transferor had done everything necessary of her to effect a valid transfer, it would be unconscionable to allow her to renege on her promise to transfer.
- Therefore, the *Rose* trust comes into existence to stop that individual transferor acting unconscionably.

Re Rose [1952]

Facts

- The deceased, by transfer dates 30th March 1943, transferred to his wife (the plaintiff) 20,000 shares in an unlimited company.
- She didn't immediately become the legal owner, she had to wait until her title was written in the registrar book.
- Issue came to court due to concern with estate duties.
    - The Crown claimed estate duty on the share on the grounds that the transfer of the share was not completed until April 10th 1943, the date which the parties agreed was the relevant date before which the gift must have been fully completed to avoid duty.

        - If the property had been given away/ left Mr Rose's control before that date, the tax couldn't be levied, as it would have been more than 5 years before his death.
    - Mrs Rose argues that at the material time, all that was left to be done was for the board of directors to agree to the transfer, importantly, Mr Rose had done everything that was required of him to effect a valid transfer.
    - Even though legal title didn't actually take effect until after this date, Mrs Rose had beneficial entitlement before it.

Held

- Were *Milroy v Lord* applied, this would be found to be an incomplete gift. It cannot be given effect as a trust by treating as a declaration, because legal title was never actually transferred.
    - The Judge dismisses this. He hold the *Milroy* rule is too broad and involves too great a simplification of the problem, without being supported by authority.
- Judges is *Rose* held that instead of everything needing to be done to complete the legal transfer before a trust can be declared, the proper question is **has the settlor done everything necessary to be done by him**?
    - If so, equitable title can then be transferred.
- Here, equitable title is deemed to have been transferred to Mrs Rose as soon as Mr Rose had finished the formalities, because the settlor had, at that point, done everything necessary to be done.
    - While the settlor is still the legal owner because they haven't actually transferred the property at law. The situation is interpreted as a constructive trust. The settlor is bound to hold the property he legally owns for the benefit of his wife, because he has done everything he needs to do for the transfer of that property.
- In *Rose* the board of directors did eventually give their consent to the transfer.
- The Court was looking at the surrounding factors in the case of *Rose*. Courts of equity will always be sensitive to context.

Why does *Rose* act as an exception to *Milroy*?

'… the settlor did everything which according to the nature of the property comprised in the settlement, was necessary to be done by him in order to transfer the property…' – Lord Evershed

- Once the property leaves the settlor's hands, the transaction is binding upon them in equity.

T Choithram International SA v Pagarani [2001]
Lord Browne-Wilkinson

Facts

- Coithram Pagarani (TCP) was a wealthy businessman. He was seriously ill.
- He executed a trust deed establishing a philanthropic foundation and appointed himself one of the trustees.
- He then states orally that he gave all his shares to the foundation.
- Informed the accountant to those companies that the accountant was to transfer the deposit balances and shares to the foundation.

- What he had done was insufficient to transfer legal title:
    - TCP intended to make an immediate, absolute gift to the foundation, but he had not vested the property in all the trustees of the foundation.
    - He died before actually executing the documents to transfer legal title to the assets to the trustees.
    - *Re Rose* could therefore not be used as an exception, because TCP had not done all he could in order to effect the trust.

- Plaintiff's claimed to be entitled to TCP's estate in his intestacy, because the property didn't belong to the trust, as it was never properly put into the hands of the trustees (if the money didn't go to the foundation, then as intestate property, the children will receive it).

Procedural History

High Court

- Judge held that the donor had not made a valid gift of the deposit balances and shares to the foundation.
- CA upheld that decision.
- Defendants appealed.
- HC and CA:
    - The donor has to have done everything necessary to be done which is within his own power to do in order to transfer the gifted asset to the donee. If the donor has not done so, the gift is incomplete, since the donee has no equity to perfect an imperfect gift (*Milroy v Lord/Re Rose*).
    - TCP used words of gift to the foundation (not words declaring himself a trustee): unless he transferred the shares and deposits so as to vest title in all the trustees, he had not done all that he could in order to effect the gift.
    - Therefore, the gift fails, and cannot be completed.

Issue: TCP had not done all he could in order to effect the trust. If this then a case where there has been an imperfect gift that equity could not enforce, despite TCP's obvious intentions?
Would equity perfect this imperfect gift?

