FIDUCIARY OBLIGATIONS

- Fiduciary = who has undertaken to act for/on behalf of another in a partic. matter in circs which give rise to a relo of trust and confidence".
- Necessary elements:
  - Discretion/power in mngmnt of affairs of another
  - In circs where other cannot reasonably expected to monitor
- *Bristol and West v Mothew:* "the distinguishing obligation of fiduciary is the obligation of loyalty... must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; may not act for his own benefit or the benefit of a third person without the informed consent of his principal'.
- **Trustees are the legal owners of property –** only trust deed and FOs/rules of law prevent them from doing what they want.
  - Must use powers in principal's best interests.
- ***Keech v Sandford* (1726):** Infant lease
  - Trustee 'only person of all mankind who might not have the lease'
  - Bc trust property came to an end (lease not in kid's name), effectively got rid of trust property – so he had no FOs and no trust
  - **Strict no profit rule**
  - If you engage in transaction w self-interest can (1) ask for profits or (2) transaction set aside at beneficiary wishes
  - Removes incentive to take benefit, forensic issue to show bad faith.
- ***Boardman v Phipps* (1966) HL:** Buying the company shares as lawyer
  - MAJ: Strict no profit rule, COI principle separate – liable for profit
    2 bases for liability: profiting, and got info/opportunity in course of fiduciary duties
    Acting as agents of the trust, why they could attend the meeting.
    Cohen: enough for COI that they could have changed their mind.
    - TBH the demarcation btwn the two is actually not that clear

    Hudson: seems to suggest u need conflict b4 no profit rule invoked
    Don't need lack of good faith, constructive trust recognised.
  - MIN: No profit rule example of conflict, need the conflict also
    Important that they didn't want shares because **there must be a conflict for there to be a breach.**
    Possibility they change mind not enough for COI – if they did:
    - Could say no can't advise you
    - Could give up his interest in the shares.
      - Counter these w – but then not being loyal? Principal oblig?

    TEST: would a rsnble person looking at circs believe there is a real, sensible possibility of COI? – here can say NO.
    Distinguished *Regal v Gulliver* (cinema owners buying shares): in *Keech* and *Regal* the trust considered buying the property – here the shares were never potential subject-matter for the trust.
    - Fiduciary can always argue principal 'could've' got it.

INTRO TO TRUSTS

Reasons to assert trust:
To prevent a claim e.g relationship prop To assert property right
To assert liability of property ownership
Trust elements: equitable, binding, has property, trustee's own property, **held for the benefit of others.**

- Trustees interact w the outside world on the basis that they are property owners – called into account by beneficiaries.

SHAM TRUSTS

***Official Assignee v Wilson* [2007] NZCA 122 – SHAM NOT FOUND**
FACTS: Reynolds settlor of family trust, Wilson and Harvey trustees. Bs - children and gchildren. Did what he wanted – but they didn't give him money for renos at one stage. Bought property in Qtown, went bankrupt, OA arguing should vest for creditors bc trust was a sham.
ROBERTSON AND O'REGAN JJ: Shouldn't benefit from own slackness.

- No direct evidence of sham – t**o draw inference need compelling material**
  - Had non-complicit trustees, documentation consistent w intention.
- *Sham trusts:*
  - Trust is void for lack of intention to create a trust.
  - In *Snook* – **need a common intention where bilateral.**
    Re Esteem Settlement: absurd if secret intention of settlor could invalidate trust.
    Wyatt: need reckless indifference, not just rklsnss or ignorance.
  - Where there is C of SM, but no C of I, person entitled to the property (usually settlor) gets it free from a trust.
  - There is **no trust to be a sham –** documentation is invalid.
  - **Court will only look behind a transaction's ostensible validity if there is good reason to do so, and good reason is a high threshold since a premium is placed on commercial necessity.**
  - Can have emerging sham – sham re one piece of property
- *Alter-ego trusts:* trustees mere puppets – not it's own cause in NZ.
  - But can be used as evidence to show that there is a sham.

