# PROPRIETARY FIXED TRUSTS AND ADMINISTRATIVE DISCRETIONARY TRUSTS: A PLURALIST ACCOUNT

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# ABSTRACT

Express trusts are not all the same. They are found in different contexts, have different purposes and the rules of trust law do not apply uniformly to them all. Nevertheless, the cases and scholarship retain a strong commitment to a central unity in trust law. This commitment is the idea that trust law is unified by the unique legal form of a duty to hold assets for the benefit of others. However, the integrity of this unique form is challenged by the unrelenting rise in discretionary trusts. Discretionary trusts contain doctrinal differences that challenge the archetypal legal form and the conceptual monism at the heart of trust law. This challenge requires us to ask what it means for trustees to hold assets for the benefit of others and how that meaning has changed. The object of this thesis is to answer these questions using an interpretive analysis of the legal materials.

This thesis argues that there are two distinct answers to what it means for trustees to hold assets for the benefit of others. It presents two distinct models of the legal form of the trust. Fixed trusts are explained by the traditional proprietary model of trusts, which is defined by beneficiaries' distributive entitlements. Fixed beneficiaries are entitled to be distributed specific benefits from the trust assets and those entitlements are immune from divestment at the volitional choice of another person. In contrast, discretionary trusts fit an administrative model of trusts, which is defined by beneficiaries' procedural entitlements. Discretionary beneficiaries are not entitled to distributions but are entitled to have trustees follow procedures in making decisions about distributions. The thesis argues that the distinction between these two trust models is well established in the case law. Moreover, the administrative discretionary trust model accounts for trustees with mere powers of appointment as well as trustees with imperative trust powers. However, the thesis argues that development of the administrative

model remains incomplete because the law on discretionary beneficiaries' procedural entitlements is inconsistent and uncertain. That is, the internal core of the administrative model — the rights and duties that regulate trustees' distributive discretions — is incoherent and beset by numerous areas of uncertainty. This has produced a spectrum of different types of discretionary trust that range from low-accountability trusts, where the discretionary beneficiaries have weak procedural entitlements, to high-accountability trusts, where they have much stronger procedural entitlements. The lack of internal coherence in the administrative trust model can be traced back to deep disagreement about the meaning and purpose of discretionary trusts. This thesis argues that the future development of discretionary trusts may be usefully inspired by public administrative law. Public law can inform a purposive theory for the regulation of discretionary trusts that produces a more coherent administrative model than that promoted by the currently dominant contractarian theory.

# DECLARATION

This thesis comprises only my original work undertaken toward the degree of Doctor of Philosophy, except where indicated in the preface.

Due acknowledgement has been made in the text to all other materials that have been used.

This thesis is fewer words than the maximum word limit in length, exclusive of the bibliography.

# PREFACE

This thesis was completed with the assistance of an Australian Government Research Training Scholarship.

Part of this thesis was proofread by Hamish McLachlan, a friend of the candidate who is not an expert in the field of research.

Research conducted for this thesis has been presented by the candidate in working papers delivered at the following conferences: Obligations IX, July 2018, University of Melbourne; Modern Studies in Property Law, April 2018, UCL; Obligations Group Conference, December 2017, University of Melbourne; Singapore Trusts Conference, July 2017, Singapore Management University; Law Graduate Research Colloquium, June 2016, University of Melbourne; Obligations Group Conference, December 2015, University of Melbourne.

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# CHAPTER 1

# INTRODUCTION

## I MONISM AND PLURALISM IN EXPRESS TRUSTS

It is widely acknowledged that not all express trusts are the same. Trusts exist in different contexts and for different purposes. Trusts can, for example, be created by settlors[1] to pass assets on death, to reduce tax liabilities, to support the disabled, to influence children's behaviour, to obscure information about ownership and power, to ensure assets are unavailable to future creditors, to stymie the claims of spouses or de facto partners, to facilitate the pooling of assets for investment, to move assets or liabilities for accounting purposes, to provide superannuation or other benefits to employees, to enable the work of agents like solicitors, and to facilitate custodianship services.[2] Trading trusts have become an alternative means of structuring businesses.[3] The flexibility of trusts has allowed them to be adapted for use by enterprising lawyers throughout domestic, commercial and public life.