Held

- When a man lying on his deathbed seeks to declare a trust over his own property, with himself as one of a number of trustees, a valid trust is created over that property, even though the dying man did not transfer legal title in the trust property to the other trustees.

- 'Although equity will not aid a volunteer, it will not strive officiously to defeat a gift'.
- Although the words used by TCP are those normally of appropriating an outright gift, in the present context there is no breach of the principle in *Milroy* if the words are given their only possible meaning:
    - The foundation has no legal existence apart from the trust declared by the foundation trust deed.
    - The words in the deed are essentially words of gift on trust.
- But TCP only vested the property in himself.
- Since equity will not aid a volunteer, how could a court order be obtained vesting the gifted property in the whole body of trustees on the trusts of the foundation?
    - There should be no question. Pagarani has declared that he is giving the property to a trust which he himself has established, and has appointed himself as trustee.
    - **There can be no distinction between the case where the donor declares himself to be sole trustee for a donee, and the case where he declares himself to be one of the trustees for that donee.**
    - In both cases, his conscience is affected, and it would be unconscionable and contrary to the principles of equity to allow such a donor to recant his gift.
- The appeal was allowed, and the action was dismissed.

Why did the court allow equity to perfect an imperfect gift?

- Fairness: TCP's intention was clear at the time, he wanted to set up a charitable trust.
    - The requirement of constitutional trust property remains. Did the person who owns the property enter into a transaction that marries up with the intention?
    - Unless what is done to set up a trust is done, it will not be enforced at equity.

- Self-Declared Trust: 'I give it to the foundation': He was giving the property to the trustees of the foundation, which included himself.
    - A trust was unequivocally intended. He self-declared a trust with those words, he's therefore bound in equity to also make the other trustees legal owners.

- His use of 'gift' did not mean gift
    - He declared that he gave the property to the foundation, but he did not give it in law.
    - The word 'gift' was not meant in its usual sense. The court held it to mean the giving of equitable title.
    - TCP likely did not know about the intricacies of trust law, no reason to demand he use legal language.

- TCP has the legal title, he is one of the trustees, and has declared the trust. This is sufficient to constitute the trust property.

- How would the property be transferred to the trustees?
    - TCP didn't transfer the property. He self-declared the trust to be held for the benefit of the foundation.
    - Legal title was retained by TCP, his conscience is bound to only hold that property for the purposes of the foundation.

Why could he not do that even if he wasn't a trustee?

1. Which mode of constitution of trust property was used?
    - An actual legal transfer to satisfy *Re Rose* (everything you needed to do to transfer the property) hasn't happened, therefore the trust must be self-declared.
        - The only documents meant to be signed was the trust documents; the idea was that there was a declaration of trust, and if it were to be formalised, the trust should be formalised, not the legal transfer.
    - Given what was said and done, it doesn't really look like a declaration of trust.
2. If it's a self-declaration of trust, one individual should be the trustee. But Paragani is one of nine trustees.
    - Appears to be a special rule if one of the trustees is the legal owner, and they self-declare a trust, it can be given effect.
    - This is a novel point, in a special situation.
    - The fact that Pagarani was a trustee doesn't matter. He could have self-declared a trust for something completely different, without being one of the trustees, which would be binding on him immediately. He'd have to transfer the property immediately.
    - No need for such complexity, the ratio is overtly complex. Should be treated as a simple self-declaration of trust.

Curtis v Pullbrook

- Briggs J held that where a man had not completed the formalities for transferring shares to his wife and daughter, then the *Re Rose* exception couldn't be relied upon, because he had intended to make a gift, but had not done everything necessary for him to do so.

When Will Equity Perfect an Imperfect Gift?

1. When the donor has done everything necessary to enable to recipient to enforce the gift without further action from the donor.
2. Detrimental reliance by the recipient (estoppel).
3. Benevolent construction of the document (trust)
    a. What was attempted – the characteristics of the situation are interpreted as a trust. Directly contradictory to *Milroy v Lord*.

b. If it's possible to interpret (little uncertainty), might err on the side of trusts if there is an ambiguity.

Formalities and Secret Trusts

Formalities in Trusts

Inter Vivos Trust

- Takes effect during life of the settlor.
- Personal Property: No formalities, can be created orally.
- Land: Property Law Act 2007 s 25(2) requires signed writing.
    - Only applies to express trusts, not trusts arising by operation of law (resulting or constructive trusts) [s 25(4)].