GLAZEBROOK: Intention assessed objectively, but sham looks at subj. intention bc whole point of sham is obj looks like trust.

- **Person who asserts sham bears onus of proving it.**
- Court should look at the 'contemporary evidence of the actions (and words) of the relevant parties'.
- Common intention btwn Ts+Bs or Bs+S is also enuf to find sham.

***Vervoort v Forrest* [2016] NZCA– NO SHAM, NO CONST. TRUST**
FACTS: V+D relo ended. V claimed assets held in the fam trust (which was created b4 the relationship), lower courts denied this. Signed deal.
ASHER J: **Stuff in express trust,** no claim 2 it + not subject to PRA either

- *Ben Nevis:* 'sham is a pretence... a doc will be a sham where it does not evidence the common intention of the parties... either intend to create different rights and obligations than those evinced by the docs or they do not intend to create rights or obligations... at all'.
- No evidence for sham – **no deliberate act of deception**
  - Just because there is de facto control by a single trustee, who is also a beneficiary, does not mean sham where other Ts not involved.
- Unconscionable assertion of ownrshp by 1 partner in relo to prop which other party contributed could be treated as giving rise to const trust.
  - ***Lankow v Rose* test:**
    P contributed more than minor way to acquisition, preservation or enhancement of Ds assets, whether directly or indirectly;
    In all the circs the parties must be taken reasonable to have expected that the P would share in them as a result.
- *Re Motorolla, Marshall v Bourneville:* can have const t over express t.
- 2 possible objections explained:
  - Unanimity of trustees – other person not involved so can't bind them:
    Traditional principles of unanimity and non-delegation but must bend to practical realities when one trustee absolutely in control and others have abdicated responsibility.
  - Property rights: can't yield beneficial ownership to third parties.
    There would be no deprivation of assets that the beneficiaries would have otherwise enjoyed.

***Murrell v Hamilton* [2014] NZCA – NO SHAM, YES CONST. TRUST**
FACTS: House under construction, in H's family trust, broke up.
WILD J:

- 3 traditional situs where const t over family trust may succeed:
  - Contributions made, reasonable expectation, transfer of prop after this.
  - Contributions made w knowledge of all trustees
  - Const trust benefits partner and claimant claims against interest
- Panckhurst ruled didn't fit into these 3, but can still find const trust.
- Mirkin abjured resps, H able to bind both, actions treated as those of both
  - So unconscionable for them to deny M's claim, she made contributions that were more than cosmetic, reasonable expectation.

Rickett's Critiques:

- Nemo dat: trustees don't have beneficial ownership, how can u give it?
- Shouldn't allow const. to come up against express.
- Trustee unanimity an issue but a red herring for nemo dat stuff.

ILLUSORY TRUSTS

KEY QS: **For who's benefit as a matter of construction of the trust deed was the power given? –** ***Pugachev.***

- What are the powers? How are they constrained?

***Clayton v Clayton* [2016] NZSC – NO SHAM, ? ILLUSORY**
FACTS: Dis. T for family, he was a DB and the sole trustee. As T could appoint and remove DBs and Ts (Cl 7.1). Could exercise power in own favour, w/o considering interests of all Bs and in a way that could be contrary to their interests notwithstanding any COIs. Mrs C arguing 7.1 is general power of appt, making it property under PRA.
O'REGAN J: No sham, but subject to PRA bc all rights/powers = GPA

- GPA: donee is free to appoint himself without considering interest of anyone else – tantamount to ownership.
- Cl 7.1 not GPA by itself: can remove DBs but not final B's so still FOs.
- BUT – everything taken together too much lol:
  - Could appoint trust capital to himself, at exclusion of others, could bring forward vesting day, had broad resettlement powers.
  - Not constrained by fiduciary duty bc it said he could do it pretty unconstrained by the FOs.
    There was **no effective constraint** on his powers.
- **Illusory trust = trustee retains such control that the proper construction is that they did not intend to give or part with control of the property sufficient to create a trust – don't like this term.**
  - 2 ways to view VRPT- BUT NOT RULING WHICH:
    Not valid because had such broad powers that he never disposed of property for the favour of anyone else
    Even though defeasible, no reason why it should not be a trust.
- At CA cited *TMSF* – man had ability to revoke the trusts.