It is also widely acknowledged that the rules of trust law do not, and should not, apply uniformly to every type of express trust. For example, in *Target Holdings Ltd v Redferns* ('*Target Holdings*') Lord Browne-Wilkinson recommended that 'in my judgment it is in any event wrong to lift wholesale the detailed rules developed in the context of traditional

[1] In this thesis 'settlor' means the settlor in substance not in formal appearance. It means those who are responsible for creating the trusts by gratuitously providing the assets to be held on trust: see *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 717 [8]; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), [214]; John Glover, 'Nominal or "Dummy" Settlors: Is It Time to Reform the Law of Trusts?' (2012) 6(1) *Journal of Equity* 19.

[2] See, eg, Graham Moffat, 'Trusts Law: A Song Without End?' (1992) 55(1) *Modern Law Review* 123.

[3] See, eg, *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 368 ALR 390 ('*Carter*').

trusts and then seek to apply them to trusts of quite a different kind'.[4] This is particularly true of superannuation or pension trusts. In *Finch v Telstra Super Pty Ltd*, the High Court of Australia pointed to a number of contextual factors that suggested the courts might apply trust law rules differently to superannuation trusts.[5] Jeffrey Hackney affirmed this sentiment when he said: 'One of the greatest errors in creative thinking in trust law is to begin unguardedly, "This is a trust therefore . . ." and to proceed to attribute to it the characteristics of the express private institutional trust.'[6]

Yet, despite the acknowledgement that different types of express trusts should be treated differently, there remains within trusts case law and scholarship a very strong thread of commitment to a central unity in trust law. This monist doctrinal theory maintains that underlying the differences between express trusts lies a single form or structure that is shared by them all. For example, in *Target Holdings* Lord Browne-Wilkinson distinguished between the 'basic principles of trust law', which are universal, and 'those specialist rules' that are not.[7] In *AIB Group (UK) plc v Mark Redler & Co Solicitors*, Lord Reed JSC clarified that *Target Holdings* should not be taken 'to say that there is a categorical distinction between trusts in commercial and non-commercial relationships, or to assert that there are trusts to which the fundamental principles of equity do not apply'.[8] In addition, a vision of trust law as a unified field underlies many, if not most, scholarly trust theories. For example, James Penner has argued for a theory

[4] [1996] AC 421, 435.

[5] (2010) 242 CLR 254, 271-2 [33]-[36] ('*Finch*').

[6] Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana, 1987) 28.

[7] *Target Holdings* (n 4) 435.

[8] *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503, 1536 [102].

of trusts, in which the unity of trust law is not found in function, but in form:[9] the trust is a unique doctrinal relationship that can be adapted for many different purposes.[10] Similarly, Paul Matthews has said that 'with the trust, one size fits all, rather like a t-shirt'.[11] That is, trusts are flexible, not because the legal form is completely malleable, but because the single form can be used for many purposes.[12] This strong monist thread in trust law sees the trust as one of the conceptual building blocks of the law.[13]

Questions have arisen about whether the monist doctrinal theory can be sustained. As Graham Moffat pointed out in 1992, there is a tension between the adaptability of trusts and the integrity of the subject.[14] This tension reaches a critical intensity when the changing social uses of trusts drive evolution of the trust form. This evolution occurs through lawyers creatively and incrementally changing how they draft trust instruments,[15] which we can safely assume is driven by clients' interests more than commitment to the integrity of the trust form.

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[9] Form is frequently contrasted with substance, however, there are several levels to this distinction. One is the distinction between a formal label and the legal substance, but another is the distinction between the legal substance and the economic, moral or social substance: see Birke Häcker, '"Substance over Form": Has the Pendulum Swung Too Far?' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 35. Here the legal form of a trust means the rights, duties, powers and other legal incidents that are the subjects of legal analysis: see below Part VI(A).