Testamentary/Will Trusts

- General formalities for both are found in the Wills Act 2007.
- Section 11 requires a written will, signed and witnessed.

Wills Act 2007

- Section 11: Basic requirements for a valid will;
    - Written, signed, and witnessed.
    - Section 15: Amendments to the will require the same formalities.
- Section 14: The High Court may validate documents not conforming to s 11.
- Section 13: A disposition of property in a will is void if ;
    - The disposition is to a witness.
    - The disposition is to a witness's wife, husband etc.
- The courts have consistently made exceptions to these requirements where evidence shows that the requirements are being used as 'instruments of fraud' etc.

Ways around Formalities: Secret Trusts

Why do Secret Trusts Exist?

- They allow a person to contravene the formality requirement of a will.
- Eg: A man may wish to provide for his mistress, so he makes a disposition in his will to his best friend, who he tells must hold the property on trust for the mistress.
- Equity will enforce this requirement because it would be unconscionable for the best friend to instead hold the property for himself. It must be able to be enforced.

Rationalisation: '**A secret trust isn't even contained in the will, and therefore the Wills Act formalities do not apply to it**.' (*Re Young*)

Secret Trusts

Full Secret Trusts

- Where the existence and the terms of the trust are not disclosed in the terms of a will: the person given the property seems to take it as an absolute owner.
    - Eg: In the will, $100 is given to X. It is claimed that X is actually the trustee of a secret trust, and therefore X cannot use the property for their own benefit.
- The intention to create a trust must have been communicated to the intended trustee, who must in turn **have accepted the office of trustee**.
- Communication and acceptance must happen **during the lifetime of the will maker**.
    - It doesn't matter if this occurs before or after the will is made.

Half Secret Trusts

- Where the existence, but not the terms, of the trust are disclosed in the will. We know there is a trust, but we don't know the terms/extent/beneficiaries.
    - Eg: $100 to X to hold as I have instructed her. – X cannot use the property for her own benefit.
- Communication must be done **before or at the time of making the will**.
    - If not communicated and accepted in time, the trustee cannot hold the property for themselves, it is simply returned to the testator's estate.

Distinction between the Secret Trusts

- In a fully secret trust, if you don't prove that a trust was intended, then the person who got the property is the owner of the property with no obligations of them.
- In half trusts, if the trust cannot be proven, the property goes back to the testator's estate.
- Difference for when communication is required to happen:
    - Fully Secret Trusts: Must happen during the lifetime of the will maker.
    - Half Secret Trusts: Must occur before the will is made.

Requirements of a Secret Trust

Intention

- The settlor must intend that the property does not simply go to the person receiving it under the will.
    - This must be communicated to the trustee, who must accept the duty.
- There must be a timely communication of intention.
- And there must be a timely acceptance by the intended trustee of the donor's intention (can be express or through acquiescence).
- Secret trusts are revocable by the testator/settlor.
- The trust is not constituted until the testator's death.

Burden of Proof

- If someone claims a secret trust, the burden is on the person claiming the secret trust exists, who must prove it on the balance of probabilities.

Re Young [1951]
Danckwerts J

Facts

- The testator, Roger Young, by his will left a trust, including a life interest for Mrs Young.
- She has to give effect to other elements in the trust (including legacies/gifts of property, and the charitable trust).
    - 'After the testator's death his wife makes a new will leaving his estate for the purposes she knows he desires it to be used for – for the permanent aid of distressed gentlefolk.'
- Thomas Cobb was one of the witnesses of the will.
- Widow stated in an affidavit that she knew of his wishes, namely that Cobb should receive a legacy of £2000.
- Subject to these gifts, he wished his estate be used to found and endow a home for distressed gentlefolk.

Issue

1. Whether the instructions communicated by the testator to his wife constituted trusts which were effective to bind the estate.
2. Whether, having regard to s 15 of the Wills Act 1837, the attesting witness Cobb was entitled to receive a legacy of £2000 from the estate of the testator.

Held

- A secret trust 'operates outside the will'.

