Theory of Equity

Original purpose

- "Justice that steps in when the rule would cause injustice"
- Aristotle - *Ethics*
  - "Rectification of legal justice"
  - "Moral virtue which qualifies, moderates, and reforms the reignour, hardness and edge of the law"
- Lord Cowper - *Lord Dudley v Lady Dudley*
  - "Assists the law where it is defective...and defends the law from crafty evasions, delusions etc…"
  - "Equity therefore does not destroy the law, nor create it, but assist it"

Equity in practice

- Equity rules and principles have become more systematized and precedent-based - basically another kind of common law, and not really about exceptional justice.
- It is a strict rule that must apply if it is in equity e.g. a fiduciary relationship - more strict than common law, because common law introduces more standards e.g. duty of care, over strict rules.
- It would make more sense to refine the rules to make them more fact sensitive/discretionary, rather than having a dual system with two sets of rules → complex application, incoherent rules - Worthington
- Equity isn't a competing legal system, but a set of rules for modifying the common law. But equity gives rise to its own areas of law e.g. trusts, successions, fiduciary relationships - Maitland.

Fiduciaries

Fiduciary Obligations Generally

Who owes fiduciary obligations?

- Anyone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence

Status-based/role based fiduciary:

- Agents; Solicitors; Company directors; partners; trustees.

Ad hoc fiduciary relationships:

- By the nature of your role you have a fiduciary relationship e.g. you owe obligations in circumstances which give rise to trust and confidence.

What are fiduciary obligations?

Generally:

- A fiduciary owes duties/obligations or they are taken to owe duties to their principal.
- Relationship between fiduciary and principal is of trust and confidence.

Types of duties/obligations:

- Fiduciary must have loyalty to the principal, to act in their best interests. (*Bristol and West v Mothew)*
  - Must act in good faith.
  - Must not profit off their position.
    - *Bray v Ford* - It is an inflexible rule of the court of equity that the person in a fiduciary position is not entitled to make a profit.
  - Must not act when there is a conflict between their interests and their principal's interests
  - Must not act for their own benefit or the benefit of a third person without the informed consent of their principal.

Why do we have these obligations?

- A fiduciary has power over the principal in some way. They can change their principal's interests or affect their legal rights because they can make decisions for, or on behalf of, the principal.
- These obligations of loyalty ensure fiduciary doesn't use this power to act in their own interest.

What happens when fiduciary obligations are breached?

- Principal will have a remedy against a fiduciary.
  - Take back the benefit the fiduciary made from being a fiduciary = damages.

Keech v Sandford

Facts

- Person had a lease of a market stall to sell goods. This person dies, and they give the lease to a friend on trust for the benefit of an infant.
- Lease comes to an end, and the trustee tries to renew it for the infant.
- The landlord will not renew the lease for an infant because they cannot get remedies against an infant if they don't pay rent.
- Trustee decides to take on lease themselves.

Issue

- In the course of acting as a trustee he came upon an opportunity to make a profit that he took for himself, not for his principal/beneficiary. The whole purpose of the lease was so the infant could benefit of this lease. The trustee did not get consent from the principal to make this profit.
- Is this a breach of the fiduciary obligation?

Held: The principal was not acting in bad faith, but the fiduciary is not allowed to take the lease for himself.

- Applied a strict rule that fiduciaries cannot make any profit out of any information or opportunities they acquire from being a fiduciary. "The trustee is the only person of all mankind who might not have the lease"
    - This is necessary to prevent fiduciaries from taking opportunities that should have been available for their principal or are to the detriment of their principal.
- Remedy: Fiduciary must hand over all the profits that they made to the principal and assign the lease to the infant.
    - Now the infant is the one that owes the obligation, and has to pay the lease? Unclear.

Criticism

- This rule is too inflexible, unfair.
- **Alternative rule:** Was there a conflict of interest? [Onus is on the fiduciary to prove].
    - In most cases, if a fiduciary has made a profit there has also been a conflict of interest. But for those cases where the fiduciary made a profit, but there is no conflict of interest, there is no real breach of loyalty to the principal, they are still acting in their principal's best interests. If the fiduciary gets consent from the principal, then no conflict of interest either.
    - THUS, we should frame this question first. If there is no conflict of interest, either because of circumstances or consent by the principal, then any profit made is not a breach of their fiduciary obligation.
    - Mathew Coniglan - no strict profit rule, just have the no conflict rule because it will cover any situations where someone has made a profit in a way that disadvantages the principal. Fiduciaries should not be precluded from making any kind of profit from information they gain as long as they are loyal.
- How would this apply in *Keech v Sandford?*
    - If fiduciary could show there was no conflict of interest because it was not possible for the principal to benefit from the lease (the landlord would never give it to the infant), then there is no breach.
    - If there is no duty to benefit the principal by taking the lease, then there is no conflict of interest if fiduciary takes on lease, therefore no breach of loyalty obligation.
    - But it is arguable that there is a conflict of interest because the trustee could have taken the lease as an adult and given the benefits to the infant, meaning it was not impossible for the infant to benefit from the lease.

Boardman v Phipps

Facts

- Man gives his life interest to his widow, Ethell Phipps, under a trust.
- Ethell Phipps, Mr. Fox (accountant) and Ms. Noble (daughter) = trustees.
- Boardman = solicitor who advises the trust to increase the value of the trust property/ one of the directors of family company.
- Tom Phipps = son of man/chairman of family company.
- The trust has shares in two different companies.
    - At the time you can only invest trust property in safe assets like real estate or government bonds. Trustees could not buy further shares in companies without court investigating first.

- Boardman and Tom Phipps wanted to try to do a number of things to make the trust more profitable.
- PHASE 1
    - They go to the AGM of Lester & Harris Ltd (one of the companies invested in), they act as agents for the trust, Mr. B tries to get Tom appointed as a director of the company, including telling Tom to try to buy more shares, but they fail to do this.
- PHASE 2
    - They try to split the company, so part of Lester & Harris Ltd is given to Phipps shareholders, and the rest of the business goes to the other shareholders, so Tom could make their part of the company profitable. They fail because no one could agree.
- PHASE 3
    - Boardman and Phipps want to take more control of the company to make it better by buying more shares. Mr. Fox said he will not buy anymore shares in Lester & Harris Ltd because they are not doing well, so B and P make a higher offer purchase and buy the shares as individuals.
        - Before doing this, Boardman asks John Phipps (the other brother) if it is okay for him to have a personal interest in the transaction, and he agrees.
    - Tom sell's off other interests and improves the company to the effect that everyone who owns shares gets a 5 pound increase to their shares (a lot).
    - John Phipps subsequently thinks Boardman's personal interest is not okay and sues Boardman (and Tom Phipps) for the profit he made from the Lester & Harris Ltd shares he bought in the course of his fiduciary role

Issue

1. Was Boardman and Phipps acting as fiduciaries to the trust?
2. Did Boardman breach his obligations as a fiduciary because of the profit he made from the Lester & Harris Ltd shares?