[10] JE Penner, 'An Untheory of the Law of Trusts' (2010) 63(1) *Current Legal Problems* 653 ('Untheory').

[11] Paul Matthews, 'The Place of the Trust in English Law and in English Life' (2013) 19(3–4) *Trusts & Trustees* 242, 245.

[12] On the relationship between legal form and social function see O Kahn-Freund's introduction in Karl Renner, *The Institutions of Private Law and Their Social Functions*, ed O Kahn-Freund, tr Agnes Schwarzschild (Routledge & Kegan Paul, 1949) 38–43.

[13] See *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588, 595 [5] (Gaudron, McHugh, Gummow and Hayne JJ) ('*Associated Alloys*').

[14] Moffat (n 2) 126.

[15] See also Lionel Smith, 'Massively Discretionary Trusts' (2017) 70(1) *Current Legal Problems* 17, 53.

While there have been many changes to trust drafting practices over the last century,[16] one of the most significant is the dramatic increase in the use and acceptance of 'discretionary' trusts, broadly defined,[17] and particularly those that Lionel Smith has labelled 'massively discretionary'.[18] The development of discretionary trusts directly challenges the notion that trusts are united by a central unity of form. While other types of trusts, such as superannuation trusts, may also be analysed as new forms of trusts,[19] discretionary trusts are the focus of this thesis because they present uniquely doctrinal differences that go to the heart of the trust relationship and form the foundation that other types of trusts build on.

## II RESEARCH QUESTIONS

The purpose of this thesis is to use the differences between fixed and discretionary trusts to explore the tension between adaptability and integrity, and to question the dominant monist conception of trusts. It asks how the rise of discretion has changed the doctrinal nature of express trusts and whether that change is conceptually coherent[20] or not. The answer that will be given to this question raises a further question. It asks what

[16] See, eg, Adam S Hofri-Winogradow, 'The Stripping of the Trust: A Study in Legal Evolution' (2015) 65(1) *University of Toronto Law Journal* 1.

[17] In this chapter, 'discretionary trusts' is used to refer to any trust where the trustees have a significant discretion to determine the ultimate distribution of trust assets. Therefore, following the argument concluded in Chapter 4, it includes fixed trusts subject to discretionary powers of appointment.

[18] Smith, 'Massively Discretionary Trusts' (n 15).

[19] See Marina Milner, 'Pension Trusts: A New Trust Form' [1997] (Mar-Apr) *Conveyancer and Property Lawyer* 89; Scott Chareneka, 'Legal Darwinism: The Evolution of a New Trust Species' (2000) 11(2) *Insurance Law Journal* 120 (author's name given as Chareneka, not Charaneka, in original); David Hayton, 'Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts' [2005] (May-Jun) *Conveyancer and Property Lawyer* 229.

[20] See below text to n 127.

higher-level theories are available to resolve any incoherence produced by the changed doctrinal nature of trusts.

The subject of these research questions is the doctrinal nature of trusts. This means their constitutive legal form, which is found in the rights and duties that lie between the trustees and beneficiaries, in other legal rules or incidents connected to that relationship, and in general principles that underlie the rules. It is a fundamental assumption of this thesis that the constitutive form of a trust is some form of legal relationship between trustees and beneficiaries.[21] The interrogation of this subject involves a claim that the trust form is not settled, positive law. This might raise an objection that the trust form is in fact settled, because it is possible to define that form.[22] For example, a general definition of an express trust is a person obliged to hold title to assets for the benefit of others.[23] The answer is that this definition is so general that it obscures disagreement. Thus, the research questions set for this thesis are as follows. First, what does 'hold for the benefit of' mean? Second, how has that meaning changed? Third, is that change in meaning conceptually coherent? And fourth, could any ongoing incoherence in what it means be resolved by higher-level theories of the trust?

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[21] See *Spellson v George* (1987) 11 NSWLR 300, 315–6.

[22] For example, James Penner has argued that

> one almost never encounters legal disagreement as to its [the trust device's] core rules or principles, for as an artificial, facilitative construct of this kind, to dispute the core rules or principles would be to dispute the existence of the device itself. It *is* nothing but its core rules and principles.