Issue 1

- It is a valid trust. It's secret to some degree, because who is actually getting the property is not specified, the beneficiaries are not known, and therefore a secret trust could be argued.
- The expectations were communicated before the date of the will, and only to the widow (not her co-executor). Upon the authorities, this is sufficient to equally bind her co-executor.
    - If, on faith of a promise by A, a gift is made in favour of A and B, the promise is fastened on the gift to both, for B cannot profit by A's fraud. (*Blackwell v Blackwell*)

Issue 2

- Widow gave evidence that the testator's intention was that the chauffeur should receive a legacy of £2000.
- The chauffeur was one of two attesting witnesses to the will.
    - Therefore, acceptance of the legacy under the terms of the will would violate s 15, making his legacy ineffective.
    - This section clearly exists to prevent property being disposed of to the witnesses of the will.
    - Witnesses shouldn't take property. They need to be objective and shouldn't have an interest in the will which they're witnessing.

- Whole theory of the formation of a secret trust is that the Wills Act had nothing to do with the matter, since the people do not take control of the gift through the will, but by virtue of the secret trusts imposed by the trustees, who takes possession of the property under the will.
- The 'secret' trustees take control of a property through the will, but hold it on trust for the beneficiary.
- Argued that secret trusts and the will are totally separate entities.
    - The will is concerned with disposing of the property after the person's death.
    - Trusts are set up during their lifetime, and take effect outside any requirements under the Wills Act.

Flaws in the Reasoning

1. Secret trusts are revocable by the testator/settlor.
    - If you create a secret trust, it is not binding on you immediately, you can revoke your intention to create it at any time up until your death.
    - The only time where it actually is going to be given effect to is once the person dies – that's after it can't be revoked.
2. The trust is not constituted until the testator's death.
    - Until the will comes into effect, upon the testator's death, the trustee doesn't have any rights to the property.
    - The testator could change their mind, or create a different secret trust.

Page v Page [2002] (HC)
Hammond J

Facts

- Evelyn Page was a well-regarded NZ artist.
- During her lifetime, she acquired a valuable collection of paintings, and she retained some of her own work.
- The Page's had two children, Seb and Anna.
- After Evelyn's death, the paintings were divided between them.

- Seb and Judith were married in 1980, and separated in 1993. Matrimonial property proceedings were commenced.

- Seb alleges an oral trust, which took the art works outside the matrimonial pool.
    - Seb argued he was the trustee of a secret trust to the paintings, as his mother wanted them to be kept within the family to be passed on to his grandchildren.
    - Argued this because he was obligated to split the property 50/50, and he wants to keep the paintings together. 'I took it in my mother's will on the basis that I was a trustee'.
    - Not written in the will, as there is no lifetime trust set up, it means it must be a secret trust.

<u>Held</u>

- *Blackwell v Blackwell*: The necessary elements of a secret trust are intention, communication, and acquiescence. The requirements are conjunctive.
- Evelyn's intention?
    - Trial judge held that no such intention as alleged had been made out. He is incontrovertibly correct.
    - Although there was a general idea the property should remain in the family as expressed in the will, it was not close to forming a trust obligation.

- Evidence can be sorted into three categories:
    1. Evelyn had a huge attachment to her art collection, and probably had a desire to somehow keep it together.
        - But this does no more than to set a context, it does not actually create a trust.
    2. The reason for the meeting was to divvy up the paintings, and ensure Seb and Anna would be custodians for their future children.
        - There was however no evidence of any language regarding the creation of a trust.
        - Evelyn would not have wanted either to feel any inhibitions if for some reason they wanted to sell a painting.
    3. What Seb did was inconsistent with the trust he now alleges.
        - He did not protect the capital of the trust.
        - There is no evidence to show he had been enjoined to keep the trust 'truly secret'.

- Trial judge rejected Seb's argument.
- The onus was on Seb to establish the interest in the secret trust.
- The Judge took an adverse view of Seb's evidence, and subsequently, Seb did not act consistently with the alleged created of the trust.
- The alleged trust was impossibly imprecise. There was no legal obligation.

Charitable Trusts

- Charity law is an area of law which falls outside the main subject matter of the law of trusts.
- They are arcane, and complicated.
- **Main effect of charities on the law of trusts is to avoid the requirements of the individual entity of a beneficiary** (the beneficiary principle).

The Beneficiary Principle

- The principle states that there must be someone in whose favour that court can decree performance of the trust, or the trust will be invalid (*Morice v Bishop of Durham*)
    - Without there being a person (or legal person, company etc) expressed as a beneficiary, there cannot be a valid trust.
- **No beneficiary = no trust.**
- You cannot have an abstract purpose for your trust: it has to be set up to benefit particular individuals, whether they are real (flesh and blood) or companies.
    - Has to benefit legal persons/entities who are regarded as persons under the law.