<u>Majority - Lord Hudson, Lord Cohen, Lord Gester.</u>

Held: Strict no profit rule + conflict of interest rule are seperate

- Issue 1: Was Boardman and Phipps acting as fiduciaries to the trust?
    - Argument 1: Boardman was an agent for trustees for some of the phases (as their solicitor), but not for buying more shares in the company because the trust did not want to buy more shares.
        - Harder to find Tom Phipps as a fiduciary under this argument, what status position did he have?
    - Argument 2: They BOTH took it upon themselves to act as agents. This explains why they were able to attend the AGM of the company.
        - Secondary literature: it has been argued they weren't agents, but they took on a role as de facto agents so they have the same obligations as an agent.
        - Other criticisms: They don't make it clear how fiduciary obligations to trustees also extend to the beneficiaries, the main focus is on boardman's obligation to the trustees, and beneficiaries seem to fall out of the picture.
- Issue 2: Did Boardman and Tom Phipps breach their obligations as a fiduciary because of the profit they made from the Lester & Harris Ltd shares?
    - Boardman was able to attend the company's AGM, get information about the company, have the ability to continue negotiating and, most importantly, the opportunity to buy more shares because of his role as a fiduciary.
    - Boardman makes a profit from the shares so he is liable for that profit.

Lord Cohen Obiter:

- An agent is liable to account for profits they make out of trust property if there is a possibility of conflict between his interest and his duty to his principal. [you can't use information or opportunities you get out of your role where there is a conflict of interest].
    - This is a statement of the rule by the majority, so it almost agees with the idea that profit rule is a subset of the conflict rule. If the profit rule is enough, this point is superfluous.
    - OR he is saying that if we applied that test, either way, there would have been a conflict of interest because if the trust decided they wanted to buy shares he would have to advise them.

- The trust may never change their mind because it is not worth it, and the court may not allow it, but in the case that they did his own interest in the business would make his advice giving a conflict of interest.
    - [Criticism by Lord Upjohn: he could just say I can't advise you on that matter because I have my own prior interests, or he could give up shares before advising them?]

Lord Hudson:

- Follows *Keech v Sandford,* the inability of the trust to purchase makes no difference to liability of the fiduciary. It doesn't matter that Mr. Fox made it clear he would never purchase any more shares for the trust. - strict profit rule.
- But he admits that "the question of conflict of interest directly emerges from the facts pleaded, otherwise no question of entitlement to a profit would fall to be considered", but says that there is a potential conflict.
    - This suggests that whether there is a conflict of interest is a necessary part of the claim.

Minority - Lord Upjohn [+ Viscount Dilhorne].

Held: One conflict of interest rule, and profit can be an example of this.

- It was of cardinal importance that there was no question of the trustees contemplating purchase of further shares because there has to be a conflict of interest for there to be a breach
- The possibility that the trustees would change their mind is not enough to say there is a conflict of interest.
- TEST: would a reasonable person looking at the circumstances believe there is a real sensible possibility of conflict of interest?
    - In this case it is reasonable to believe there is no conflict of interest because the trust clearly had no interest in purchasing shares.
    - If they did change their mind there wouldn't automatically be a conflict of interest because
        - he could give up his shares; OR
        - say he can't advise them. He had no requirement to advise them, he wasn't employed by them as an in house lawyer, general retainer or required by K to give advice
    - If he kept shares and gave advice that would be a conflict, but we can't say the possibility of them buying shares always provides for a conflict of interest, we don't know what he would have done.
        - [Possible counter: fiduciaries are supposed to be loyal, if you take interest in transactions that they are involved in can you really be loyal? But loyalty doesn't extend to always being able to advise your principal, especially if the principal seems like they aren't interested in something at all].
- The case *Regal v Gulliver* is not analogous to this case as the facts are very different.
    - Facts
        - Directors of Regal were going to buy more cinemas owned by Amalgamated, and sell the whole business to make money. Regal owned some shares in Amalgamated.
        - Cinema owner was not going to lease cinema to Amalgamated unless all shares were owned by Regal, or if the directors of Amalgamated gave a personal guarantee that they will pay rent.
        - Directors of Regal themselves decided to take up the shares in Amalgamated because Regal couldn't afford to buy all the shares.
        - When they sold the company, the directors made a profit.
    - Issue:
        - as fiduciaries who made a profit from their position, do they have to give profit to Regal?
    - Held:
        - the directors have to hand over the profit because there is a strict rule that you cannot profit from your position as a fiduciary. It didn't matter that they acted in good faith or that there is an opportunity/possibility that the principal had an interest in that area.
        - Majority in *Boardman v Phipps:* this case shows it is a strict profit rule because there was no way Regal could have afforded to buy the shares, no conflict of interest here but there was still a breach.
    - Lord Upjohn distinguishes this case.
        - Regal intended to have all the shares for the company, so that they could sell the business for maximum amount of money. The point of the scheme was to increase assets and boost benefits for principal.
        - Because the directors personally profited, as opposed to the company, there was a conflict of interest.

        - Fiduciary can always argue the opportunity "couldn't" have gone to the principal, but this doesn't mean it is persuasive.
            - Did they try alternative ways of getting money for Regal to buy shares themselves, or tried to strike a different deal with the cinema that was within what Regal could afford?
        - Arguable there was a conflict of interest here.
    - Also he says in both *Keech v Sandford* and *Regal v Gulliver* the case concerned trust property or property with which the principal was contemplating purchase of. In *Boardman v Phipps* the property at concern was never contemplated as subject-matter as the possible purchase by the trust.
- Equity is supposed to be about fairness in individual cases, it's not meant to be about inflexibility.
    - If no reasonable person would think what Boardman did was wrong and what he did benefited the beneficiaries of the trust, why should he be liable? We want a rule that holds people to high standards but it shouldn't be inflexible.

Main take away criticisms

- Applying a strict no profit rule is against purpose of equity. Equity is not supposed to be so strict that it leads to unfairness and inflexibility.
- Michael Brian - Boardman is a decision that defines attitudes to the application of fiduciary standards. It has never been doubted that an honest fiduciary must occasionally be shot for the encouragement of others. The proposition that an honest fiduciary will be held accountable for their own gain, when their "breach" materially benefited the principal has not been enthusiastically received.
- *Boardman v Phipps* is a foundational case that is justified by the case *Regal v Gulliver* where it isn't clear if there was no conflict of interest. They interpret it to show you don't need a conflict of interest, and a strict profit rule applies, but that isn't clearly what the case showed.

Commercial Fiduciaries

When will the courts say that a relationship was not only contractual but fiduciary?/When is the denial of self-interest obligatory in commercial transactions?

Vercoe & Ors v Rutland Fund Management Ltd & Ors:

- Commercial transactions generally involve a degree of self-seeking and ruthless behaviour = accepted/expectation. But in a fiduciary relationship required self-seeking behaviour to be reined in on the grounds that special obligations of trust have been assumed by the fiduciary to the other party.

Courts have the power to say that one party, by the nature of their role, has undertaken a responsibility to be loyal to the other in a commercial relationship.

- Question for the courts: what is the relationship between the parties?
    - Is there a K that specifies what the relationship should look like?
    - What are the surrounding aspects of the relationship? (e.g. collateral K)
- Peter Birks - It is hard to tell whether the court will consider a relationship to be fiduciary, but there are some necessary elements:
    - The one who is a "fiduciary" has discretion and power in management of another's affairs.
    - In the circumstances it would be unreasonable to expect the other party to monitor the "fiduciary" or take other precautions to protect his own interests.