***Pugachev* [2017] EWHC (Ch), SHAM**
FACTS: P was DB, shell companies as trustees. He was the 'protector'.
KITCHIN LJ: Bare trust for P in essence but sham, if not const t for DBs.

- Citing *C v C:* can look at the powers and duties as a whole, work out what is going on as a matter of substance – **don't like illusory term.**
- **Irreducible core** – *Armitage v Nurse:* if the beneficiaries have no obligations enforceable against the trustees, then there is no trust.
  - Min. necessary is that the trustees perform the trusts honestly and in good faith for the benefit of the Bs.
- In a DT – the DBs don't have a proprietary interest, Ts are fiduciaries under FO but don't have to allocate to anyone
- Have to look at if powers as protector were purely personal.
  - Need to look at powers conferred, and effect indiv. And togeva.
- These **give protector ability to act in own best interest –** ***not constrained by considerations of interests of beneficiaries as a class.***
- 2 main reasons this is just a bare trust for Mr P:
  - He is a named DB
  - He has extensive powers: veto powers, esp important that can remove trustee 'with or without cause,' can appoint another protector

***Webb v Webb* [2020] UKPC – NO SHAM but TRUST SET ASIDE**
FACTS: T in Cook Is/here. He was trustee, B and 'Consultant' for them.

- He was able to act as T and exercise all powers/discretions conferred by deed notwithstanding the interests may conflict w duties to trusts or beneficiaries (Cl 14.1(c)).

- Main issue w Cl. 14.1 which allowed him to make himself sole beneficiary – power was as settlor so not subject to any FOs.
- Powers can be construed two ways:
  - So extensive that he never disposed of property
  - So extensive that @ equity viewed as tantamount to ownership.
- Reserved to second one – bundle of rights same as ownership.

CERTAINTY OF INTENTION

- 2 ways trust can arise:
  - Transfer property to trustees to act as trustees who accept it
  - Declaration of manifestation of an intention by the owner that they hold it on trust for the Bs.
- **Need a PRESENT intention**

***Paul v Constance* [1977] EWCA - TRUST**

FACTS: Mr C dead. He broke up w Mrs C. Used to go bingo w Ms P. Opened an account for their winnings – as much yours as mine.
SCARMAN J: Trust found for Ms P.
- *Snell's principles:* 'words ought to be construed as imperative... No particular form of expression is necessary... A trust can be created without ever using the word 'trust' for **what the court regards is the substance and effect of the words used.'**
- Dealing w ppl who dk equity have to put words/actions in this context
- Present declaration it was as much hers as his
- This is a borderline case because hard to pinpoint moment of declaration.

Confirms objective approach in *Byrnes v Kendle*

[55]: "whether in substance a sufficient intention to create a trust has been manifested" – *Twinsectra* ltd.
[115]: subj. intentions don't matter unless questioning a trust e.g a sham
[113]: Looking at objective meaning that the terms would convey to a reasonable person.