Morice v Bishop of Durham [1805]

Facts

- Personal estate of trust to the Bishop 'to dispose of the ultimate residue to such objects of benevolence and liberality as he in his own discretion shall most approve of'.
- Next of kin contested the validity of the trust: the residuary request is an invalid trust, a trust not for people but for purposes, and those purposes are not charitable.
    - Under testamentary rules, if the trust was invalid, they would have benefited from property not disposed of.

Issue: Whether the trust is a trust for a charitable purpose.

- The Bishop does not get to use the property for himself, so there is a trust established for that property. T
- The question is 'is it a trust for a charitable purpose, or is it to be held on resulting trust, and the benefit should be returned to the settlor?'

Held

- 'There can be no trust over which the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust'
- **There must be somebody in whose favour the court can decree performance**.
- Liberality and benevolence can find numerous objects.
    - This would appear to give the Bishop unrestrained discretion.
    - He could have devoted the property to charitable purposes, but the question is **not whether he may apply it, but is he bound to so apply it?**

    - Because the property is not strictly limited to only charitable purposes, it can't be seen as a charitable trust.
- It is invalid as a purpose trust.

Why does the Beneficiary Principle exist?

- People trusts good, purpose trusts bad.
- If a trustee had legal title to the property, and if there was no one who could go to court and say the trustee is not giving effect to equitable obligations, then that would act as effective ownership for the trustee.
    - Beneficiaries are needed in order to decree performance.
- In the case of a charity, who enforces the trust?
    - A charity is just an abstract purpose with no specific beneficiaries.
    - *Morice* takes it for granted that there will be someone who will enforce a charitable trust. Why?
        - The King, and in more modern times, the Attorney General, as representatives of the Crown are responsible for enforcing charities.

Why did the charitable trust still fail in *Morice*?

- The general principles were benevolence and liberality.
- The Bishop was to hold the property on trust and give effect to those purposes.
- Within the purposes of benevolence and liberality, it is possible to devote the property to charitable purposes BUT the concept of charity is more limited than benevolence and liberality.
    - Therefore the Bishop is not restricted to ONLY using the property for benevolence and liberality.
- Because the property could have been devoted to non-charitable purposes, the trust is invalid as a charitable trust.
- As the trust is not charitable, it fails as a purpose trust, for want of satisfaction of the beneficiary principle.
- Therefore, because the trust has no beneficiary, it is void.

Re Astor's Settlement Trusts [1952]

Facts

- Fund set up for the purposes of maintaining good relations between nations, and the preservation of the independence of newspapers, editors, and writers.

Issue: Who is the beneficiary?

Held

- The purpose of the beneficiary principle is that someone must be able to take control of the trustee's actions.

- Either an individual/s, or, if the trust is charitable, the Crown can take control.
- If the trust is not charitable, who can take control? Who could initiate proceedings? If no-one has a right to enforce the trust, then nobody could get to court.
    - 'If the purposes are not charitable, great difficulties arise both in theory and in practise. In theory, it is difficult to visualise the growth of equitable obligations which nobody can enforce, and in practise, because the creation of large funds devoted to non-charitable purposes which no court and no department of state can control is not possible.'

The Beneficiary Principle

- People trusts good, purpose trusts bad.
- Private purpose trusts are invalid (non-charitable purpose trusts (*Morice*).
- Trusts (that are not charitable) must be for the benefit of ascertainable individuals.

Leahy v A-G [1959]

- The general purpose was that of helping the catholic brotherhood/order of nuns.
- This particular kind of religious activity that was envisioned wasn't charitable, and was seen to be an abstract purpose.
- This was a strict interpretation of the rule.

Re Denley's Trust Deed [1969]

- Land held on trust for employees of the company to use for recreation.
- It wasn't a charitable purpose.
- But it was found that the employees were people who could enforce the trust.
    - The employees were interested enough in having a sports ground that they could enforce the trust.

Charitable Trusts

- The law of charities is often associated with its origins in the courts of equity in relation to charitable trusts.
- However, charities don't have to be trusts.
- You can have all types of legal structures through which you can pursue charitable purposes.
- Charities may include:
    - 'Incorporated Trusts' under the Charitable Trusts Act 1957.
    - Incorporated societies.
    - Unincorporated societies.
    - Companies.