Why do we have commercial fiduciary relationships?

- Some argue we shouldn't have them, just because you say you will perform obligations does not mean you are promising to be loyal.
- In commercial life, things of mutual benefit exist, company law has ideas of fiduciaries, partnership law, joint-enterprises. We need to properly characterise the relationship that the bargain gives rise to, and that can include a fiduciary one.

Arklow v Maclean

Facts

- Mr. Windgate (Arklow) want to buy an island. Scheme = get japanese company to buy forests on the island, another company to buy a younger forest, and another company to buy the mill = $20 million. Then Arklow can use the money to buy the island personally, without any outlay. He needs $4 million to start this plan off.
- He sought assistance/finance from Fay Richwhite, a merchant bank. Arklow's agent, Mr. B explains the plan to Fay, and Mr. B gives them an information memorandum (but Fay deny that).
- Fay says they will act for Arklow on certain terms e.g. Arklow has to pay 5,000 up front. Arklow doesn't want to do that so they never accept the offer (or clearly rejects the offer either).
- A few months later Fay says they are withdrawing their offer because they aren't interested in acting for Arklow anymore.
- Fay gets another party together and buys the island, using a very similar scheme that Arklow came up with.

Arklow argument

1. Breach of fiduciary obligations: fiduciary shouldn't profit from information or opportunities they took or gained through their fiduciary role. Fay was Arklow's fiduciary, so should have been acting for him.
2. Breach of confidence: misused confidential information. In the meeting between Arklow and Fay, Fay agreed to treat what Arklow said as confidential.

<u>COA</u>

Majority - Richardson P, Gault and Keith JJ

- Gault J:
- Blanchard J:
    - Was there an obligation and was it breached?
        - That Fay agreed to keep the agreement confidential, and they did not signal any intention to pursue its own interests in relation to Matakana, conveyed to Arklow that they would not try to profit from the information unless they told Arklow that.
        - Limited Fiduciary Obligation = If a party receives information in confidence and doesn't immediately convey an interest in the opportunity the information relates to
            - There are obligations on parties in the initial stage of dealing where someone might become your agent because the actor already regards themselves as fiduciaries (shown by their actions).
            - This is independent of a claim that they used confidential information though.
            - Unclear if matters that they could have accessed info the other way, or the info wasn't confidential.
        - Industry practice
            - The evidence of Mr Pryke concerning the practice of merchant banks in this country is supportive of the view that a fiduciary duty of loyalty does arise in their dealings with prospective clients.
        - THERE WAS A BREACH OF DUTY.
    - Breach was relatively minor
        - 1. What was disclosed to it in confidence, adding to its existing general knowledge about Matakana, was, in reality incapable of leading to a transaction with the receivers. And it would have inevitably have come to the same conclusions about price, value and feasibility once it began its own research.
        - Information gave them the idea, but it wasn't used to put together the deal, the deal was similar but still different.
        - 2. Fay began pursuing its competing purchase plan before it withdrew its mandate proposal to Arklow. It got a head start in the race to buy the island through it's breach.
        - Arklow would have lost the race even if no breach of breach of fiduciary duty.
        - NO LOSS.

Minority - Thomas J

- Was there an obligation?
    - At the point of the initial meeting, even before a contractual arrangement is agreed to, the relationship cannot be viewed at arms-length unless defined as such at the outset.

    - Upon receiving information about how a business opportunity works they have relinquished it's self-interest and cannot exploit the relationship by using confidential information for its own benefit.
    - But fiduciary obligation not to further its own interests at Arklow's expense has a limited scope. It is only operating for a certain period of time and can be put to an end at the formalisation of its relationship with Arklow or the termination of that relationship.
        - [Arklow didn't enter into a pre-contractual arrangement because probably thought agreement of confidentiality was enough].
    - The court can be guided that a fiduciary relationship existed by the evidence of the practice and standards prevalent in the industry. To hold otherwise would be to run the risk of making determinations divorced from, or even at odds with, accepted commercial and industry practice.
        - Industry practice may influence the reasonable expectations of the parties or indicate the situation where those persons who are engaged in the industry perceive a party to be sufficiently vulnerable to warrant restricting the freedom of the ascendant party to take advantage of the situation.
- Was there a fiduciary obligation to not start another deal until they had told Arklow?
    - There is an implicit undertaking of a limited duty.
- Was breach sufficiently serious/was there loss?
    - It is clear that Fay proceeded to use the information to advance a competing deal...It would be naive to think that the information which galvanised Fay into activity was not used by them in putting together their own deal.
    - No evidence Fay would have beaten Arklow without the breach of fiduciary duty. Arklow could have beaten them to it.
    - THERE IS LOSS.

<u>Privy Council</u>

- One party is entitled to expect that another will act in their interests.
- If you don't fall within those defined categories it's a hard question as to whether you are a fiduciary/how do you know there is that expectation?
- TEST: has there been an undertaking by one party to act in the fiduciary interest of another?
    - There was no fiduciary obligation because he didn't accept the offer that was made.
    - If Arklow had taken up the offer for Fay to act for them, then they would have a duty. Without a K, Fay never acted as an agent or had an obligation to act on behalf of Arklow.
    - Arklow voluntarily chose to disclose information in arms length circumstances and Fay took no duty apart from confidence.
    - Arklow didn't accept, or reject the offer, but later exerted a fiduciary relationship existed when it was convenient for him.
- What about Thomas and Blanchard J's idea of a limited fiduciary duty in the circumstances based on commercial practice?
    - Practice doesn't equal the law.
    - It may assist in ascertaining reasonable expectations of parties but high expectations do not necessarily lead to equitable remedies.
        - Issue: if this is a reasonable expectation, isn't that an implied undertaking? Why not give effect to that to show a fiduciary obligation?
- NO DUTY
- NO actual use of the identified items of information when constructing the new deal (Blanchard's argument) so no breach of confidence.

Chirnside v Fay

Facts

- Chirnside and Fay were working together to progress a property development.
- Chirnside signs the contract with Lion Nathan on the land to buy the property and turns it into Harvey Norman. But at an earlier stage Fay is the one who convinces Harvey Norman to be a tenant for the building, and organised finance for the project (more difficult for Chirnside to obtain finance).

- Chirnside feels that for the previous project, Fay got the better deal for the amount of work that he put in. So Chirnside wants to capture the profits that flow from the project and geta better deal for himself.
    - Chirnside finds finance another way with the help of solicitors and incorporates a company that he has a large stake in to do the project.
- Fay hears about what Chirnside is doing, and asks for the proceeds of sales, Chirnside refuses.
    - He argues they didn't sign a K, his company provided fiance and they are the ones that will receive the profits, so he doesn't owe Fay anything.

Issue

- No contractual relationship, but they were business partners so is there a fiduciary obligation to not take unauthorised profits?