***Ruscoe v Cryptopia* [2020] NZHC – TRUST :** Arg for accountholders that there are separate trusts for each CC and that trusts existed before amended terms came into effect – YES TRUST
- Subject matter - CC, objects those w positive balances in SQL database
- Arg 1: Account holder's j unsecured creditors.
  - Not a situation where they only had contractual rights – the language in new T+Cs was like 'your assets,' 'held on trust for you'.
  - T+Cs didn't change anything, affirmed trusts were in operation
- Arg 2: Statements of intention – arguing express trust
  - Language/conduct which shows sufficiently clear intention to create such a trust - no formal/technical words req.
  - Can draw an inference from avail. Evidence
  - Look at nature of trans. and circs of relo, incl commercial necessity
  - Not necessary that person knows what a trust is
  - **The overall question is whether, in the circs of the case, and on the true construction of what was said and written, a sufficient intention to create a trust was manifested.**
  - Intention objectively assessed – satisfied it was manifested here
    Didn't give them keys to assets, so custodians.
    Bare trusts came into being for each CC whenever they came to hold a new currency for accountholders.
    - All accountholders beneficiaries for that particular currency
  - Their principal role was to hold the digital assets, follow instructions and allow beneficiaries to increase or reduce their beneficial interest
  - *Quoine:* segregation form personal assets factor in trust q.

***Thexton v Thexton* [2001] NZHC – NO TRUST**

FACTS: Fruit juice business, Snr supposed to get 50% interest and be partner, never did. Wife claiming held on trust.
SALMON J: No trust, no intention sufficiently manifest
- Even tho intended, never resulted in the **necessary declaration of trust.**
- **Burden of establishing sufficient intention is on the person asserting that there was a trust.**
- Q of construction – looking at words used in circs.
  - Where no words, can infer if someone constituted themselves as T
- Would have to have declaration each time capital increased: payment for increased shared funded by debiting shareholder accounts, so would be funding shares out of money owed, also of v high value.
- But Jnr did breach an FO in failing to make full disclosure ab negotiations w Cerebos: family company, Snr had high involvement, reposed trust in Jr so Jr under FOs.

***Korda v Australian Executor Trustees* [2015] HCA 6 – NO TRUST**

FACTS: FCo and related company MCo managed pine plantation, AET statutory trustees for covenantholders (investors). FCo insolvent.
FRENCH CJ: No trust, no intention sufficiently manifest.
- Arg 1: Statute did not require them to act as trustee
- Arg. 2:Their obligations were **contractual.**
  - AET argued on prospectuses - did not speak of proprietary interests, they were a marketing tool – not ab rights/obligations
- Arg. 3: Tax benefits inconsistent w trust – would risk covenantholders to being considered participants in profit-making scheme.
- Arg 4: Argued that ability to register caveats over titles = proprietary interest: no, just bc security doesn't mean trust, don't show intention.
- Arg 5: Covenantholders exposed to risks of indemnity.
- Arg 6: AET expressly made a trustee, nothing for FCo or MCo.
- Arg 7: Tripartate agreement didn't require them to treat money as a fund.
- Arg 8: Although you can't be reluctant to imply a trust (as ppl were historically) commercial benefit to one party is not enough to imply a trust – it has to be the intention of the parties.

CERTAINTY OF OBJECTS

Mere power: power to appoint property, where the donee is **under no obligation to appoint the property**
Trust power (discretionary trust): A power to distribute which donee **must exercise** otherwise the court will step in.

***McPhail v Doulton* [1971] HL**

FACTS: Baden made trust for 'relatives' and 'dependents' of employees.
WILBERFORCE: Don't need = distribution, assimilate tests.
- *Broadway Cottages:* need complete list for equal distribution.
- **Assuming test for validity is whether trust can be executed by the court, doesn't follow that execution is impossible unless there is equal division.**
- Adopting the powers test from *Glubenkian:* the trust is valid if it can be said w certainty that a given individual **'is or is not a certain member of the class'.**
- If called upon to execute trust, do it in way that best effect's intention.
- Trustee ought to survey the range of objects as will enable them to carry out FO of appt – wider than trust power search.
- Diff btwn conceptual and evidential uncertainty.
  - But can have words be so 'hopelessly wide' that they are administratively unworkable.