- But if you're going to be considered a charity, it's crucial that the organisations meets the statutory definition of charity.
- Interpretation is essentially based on an old English statute:

Statute of Elizabeth (1601)

Releife of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Universities, some for Repaire of Bridges Portes Havens Causwaies Churches Seabankes and Highwaies, some for Educacion and prefermente of Orphans, some for or towardes Reliefe Stocke or Maintenance of Howses of Correccion, some for Mariages of poore Maides, some for Supportacion Ayde and Helpe of younge tradesmen Handicraftesmen and persons decayed, and others for reliefe or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitantes concerninge paymente of Fifteenes, setting out of Souldiers and other Taxes;

This definition is still binding, it must be satisfied if you want to register as a charity under the Charities Act.

Pemsel [1861]
Lord Macnaghten

- Finds that charity, in its legal sense, comprises four basic principles:
    1. The relief of poverty.
    2. The advancement of education.
    3. The advancement of religion.
    4. The advancement of other purposes beneficial to the community, not falling under the above heads.

- For something to be considered a charity, it must meet two requirements:
    1. It has to come within the spirit and intendments that were specified in the Statute of Elizabeth, as interpreted by *Pemsel* AND
    2. It must be for the benefit of the public (as a whole, or a sufficient section of it).
- The wording used in the Statute of Elizabeth is largely the same as the wording used in the Charities Act 2005, s 5(1).
- In order to be a charity for the purposes of the Charity Act, it must be shown that your organisation falls within one of *Pemsel's* categories, and that the activity is of public benefit.

Canterbury Development Corporation (CDC) v Charities Commission [2010] (HC)
Ronald Young J

Facts

- Existing charities registered under the Charitable Trusts Act 1957 are required to apply for registration under the Charities Act 2005 if they want to retain their tax-exempt status under the Income Tax Act.
- Three appellants (CDC, CDCT, and CEDF), which had previously been registered as charities, applied for registration.
- The Charities Commission declined all the applications.
- This is an appeal against that judgement.

Issue: Can the companies be registered under the Charities Trusts Act 1957?

Held

- CDC argued that the charitable purposes of the CDC is the relief of poverty, the advancement of education, and the beneficial effect to the community through the development of industry and commerce.
- Judge held no. Their methods/purposes are too indirect, too remote.
    - They do not relieve poverty by increasing work in Christchurch.
    - The educational service which they provide does not come with the provision of the enhancement of education as intended under the Act.
    - The spirit of charitable purpose is not at the core of the CDC.
- Could you argue a general public benefit?
    - No, due to remoteness.

- This case demonstrates how difficult the law to become a charity is.
    - It must be shown that the organisation fits into one of the four categories;
    - AND it must show a benefit to the public.

Political Purposes

- Historically, anything for a political purpose by definition couldn't fall within any of those charitable categories.
- Reasoning: If the charity was lobbying for a law change, it would be difficult to say you were working for the public benefit.

Re Collier

- The objective of wanting to change the law was not 'illegal', but also was not charitable.
- The Court couldn't tell whether the desired outcome would be in the public benefit.

- Australian case law has taken a broader approach.
    - Shifted from saying political purposes by their nature are uncharitable to applying the basic test; 'can you show this activity is in the public benefit?
- New Zealand has followed, it doesn't have a blanket approach, but it does require that the charity satisfies that basic test.

Greenpeace [2014] NZSC

- 'The majority held that a political purpose exclusion should no longer be applied in New Zealand. They concluded that a blanket exclusion of political purposes is unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit within the senses that the law recognises as charitable.'

Key Features of Charitable Trusts

- 'It has to be recalled that charitable trusts are an exception to the usual revenue and other laws. Because of this privileged position, charities must meet strict legal requirements' – *Re Tennant [1996]*

- Why would an organisation want to be registered as charitable?
    - Exception to the beneficiary principle
    - There is no perpetuity requirement on the trust.
    - Tax advantages
        - Can be exempt from income tax, general rates etc.
        - Donors get tax credit for donations.

- Difference between charitable trusts and charitable companies
    - A purpose trust MUST be charitable, otherwise the trust will be invalid.
    - A company/organisation can take another form, and still continue to exist, but it won't have the benefits that come with charity status.
    - This is a fundamental difference.