Held

- Are there fiduciary obligations in this kind of relationship?
    - Elias CJ: When parties join together in a joint venture with the view of making profits it is inherently a fiduciary relationship.
    - Other judge: most joint venture relationships are inherently fiduciary because of analogy of partnership.
    - Are they saying all joint ventures are inherently fiduciary?
        - Joint venture - commercial term, not a legal term that helps us categorise legal doctrine. It can cover all kinds of commercial relationships, and not all are necessarily fiduciary.
        - Elias CJ's "with the view of making profit" [and the costs/burdens]" qualification is more helpful to define what kinds of joint ventures are fiduciary.
- When are fiduciary duties going to arise?
    - Fay was adamant that they had a fiduciary obligation because of their business partnership. But so was Windgate in *Arklow.*
    - Test: What are the reasonable expectations in those circumstances? Do they give rise to an implied undertaking?
        - Fay and Chirnside had done a previous transaction, so that solidifies the idea that these guys trusted each other, so it's easier to say = fiduciary relationship.
        - Tipping J: that they didn't sign an agreement showed the trust they had in each other.
- Was there a fiduciary relationship on the facts?
    - Asking: "where the circumstances such that one party is entitled to repose and does repose trust and confidence in the other"
        - They initially discuss it together. Worked together on feasibility of calculations, joint (initial) negotiations to purchase Speights building, liaising with council, architects and other advisors, talking to Lion Nathan, visiting the land. All these actions suggest they were working together as partners.
        - [Mr Chirnside introduced Mr Fay as a principal in the development].
        - That Fay still played an important role, providing finance and getting Harvey Norman on board, and the nature of this relationship as above shows it is a fiduciary relationship.
            - [Maybe he should get paid on a contractual basis like a merchant banker because actions are more arms length?]
    - Did not matter that the parties had not formalised their arrangements
        - They don't accept the submission that the parties had not reached sufficient agreement or understanding on key issues to move this transaction from one of antagonism to one of collaboration.
        - No express undertaking under K. But this is equity, you don't need an express undertaking under K, it can be implied through expectations of an undertaking.
        - That the parties may have expected to settle arrangements more formally later does not alter the character of the relationship already established and underway
- Breach?
    - Yes because Chirnside diverted to his own account the entire joint venture, in breach of the no-conflict limb of the obligation.
- Remedy?

- Remedy on a loss of chance basis that you would get paid off. But it was only 25% likely so discount profit by that much because there was no K and it is unclear if they would have agreed on that amount of payment given Chirnside's dissatisfaction with the relationship.

Note: other cases have held that if there is a K that specifies obligations clearly, it can exclude the existence of a fiduciary obligation. Have to read the K.

Can we apply reasoning from *Chirnside* to *Arklow*?

- Wind gate was very certain that they had a fiduciary obligation.
- Could we say that there was an implied undertaking, it didn't matter that there was no K?
    - Maybe given industry standards, everyone would expect that a merchant banker wouldn't compete = implied undertaking that has a limited scope?
    - But in *Chirnside* there was lots of evidence that they were working together, so there was a clearly implied undertaking than in *Arklow*.

Amaltal Corporation Ltd v Maruha Corporation

Facts

- Commercial fishing joint venture, set up under a joint company.
- A separate company was set up. They were still working together in joint venture business opportunities, but when you looked at the K it wasn't a partnership. Previously they had worked as partners, but this new K was structured in a different way.
- Amaltal concealed a tax deduction which meant it made a bigger profit (higher payment form Maruha).
- Maruha wants to sue Amaltal as a fiduciary.
    - General relationship was not fiduciary because former partnership was replaced with a company BUT Amaltal was a fiduciary for Maruha in respect of accounting and tax returns, which it had undertaken for the joint company.

Issue

- Is there a fiduciary relationship under this new K?
- Was there a breach?

Held

- Contract: looks like for a limited purpose Amaltal is a fiduciary for accounting and tax purposes.
- Characterisation of a commercial agreement as a joint venture can be unhelpful to guide whether the parties owe each other fiduciary obligations.
    - When commercial parties elect to use an incorporated vehicle for a venture that can only loosely be called a joint venture, it is unlikely that their relationship as a whole will be fiduciary in nature.
        - It's a different way of structuring a transaction from the partnership model, or Chirnside where people start acting together. If you choose to incorporate a company and take shares in the company you aren't owing fiduciary duties.
- Better to ask, instead of is there a joint venture, what is this party doing for another person in a business context, and for that purpose were you acting on that other parties behalf?
    - There may be a fiduciary obligation if the nature of the commercial relationship or part of the transaction gives rise to one party relying on the other for loyalty in performing actions they have agreed to perform, or being entitled to and actually reposing trust and confidence in the other party?
        - This can be expressly agreed or less formally assumed based on the conduct of the parties in the relationship.
- *Paper Reclaim Ltd v Aotearoa International Ltd*: instead of joint venture apply
    - What did the parties agree to do?
    - Does any particular aspect of their agreement gives rise to a relationship that can be characterised as fiduciary, imposing an obligation of loyalty on one or both parties, which supplements the express or implied contractual terms?
        - If one party is entitled to repose and does repose trust and confidence in the other = fiduciary.
        - If, expressly or impliedly, there is an agreement to act on behalf of another and put the interests of the other before one's own = fiduciary.

- When does a fiduciary relationship end?
    - If in K, when the K specifies.
    - If it is an implied relationship, or K doesn't specify, then you can withdraw from the fiduciary relationship at any point if you
        - Give notice
        - Make arrangements of how you will severe joint interests
        - If there are any assets they will have to be broken up and shared out fairly between the parties.
        - Any duties of confidentiality will remain.

Trusts

History

Trusts Act and Trust Bill

1956

- Similar to the PLA, you have to use common law concepts to understand it and clarify certain things. It sits above equitable rules of trust.

Trusts Bill

- How do we deal with trusts in a modern context? - PDF.

Law Commission Papers

Law Commission Issues Paper

- What is a trust?
    - Fund of trust property. -
        - device that enables one to enjoy various rights, power and privileges in respect to property greater than those enjoyed by owners of property, by enabling them to enjoy the benefits of ownership without being subject to all the duties and liabilities resulting from ownership.
    - Obligation on trustee - trust instrument, fiduciary, statute.
    - Personal and proprietary remedies for the beneficiary - against trustee and third parties.
- Why were trusts originally used?
    - Crusaders: They want people to look after the land if they die, to avoid taxes from the lord if the heir is a minor and to specify who benefits from/inherits the land. If one trustee dies, there is another trustee, so it never falls to be inherited.
    - Fransiscan monks: they cannot own property because of their religion, so land for their monasteries is held on trust by others, monks are beneficiaries, to ensure they have a stable entitlement to be in the monastery.
    - Avoidance of liabilities that would otherwise attach to ownership (law/religion)
- Early problems with the trust?
    - Lords/King did not like the loophole trusts created to avoid taxes.
    - Creditors couldn't use property to repay debts because those that owed debts didn't own the land.
    - Henry VIII enacted a Statute of Uses: if you have settled property on a trust, it is not B who owns the property/has legal title but the person who takes the benefit.
        - But lawyers found another loophole: instead of conveying property to B for the use of C (C is legal title holder under new law), they say they will convey property to B for the use of C to the use of D (under new law C is legal title holder, but D is protected by equity and can benefit).
- The role of trusts in common law?
    - Common law doesn't recognise trusts. If you transfer ownership to B, they could take land themselves and common law would not recognise that as a problem for A.
    - Equity steps in to ensure protection for beneficiaries. Common law owners can only use property for someone else e.g. make a trust a legal institution. (Modern: commercial trustees can exist = paid)
- Civil law vs. common law trusts?
    - Civil = fiduciary relationship that creates facility to look after land - personal right/obligation.
    - Common law Trust = beneficiaries have some proprietary ownership of the land. Creditors cannot use land held by a trustee to satisfy debts because a trustee cannot own land beneficially in equity.
- A trust is not a legal entity or legal person like a company.