***In Re Baden's Trust (No 2)* – VALID TRUST, CERTAIN OBJECTS**
- SACHS LJ: Deeds must be looked at thru eyes of businessman seeking to help employers and ppl connected to them, not going to look at them in the same way a lawyer would – practical and common sense approach.
- Once you have conceptual certainty, need evidence that in the class.

CERTAINTY OF SUBJECT MATTER

***In Re Goldcorp Exchange Ltd (in rec)* (1995) PC**

FACTS: Got the bullion but didn't segregate, did what they wanted with them, sometimes didn't have enough. Made it sound like beneficial.
LORD MUSTILL: **N for G1 and 2, Y for W&H claimants**
- Diff btwn generic goods and goods ex bulk.
- Arg. 1: Nothing in contracts = title: W generic goods, cannot acquire title until you know to what good that title relates.
  - Asserted FOs but didn't assert anything beyond contract.
- Arg 2: Nothing in the collateral promises that meant a trust when bullion acquired either: if it was ex bulk, would be alg but **company cannot have intended to create an interest in general stock** which would have inhibited them to deal with it other than for the purpose of delivery to non-allocated claimants.
  - Also the customers can't have thought that there was a trust over waxing and waning stock that had different claims to it at any time.
  - They didn't treat it as if it was segregated property for someone else.
  - Nothing in the collateral promises entitling customers to this.
- For W&H: stored and recorded separately, vendor never claimed, held as custodian for them.

***White v Shortall* (2006) HCA – TRUST**

FACTS: 222,000 held on T for the P. All of assets on T.
CAMPBELL J:
- *Hunter v Moss* – 1000 shares, 50 held by D on trust for P: ppl don't like it bc need segregation/knowing which exact shares. Used analogies:
  - Specific legacy of shares: if it was a legacy, there would be no problem. But issue w this is that inter vivos declaration where beneficial divestment is still up in the air.
  - Analogy of inter vivos gift of shares.
  - Analogy for contract for sale of part of mass of goods e.g *Re L Wine.*
- **Issue w these analogies: they are different from inter vivos declaration of trust over shares in a company, unsure if differences unite them or mean we should use different principles.**
- Instead need to give effect to the intention **in a way that is appropriate to the kind of property being talked about.**
  - Shares are fungible, not identified so **nothing in the nature of the trust property that is inconsistent w trust declaration.**
- Bc SM is whole shareholding, don't need to point to specific shares.
- Selling P's shares would be breach of trust, but can use tracing rules – if goes below 222,000 w/o noting whose shares, presumption of acting in accordance w obligations as trustee.
- Where remedy is failing to vest beneficial property, compensation.

***Lehman Brother* (2011) EWCA – TRUST**

Agreed w trial judge: 'a trust of a part of a fungible mass w/o the appropriation of any specific part of it or any beneficiary does not face uncertainty of subject matter, provided that the mass itself is sufficiently identified and provided also the beneficiary's proportionate share is not uncertain'
- Complexity of pattern holding doesn't prevent trust.
- Limited duties than normal – could do what they wanted w it, didn't have to segregate it, could use for their benefits, could mix.
- But ultimately **had to account to LBF as beneficiaries for dealings**

***Proprietors of Wakatu v A-G* [2017] NZSC – TRUST**

FACTS: Tenths obligation, didn't do the ballot for land.
ELIAS CJ:
[423]: *Re L Wine* and *Goldcorp* ab const. trusts in non-segregated assets: don't stand for rigid rule that trust can't exist in non-segregated property.
- They seem to turn on intention more – just need to show intention for unseg.

[426]: Oliver J and his sheep thing – just cared about there being expressed intent and if the pool was ascertainable.
[430]: Distinguishable from *Goldcorp* – accepted system of selection from the most non-fungible asset, specified geographical area (the only land they can give is Crown land) w sufficient land for the obligation.
- Here the lack of differentiation expected to be temporary, also not competing equity.
  - Any uncertainty is evidential uncertainty
  - Might make a difference that they wouldn't have had to apply any fungibility arguments because would've just been getting damages?