Trust Duration/Perpetuities

- In a people trust, the trust won't last forever.
- It has to be distributed within a period of a life plus 21 years.
    - It's a relatively complex rule.
- The Perpetuities Act allows for trusts to specify a vesting date – up to 80 years from when it's set out.
    - Vesting day means the day upon which the trust ceases to be.
    - It can be earlier of course, at the discretion of the trustees.
    - Requires instruction of what shall happen on the vesting day (eg: All remaining beneficiaries take an equal share in the property).
- The point is that at some point, someone will take possession of the property. It will not continue forever.

Perpetuities Act 1964

Section 6: Power to specify perpetuity period

(1) Subject to subsection (2), where the instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being of any other duration, shall be such period not exceeding 80

years as is specified in the instrument as the perpetuity period applicable to the disposition [...].

- Perpetuities period does not apply to charitable trusts – they can keep going in perpetuity.
- **Another benefit of being a charitable trust.**

How is a charitable trust created?

- They can be created in exactly the same ways as ordinary trusts:
    - Conveyance to trustees (transfer of the property).
    - Declaration of a trust (self-declaration).
    - Trust under a will.
- A charitable trust will not fail for uncertainty of objects, provided a general and qualifying charitable purpose is evident.
    - Much more relaxed requirement.
    - There can be a general/vaguely stated charitable purpose, which gives the trustees a wide discretion in how to give effect to it.
- Traditional rule is that the validity of a charitable trust depends on the legal effect of the language used by the settlor. **Certainty of intention – what was intended.**

What happens if the trust is for a non-charitable purpose?

- The same as what happens when an invalid personal trust is created; the property returns to the settlor.
- Intestacy, residue, or 'gift over' clauses in wills would come into effect.
    - In the case of a will trust, the intestatory rules apply, and the property will go back to the estate.
- This applies even if the purposes are a mixture of charitable and non-charitable purposes, and the trustee could devote the *entire* fund to non-charitable purposes (*Morice*).
- This creates a problem: The settlor intended to do something charitable, and did not want the next of kin to receive the property.
- **The rule that you cannot have charitable purposes alongside non-charitable purposes frustrates what people want to do with their property.**

Section 61(B)

- 'Blue pencil' modification rules are outlined in this section.
- Applies when there is a mixture of charitable and non-charitable purposes.
- The blue pencil rule allows the courts to erase the non-charitable purposes, and give effect to the charitable ones, creating a valid charitable trust.

- Where the purpose is in general terms, which allow ambiguity, those terms may be modified.

    - The general terms cannot simply be erased, the language must be modified as to exclude the non-charitable purposes.
    - But this cannot apply simply to a vague purpose that might have some aspect of charity applicable to it, it requires the testator to have had **a substantially charitable mind.**
    - This rule cannot be applied simply to a vague disposition which could be used to charity – s 61(b) will not be applied to remedy a vague section, the will will simply be found to be invalid.
    - The machinery of the trust cannot be destroyed.
- **The court cannot 'blue pencil' operative clauses *(CDC)***.

Can s 61(b) be used if it is not a trust being dealt with, but a corporation?

- Yes. There if no reason to limit the rules to trusts.
- What is the purpose of 61(b)?
    - To save a trust that would otherwise be invalid for infringing the beneficiary principle due to the inclusion of a non-charitable purpose.
    - Corporations and other organisations will not become invalid if they have a non-charitable purpose, they simply lose the benefits of being registered as a charity.
        - In addition, corporations cannot simply change their purposes. If property belongs to the corporation, it cannot revert back to anywhere else, it's their property.

What if a charitable purpose cannot be carried out? (1) *Cy Pres*

- The Court has inherent jurisdiction to vary charitable trusts.
    - If the intention of a settlor is impossible or impractical to carry out, the intention of the settlor is recognised to be that of giving the property for a general or 'paramount' charitable purpose (not only the singular purpose specified in the will).
- The Court will devote the funds **to a purpose 'as close as possible' to the original intention.**
- The Court can direct a scheme for carrying out the charitable purpose.

What if a charitable purpose cannot be carried out? (2) Charitable Trusts Act 1957 s 32

- The trust must be charitable – whether general of for a specific charitable purpose – for the court to have jurisdiction.
- The Court's consideration in administrating the charitable trust:
    - If it is 'impossible or impractical or inexpedient to carry out the purpose';
    - Devote the property to a purpose 'as close as possible' to the original purpose;
    - The Court establishes a 'scheme' for the administration of the trust in these circumstances.
- Lower threshold than *Cy Pres*.