- Insolvency situations?
    - Ownership of property is in substance in the beneficiary
        - although academic debate about what exactly that ownership is.
        - Rickett: When someone is a beneficiary to a discretionary trust? They have personal rights against the trustee to live up to obligations, enough to enforce the trust. But harder to say they have this bit of the property.
        - But we do know that no matter what type of trust, trustees don't have proprietary rights.
    - So liabilities of ownership are theirs, including taxes, creditors. If the trust is split up between beneficiaries, the proportion owned by the beneficiary can be used to pay taxes or creditors.
    - Exception: if the trust is discretionary and is not fixed, it isn't certain what proportion one beneficiary will acquire, and therefore own, from the distribution of trust income or capital when the trust is wound up.
        - This makes it impossible to pay taxes or creditors to satisfy debts, as proportion of income or capital is unknown.

Law Commission - preferred approach

- What are good reasons for people settling trusts?
    - To allow self-employed persons to separate personal assets from business assets (but could use a company instead).
    - Traditional estate planning - to ensure family members will keep the farm in the family, or keep the company, instead of parcelling it out amongst children.
    - Protect your assets from relationship property acts
        - e.g. settle family home on a trust for the benefit of themselves and children after a first relationship ends but before a subsequent relationship begins or to prevent assets being claimed by a child's spouse or partner in the event of a future relationship breakdown.
            - Is this good? You are defeating the purpose of the RPA, and it's fair to share property.
            - RPA has anti-avoidance provision to prevent trusts being used in that way: if it was relationship property, and then it was taken out of the pool though a trust, the courts can order it to be part of RP.
    - For efficient operation of business, especially family businesses, where proceeds can be shared with family members who have no control over the business e.g. by owning shares.
    - Protect family members will special needs.
    - Protect investment schemes and commercial arrangements
    - Management of Māori land
    - Philanthropic or charitable activities.
- Less acceptable uses of trusts?
    - Obtain tax advantages
        - Much harder now after SC decision and realignment of top tax rates.
    - To qualify for state assistance
        - Avoid a large asset being counted as part of personal income assets, to be eligible for government benefits such as subsidies for rest home care or working for families, student care allowance.
        - But many different rules regulating different types of government assistance allow government to consider dispositions to trusts as part of assets.
    - Defeating creditors claims for repayment because they don't technically own property.
        - But provisions in PLA protect against this.
    - Defeating the equal sharing regime under the PRA by transferring relationship property into a trust when they see the relationship beginning to fail.

Different papers demonstrate different attitudes

- First paper is more skeptical of why we even need trusts.
- Second paper demonstrates trusts can be a useful way of providing benefits to the ones you love in a more flexible way that can be tailored to future unforeseen circumstances.

Constructive Trusts

Professor Rickett

- Law of trusts in NZ is in a shambolic state.
- Should preserve property and equitable rules, shouldn't bend and change them, keep consistency.
- Types of trust
    - Sham trust: Settlor pretended to set up trust (maybe to protect assets), there is no trust, the settlor is still beneficial owner.
    - Illusory trust: objectively there is not trust, settlor is still beneficial owner.
        - These ideas are not based on sound doctrinal grounds/law, they are based on ex-post facto policy justifications, ideas of fairness. It can't be done within trust law. It is an instrumental jurisdiction.
    - Constructive trust: there was no express trust or intentional decision to draw up trust deed, but because of what parties have done in relation to property we are going to interpret and recognise the situation as one in which there is a trust. Trustees hold property for more people.
- Compares NZ to Zimbabwe: Mugabe was taking land from white settlers and redistributing it/ending property rights currently in existence= robin hood law. Judges enact our own robin hood law through mucking with property/trust law.
- What is the problem in cases like *Morale v Hamilton* or *Vervoort v Forrest*?
    - They didn't accept that it was a sham trust or an illusory trust
    - BUT they imposed a constructive trust over parties involved in an express trust.
        - Constructive trust tells us to hold the property for someone else (former relationship partners) other than the nominated beneficiaries under an express trust.
        - Problem: deprives the beneficiaries of their property. They are the "owners"/have beneficial ownership in equity.
        - Rickett believes that recognising a constructive trust is theft from the beneficiaries.
        - <u>Constructive trusts are awarded instrumentally, not by law but by policy. We want them to get something because it seems unfair.</u>
        - <u>Goes against *nemo dat* = you can't give what you don't have.</u>
- What would have been a better solution according to Rickett?
    - There isn't anything unfair about the trust itself.
    - Unjust enrichment = claim against trustees personally, not the property itself.
        - Unanimity of trustees means they have to act together to take action, only one trustee was creating an expectation of a trust claim, claimant should just claim against individual trustee.
    - The property itself is not owned by the trustees, so they cannot give the property right to anyone else through damages. Preserve rights of nominated beneficiaries.

Murrell v Hamilton

Facts

- Mr. Hamilton's parents warned him to set up a trust to protect the family house, to keep the property outside of the relationship property act.
- Hamilton and Morale get divorced. Morale cannot get benefits to trust property because Hamilton doesn't own it. (Seems unfair).

Issue

- Is it a sham trust or an illusory trust?
    - No, the trust actually exists.
- Is there a constructive trust, in which Morale is a beneficiary?
    - Yes.

Held - HC - Pankhurst J

- Normally trustees have it all act together to take action. Settlor was only one trustee that was creating the expectation of the trust claim, and other trustees weren't involved in that.
    - Similar argument to Rickett, maybe she should have just claimed against the settlor.

Held - COA

- Intention of Parliament through RPA is that the property is split. The trust property is the family home, so should be relationship property.

    - Maybe could get right to house through measures under act - if relationship property is taken out of the pool and put into a trust.
    - But I don't think that exception covered this case.
- **Claimants have contributed to the trust property and there are expectations around their ownership of the home.**
    - *Lankow v Rose:* Trustees can hold property for someone else (constructive trust) if
        - There was a contribution to the property (direct or indirect)
            - Valuable contribution to the property must be established, not one that is only to the relationship between the parties.
            - Not just those contributions to a common household that are adequately compensated by the benefits the relationship itself confers, but the contribution manifestly exceeds the benefits.
        - They have a reasonable expectation of an interest in the property
            - Trustees have interacted with the claimants in a way that has given them an indication that the claimant had an interest in the house e.g. allowed them to make contributions.
        - The defendant should reasonably expect to yield the claimant an interest.
    - Used to use this before we had legislation, to give property to partner, particularly with de facto couples that were basically like marital couples. It is less important law now that we have RPA that extends to de facto relationships.
    - In UK - look for actual intentions or imputed intentions. Need some kind of representation or common intention to have a constructive trust.
    - **In this case:** the judges use this mechanism to achieve sharing between the claimant and the settlor where the legislative mechanism has been avoided through a trust.
- They aren't destroying the trust, just mitigating the unfair effects of the trust.
- Liability of trustees:
    - If other trustee is not involved and abjure their responsibility and leave it up to one trustee, then the whole trust is going to be bound.
        - Sort of response to Pankhurst points.
        - But they don't really get into property problem, that trustees cannot give what they do not own, as brought up in Rickett's article.

Vervoort v Forrest

Facts

- Mr. Duffy had property in a trust, which the trust had bought during their relationship.
- Ms Vervoort and Duffy split up. V does not have access to trust property, as D does not own it.

Issue

- Is trust property part of relationship property, should it be split between the parties?
    - Is there a constructive trust?

Held

- Beneficiaries were never entitled to the increase in value of the profits made by the claimants through contributions that were substantial, increase the value of the property and outweigh any benefits that the claimant got.
- Response to Professor Rickett's point about unanimity of trust actions.
    - While traditional trust principals require unanimity and non-delegation, the Court's approach to trusts must, as the recent cases show, meet the reality of how property is owned in NZ. Good portion of NZ's real estate is now held in discretionary family trusts of the same type as the trust created in this case.
        - Social reality rather than law.
        - Application of constructive trusts is dealing with this reality. In these family trusts, the settlor is the one who often controls the trust. Controlling partner can't avoid RPA because of a trust, that would allow trusts to create inequity.
        - If only one trustee is taking control, calling the shots, giving expectations to a claimant and taking claimants contribution, trust as a whole is bound.
        - In these circumstances we can bend the strict principal of trust unanimity.

- Response to Professor Rickett's point that property is held ready as belonging to beneficiaries, and trustees cannot give what they do not have
    - Doctrinal argument or double down on instrumentalism?
    - Similar argument as above:
        - Often trustees of family discretionary trusts are also beneficiaries and control them, which means the trustees has an ability to give a third party expectations (in return for that third party's contributions) over trust property must be recognised.
    - There is no misappropriation of property in that the beneficiaries of the express trust have no claim in conscience to the increase in value resulting from the contributions.
        - Beneficiaries cannot expect trustees to retain for them an unearned benefit, extracted by expectations engendered by the trustees.
        - Reasonable for express trustees to yield the third parties an interest.
    - This is giving effect to constructive trust principles from the *Lankow v Rose* case.
        - These principles go further than comparable English trust cases. They already party eschew (rejects) a traditional property rights analysis as a partner's contribution creates a right against D's property generally, rather than by way of specific proprietary right.
        - Require some kind of finding of an intention/expectation of beneficial ownership by the claimant.
            - We are just extending it a bit further, we are already in the realm.
            - Court should be able to respond to injustices.
    - Doesn't quite deal with Rickett's argument - *nemo dat*.

Rickett responds

- This is still instrumentalist. The main thing they do is pointing to the social reality.
- While social reality has an impact on the law, we can still ask what about doctrine/law/existing property rights?

How could we construct a doctrinal argument to respond to Rickett's arguments about nemo dat?

- While trustees do not have beneficial ownership, they are still the owners of the trust property. They can sell it, enter into K's in relation to it because they are the legal owners.
    - Equity is what steps in to criticise these actions if they are a breach of trust obligations.
    - But this doesn't prevent the trustees from doing things with the property if what they've done is asked for or acquiesced in contributions being made, and in doing so have created an expectation of a property interest (e.g. their actions that create an expectation have not breached trust obligations).
    - In this case, there should be a claim to a constructive trust.
- Relativity of title - you can create multiple rights in the same title, but rights are relative.
    - The express trust comes before the constructive trust, so express takes priority. (First in time rule).
    - But contributions may increase the bundle of rights claimants have to the property, not as a competing interest but as new rights that should be given effect, so this will affect what equity will say. Meanwhile, actions of trustees may mean we don't apply first in time rule, or bundle of rights are altered.
- COA doesn't really get into that because it's complicated.

How does it work when the settlor is a trustee or a beneficiary?

- If you are the only trustee and the only beneficiary = you are just holding property for yourself.
    - It seems like the trustee and beneficiary should be two different people because the trustee is supposed to hold the land for the benefit of the beneficiary.
- If trust has multiple trustees and/or multiple beneficiaries, but trustee is one of the beneficiaries.
    - Odd because trustees work out how capital and income should be distributed, and they are meant to act as a fiduciary to act in the beneficiary's best interest.
        - Seems like a conflict of interest because they will benefit.
    - Especially odd if it is a highly discretionary trust and one of the people who would benefit is also the person who decides who benefits.

Sham Trusts

Definition

- Where the trust is just an appearance or pretence - usually in documentation - to create one set of legal arrangements, but the actual legal relationship/rights and obligations intended is something different or no rights and obligations are intended at all. Intention to have a trust is in appearance only.
- *Snook v London and West Riding Investments Ltd* - Diplock J - for acts or documents to be a sham, all the parties 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.
- *Ben Nevis Forestry* NZSC - A document which originally records a true common intention 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.
- The idea of a sham applies generally, not just to trusts law.

Finding a sham trust

- *National Westminster Bank plc v Jones:* The person who asserts that the legal situation is a sham will benefit from a ruling that the legal situation is not as the objectively interpreted documents present it. <u>There is caution about - and a presumption against - reading documents as shams.</u>
    - Courts want to protect commercial certainty and certainty of property rights.
    - They don't want to lightly take away the benefits for the ostensible beneficiaries.
- Does the intention have to be mutual (trustee and settlor)?
    - Palmer argues that because only the settlor's intention matters in determining whether a trust has been declared, only the purported settlor needs to have the sham intention.
        - This view sees the subjective sham intention as negativing the settlor's objective intention to declare a trust.
        - A trustee need not accept the trustee office; the court will appoint a different trustee.
        - Certainty of intention (of settler) to declare a trust (either real or sham). Subjective intention overrides the objective intention, so there is no trust.
    - Conaglen argues that the general 'sham doctrine' always refers to mutual intentions, and that doctrine
        - Most trusts are bilateral, there is a settlor and trustee who are separate persons.
        - To bypass the objective interpretation of the documents is only warranted where all parties had the sham intention. If not, then the trustee would act according to the objective interpretation, and it couldn't be a sham, despite the settlor's intention.
        - Objective intention determines trust existence of trust, but subjective may show a sham. Objective intention of settlor determines trust existence BUT subjective intention of settlor AND trustee determines the sham.
- Indications of sham intention in trusts *Rosebud v Bublitz* : balancing test
    - Contemporary evidence of actions of relevant parties showing that trust was not intended to be genuine.
    - Actions of trustees that show disregard for their trust obligations and the beneficiaries interests
    - Use of trust property for another's benefit - e.g. settlor is taking lots of benefits which aren't clearly benefiting the beneficiaries.
    - Settlor control - trustees acting on word of the settlor.
    - Poor administration: absence of meetings/resolutions/annual accounts; intermingling of financial arrangements or trust property with other property.

Official Assignee v Wilson

Facts

- Mr. Reynolds is a businessman who goes bankrupt in 1990.
- He later buys a house in Invercargill, and lives in it with his children and his de facto partner.
- The house is owned by a trust that he has established for his children (beneficiaries).
- Trustees are Wilson - lawyer, C - mother in law.
- Reynolds isn't a beneficiary or trustee but lives in the house.
- First, he wants to renovate the house, but trustees don't want to fund that renovation (no more borrowing by trust) so they sell house to Reynolds. Reynolds borrows money and renovates it.

- Second, he sells the Invercargill house, and moves to Queenstown. The trust buys a house in Queenstown. The family live in it, and Reynolds pays the mortgage.
- Reynolds goes bankrupt again - $500,000.
- Official Assignee steps in, Reynolds has no property to pay back creditors.

Argument

- Official Assignee says that Reynolds is the true owner of the property because the trust is a sham (and therefore property can be used to pay back creditors).
    - Either Reynolds is the actual owner of the property OR
    - the trustees are holding the property for Reynolds as a beneficiary, not the children.

Held

- Court is reluctant to accept the argument
    - If you say the trust is fake, this means the ostensible beneficiaries would lose out to Reynolds creditors.
    - People go bankrupt all the time, so why should his children pay for that?
    - Need to be sure it is a sham to not unduly deprive the ostensible beneficiaries
- What is the problem with the Official Assignee making this argument?
    - Official assignee is the person who turns up when someone goes bankrupt, and sorts out how to pay the creditors. She effectively steps into the shoes of Reynolds.
    - Reynolds can't say that the trust is a sham, he is the one that drew up the documents and passed over property to the trust.
        - If settlors could do this, they could take back the property given under trust at any time by saying it was a sham when they want to reap the beenfits.
    - For this reason, the case fails.
        - Today: Amended Insolvency Act to allow Official Assignee to say a trust is a sham (added to their powers). There has been one case where this has been successfully argued.
        - It makes more sense because it is unfair on OA that you can't say the trust property is a sham for the purposes of bankruptcy, when the courts can say it is a sham for other things like RPA.
- Is it a sham trust, in any case? [Obiter]
    - Argument of OA: Reynolds is calling all the shots and trustees just do what he wants. They let him live in it, buy it back for renovation, and buy a new house. They also do a joint borrowing transaction = borrow more money than is needed to buy the QT house and effectively gave the extra to Reynolds to help pay off debt he owes.
        - This shows the trustees are acting for Reynolds, not the children.
    - Have to show that Settlor AND Trustees had a subjective, actual intention that was different to the objective transaction. (More like Coniglan argument)
    - COA: Looking at factors, balancing test.
        - Sale back to Reynolds may have been good for the beneficiaries (e.g. maybe it was better for trust to have cash if property market was dropping).
        - QT house transaction/joint borrowing transaction:
            - Could be a breach of fiduciary duties but that does not mean it is a sham trust. Breaches that suggest it is a sham trust have to show you are not giving effect to the trust, and that isn't clear here.
            - Or it could have been to secure a lower rate for the borrower. Extra cash from the joint borrowing transaction helped get rid of the existing mortgage over the invercargill property so the lender for the QT property could take a first mortgage over the invercargill property.
                - As both properties are in the security package loan, this reduces the rate of interest on the loan which is good for beneficiaries.
        - He is paying the mortgage for the house, and some of the deposit. This is almost like a rental situation, so he isn't getting the benefit of living at the house for nothing.
        - The trustees didn't let Reynolds renovate the house - they didn't do everything he wanted if they thought it wasn't good for the trust/beneficiaries.

        - If it was a sham, why bother transferring the property back to him? If he owns it, he could have just had the trust to renovate the house.
    - There was enough sound administration around it to be convincing.
- ON BALANCE, it is a real trust.

Clayton v Clayton

Facts

- Mr. C set up a trust to avoid RPA obligations that would arise. He had up to $1 million in assets, and his business was worth $28 million.
    - Mr. C is the Settlor and Trustee and Beneficiary of the trust, and he had additional powers as a principal family member.
    - Other beneficiaries are Mrs. C and their children.
        - (And children are final beneficiaries, so remaining property at the end of the trust that hasn't been distributed would go to them)
    - The trust is highly discretionary, which means the trustee can decide how to distribute the capital and income of the trust.
    - Provisions
        - The trustee can exercise discretion in his own favour.
        - The trustee can exercise power even though the interest of all the beneficiaries are not considered, even if the exercise results in distribution to one beneficiary to the exclusion of others, even if the exercise of power is contrary to the interests of other beneficiaries.
        - The trustee to exercise any power to discretion even if it conflicts with duty of trustee to beneficiaries.
        - The trust includes provisions that the principal family member can remove or appoint trustees.
            - Could argue any discretionary trust allows you to do that, but still unique to have this all laid out, basically excluding any fiduciary duties he has to beneficiaries.
- In addition there is an agreement to contract out of the RPA (so Ms. C would only get $50,000)

Argument

- Mrs. C wants to scrap the agreement to contract out of the RPA.
- Mrs. C wants to argue that the trust is a sham trust, or an illusory trust so that the trust is actually Mr. C's property and can be divided under the RPA.

Held

- The agreement to contact out of the RPA is unenforceable.
- All in all, he could easily transfer the entire trust property to himself at any time, he isn't confined to a fiduciary duty and doesn't have to think of other people's interests.
- Technically the property does not belong to C, but for the purposes of RPA, the ability to give himself the property at any time with no restrictions means the property is owned by him and can be divided.
- Because of this we don't need to argue a sham/illusory trust argument.
    - There is no value in using the illusory trust label, if there isn't a valid trust, it just isn't valid.
    - But here is a difference between sham and illusory trusts, COA were wrong. It is possible to argue that the documents and transaction were true but what you said you were going to do is objectively not a trust.
    - This is not saying that there is no trust (protecting property law) but just using the legislative overlay to change the way we perceive his ownership of the property.

Discussion

- External Regime
    - The courts use the idea of an external legislative regime to find for Mrs. Clayton, without contravening property/trust law or any ideas of what a trust is.
    - It is always within the power of the legislature to say that the way in which you hold a power through a trust deed creates a kind of liability of ownership over the trust property. The legislature is an external regime which overlays our understanding of ownership/property law.
        - EXAMPLE: Tax law in England requires that if you retain control of the trust or retain any possibility of benefiting from the trust, the state can tax you on that trust property.

        - In *Clayton,* they apply the RPA legislation to create a wider definition of property for relationship purposes. The legislation is creating a regime of equal sharing, and allows a more substantive approach to be taken by the courts in understanding what is property owned by the parties - judicial mixture of worldly realism.
        - UK: "financial resources". NZ: "property" - but still broad inquiry.
- Is it really a trust?
    - In this case, taking a practical/substantive view point, there is not any difference between Clayton having the property in the trust, and owning the property, other than he has to go through the motions of there being a trust when exercising powers. (e.g. have to record resolutions to show that you are doing it to benefit a discretionary beneficiary in a particular way).
    - HC: The trust crosses the line, it is not a trust because Clayton effectively retained all the powers of ownership and could cancel it at any time. He hasn't lost anything from declaring the trust, has the same rights and powers as if he owned the property, as if the trust was never created.
        - A trust is about disposing of ownership for the benefit of another
        - There should be a fiduciary relationship.
        - There should be a separation between the legal ownership and the beneficial ownership.
        - Rights for other beneficiaries are whittled down so much that obligations don't exist for them anymore, he is the owner of property.
    - COA: It is a trust, but the RPA external regime means it is Mr. C's property for the purposes of RPA. They leave legislature to reign in trusts to ensure the trusts don't go too far.
        - There is a trust because he still has to be honest when acting as a trustee. By having to comply with remaining duties in good faith there is a trust.
            - Is this enough? There are lots of transactions that require you to exercise powers in good faith that aren't fiduciary, so is it enough if that is the only thing remaining for it to be a trust?
    - SC: don't say whether it is a sham or illusory trust.
        - Could argue it is not valid trust because Mr. C reserved such broad powers to himself in the deed, so he did not dispose of the property through the trust deed in favour of another.
        - Could argue the extent of Mr. C's powers call into question whether trustee obligations apply.
            - But this does not deny that a valid trust may come into existence at some point in time in the future, such as if Mr. C were replaced with a new trustee who was not the Principal Family Member and/or beneficiary.
        - Even though trust can be defeated by being taken back by Mr. C at any time, until he does that it is still a trust because there is still enough obligations on him as a trustee. [Could be relevant here, except in that case power of revocation didn't exist like in Clayton].
            - Illusory trust argument isn't possible so long as trustees have obligations and their duty to act and to give effect to the terms of the trust deed is not excluded.
        - Court had a unanimous view, complex which side is right. So didn't conclude.
    - What do we think?
        - It can be possible for the settlor to be the trustee and beneficiary, but without any real fiduciary obligations how is this a trust?
        - Facts: Clayton is the only trustee and he didn't know what the documents of the trust deed said, just did what his advisors said. Further, the only decisions he makes in relation to his trust are to sign documents he was told would benefit himself is he giving effect to document?
        - SC says he intended to separate ownership and control, but any sham trust wants to present this to the outside world. If you aren't doing anything to actually enact this trust, how can it be a trust?
- How can we distinguish this trust from the other cases, *Official Assignee, Murrell v Hamilton, Vervorrt v Forrest*?
    - In *Clayton,* he is the sole trustee, and a beneficiary.
        - In the other cases there is a co-trustee who has to think about how to distribute capital to the other beneficiaries, so could act as a check to the settlor. The court wouldn't sanction one trustee taking over and distributing the benefits to themselves.
        - But in reality other trustee might just do what settlor trustee wants/agree.

- It is possible it could not be a valid trust if there is another trustee, or if the settlor is not a trustee at all but the trustees are under their thumb.

Webb v Webb

Facts

- Looks like the trust in Murrell/Vervoort. Not as extreme as in Clayton.
- Mrs. Webb claims that it is an illusory trust.

Issue

- Is it an Illusory trust = the document show that objectively there isn't a trust, although all parties were acting honestly and with intentions that aligned with the documents.
    - Sham trust = the documents objectively are a trust, but the subjective intention of the trustees and the settlor do not align with these documents (they are acting dishonestly).

Held

- *Pugachev* and *Clayton* both show that there is no trust if on an objective analysis of the powers reserved to the respondent in that deed, the settlor evinced an intention to irrevocably relinquish a beneficial interest.
    - *Pugachev:* Remaining powers meant that Pugachev did not effectively alienate his beneficial ownership of the assets. There was no trust objectively on the documents. - Illusory trust.
    - *Clayton* the result would have been the same whether approached in terms of trust invalidity or in terms of a bundle of powers treated a matrimonial property.
        - Note: but this isn't really true. They got around having to answer the question of whether it was an illusory trust by using the external regime argument. They didn't really answer the question.
- Test: whether the powers reserved to the settlor were inconsistent with an intention to irrevocably relinquish a beneficial interest?
    - What would have occurred if the respondent had attempted to recover the property?
        - If it required the assent of a truly independent person, or would have been subject to an enforceable fiduciary duty, it is not an ineffective trust.
        - If settlor retained uncontrolled power to recover the property it could not be said that he divested beneficial ownership of the property, therefore the trust is objectively ineffective.
- Factors
    - He was a sole trustee
    - It was a highly discretionary trust.
    - He was a beneficiary.
    - He could take on the role of consultant to remove and replace trustees, or remove beneficiaries.
        - These all suggest he could exercise his powers to recover property, which is inconsistent with an intention to relinquish his beneficial interest.
- Policy
    - This is not bending the rules of trust law, according to the basic principles of trust law this is not a trust.
    - Trustee must owe obligations to the beneficiaries, have a fiduciary duty, that is more than just to themselves.

Comments

- If a trust deed names someone as a trustee and a discretionary beneficiary, it is possible to say that they are not allowed to make a decision to give themselves income or capital to the detriment of other beneficiaries, or that they are not divesting beneficial ownership to themselves?
- It is implicit that by being a sole trustee and a beneficiary that you can make a decision to recover property for your benefit because otherwise what is the purpose of them being a discretionary beneficiary. You don't need an express clauses that negate a fiduciary obligation.
    - Counter: however, if there is no express clause, while there is the ability for the settlor as trustee to grant benefits to themselves, there is still technically a fiduciary obligation on them to act for the other beneficiaries as well that is not clearly reduced or extinguished. So it isn't really implicitly the same. Without an express indiciation, the trustee may feel more inclined to consider other beneficiaries interests as well. So maybe it isn't always that fiduciary obligations are implicitly negated if the settlor is the trustee and the beneficiary.

- The cases seem to emphasise these express clauses as a major reason why they find the settlor did not relinquish their beneficial interest, but should it matter?
- Things that distinguish these cases from other family trusts where the settlor is a trustee and a beneficiary
    - The settlor is the only trustee (so can make sole decisions with trustee powers that can benefit their interests)
    - Express negation of fiduciary obligations (but could argue this can be implicit).

Pugachev

Facts

- Mr. P was the settlor, beneficiary and protector of the trust. As protector, he had the power to remove and appoint trustees, to direct the sale of a particular asset, to veto the distribution or vesting of trust property, to veto the removal of beneficiaries and to veto any variation of the trust deed or release or revocation of its powers.

Argument

- Appellants: Illusory trust argument - According to the terms of the deeds properly construed and on a proper application of the law to them, the trusts were not effective to divest Mr. P of his beneficial ownership of the assets put into them.
- Defendants: You cannot interpret the protectors powers as fiduciary because we should assume the protector is protecting the trust and the beneficiaries. The powers are conferred on P as to be a fiduciary.

Held

- Mr. P's powers he holds are 'non-fiduciary' powers, he holds them for his own benefit to ensure that the trust property is used in his benefit.
- Remaining powers meant that Pugachev did not effectively alienate his beneficial ownership of the assets because his powers were such that he could control what happened to the property, and did not have any duty to act in the interests of anyone but himself. There was no trust objectively on the documents. - Illusory trust.
    - Note: the idea of a protector is to ensure that the trustee is doing what they ought to do. This can be a legitimate device, particularly with offshore trusts when the trustees aren't people they know. If this was the case, it would not be an illusory trust.
- In response to the defendants arguments, the court says that the fact that the trustee's obligations are fiduciary does not support the proposition that the Protector's powers must also be fiduciary.