Penner, 'Untheory' (n 10) 666 (emphasis in original). However, Penner also noted that there was a question whether the development of discretionary trusts had changed what he had identified as the core constitutive principles: at 664 n 18. This is the question explored in this thesis.

[23] See *Trusts Act 2019* (NZ) s 13; *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614, 622 (Dixon J).

## III THESIS OUTLINE

The argument presented as an answer to the first and second research questions will be that the nature of trusts has changed through the establishment of a new administrative model of discretionary trusts. It is distinct from the traditional proprietary[24] model of fixed trusts. In response to the third question, while the acceptance of distinctive discretionary trusts reduces the incoherence existing between the law of trusts and powers, much incoherence remains within the administrative model, where the trustee-beneficiary relationship remains underdeveloped. The fourth question will be answered with an argument that public law can be drawn on to develop a higher-level theory that resolves the remaining incoherence within discretionary trusts.

Chapter 2 sets the foundation of the thesis by describing the trustee-beneficiary relationship as it exists in fixed trusts. The core of this relationship is that a fixed beneficiary has an individual right, against the trustee, to access a specific benefit from the trust assets. This right represents a gift from the settlor to the beneficiary, which is meanwhile managed by the trustees.[25] The trustees have a correlating duty to ensure that the benefit of the trust assets is only made available to the entitled beneficiaries. The beneficiary's right is a distributive entitlement as it gives the beneficiary a right to access the benefit of assets and is immune from divestment at the volition of others. This right-duty relationship is given conceptual unity by proprietary principles, as they manifest in

[24] This is not an anti-obligational property model but a model that acknowledges that its proprietary appearance is crafted out of obligations: see below text to nn 63–76. See also SFC Milsom, *Historical Foundations of the Common Law* (Butterworths, 1969) xi.

[25] See FH Lawson and Bernard Rudden, *The Law of Property* (Clarendon Press, 2nd ed, 1982) 55.

equity. This proprietary fixed trust model is the traditional conceptualisation of trusts and, thus, the archetypal model.

Chapter 3 distinguishes fixed and discretionary trusts by analysing the distinct trustee-beneficiary relationship in the trust power found in *Re Baden's Deed Trusts; McPhail v Doulton* ('*Baden*').[26] This type of discretionary trust is chosen because it is, historically and conceptually, the central case of discretionary trusts. In contrast to the fixed trust, the beneficiary of a trust power does not have an individual right to access any benefit from the trust assets, because the trustees have power to decide who should receive the benefit. Instead, the core of the trustee-beneficiary relationship is formed by constraints on how the trustees exercise their power, and through which the beneficiaries can hold them accountable for their decisions. That is, the beneficiaries have procedural, not distributive, entitlements, which regulate the trustees' decision-making. These entitlements include external constraints on whom the trustees can distribute benefits to and internal constraints on how the trustees decide between eligible beneficiaries. The lack of any right to access a specific benefit from the assets means that proprietary principles only fit part of the relationship. That is, while exclusionary, or 'ring-fencing', proprietary concepts fit with the external constraints that restrict to whom the trustees can distribute benefits, within those limits equitable proprietary principles do not characterise the trustee-beneficiary relationship. Instead, that relationship is characterised by the administrative principle of a constrained discretion.

Chapter 4 demonstrates the value of a pluralist account by resolving a longstanding tension between trust law and the law of powers. Many trusts take the form of a fixed

[26] [1971] AC 424.

trust in default that is subject to a discretionary power of appointment. Historically, trusts and powers have been seen as governed by distinct areas of law. For example, the trust in default has been conceptualised as an ordinary fixed trust, albeit with defeasible interests. The key work here is Lionel Smith's recent account of 'Massively Discretionary Trusts',[27] which clearly sets out the orthodox position. This chapter utilises Smith's insights to argue for an alternative interpretation that integrates trusts and powers through the discretionary trust model. It argues that the rights and duties between trustees and default beneficiaries, and those between trustees and discretionary objects, are indistinguishable in substance from the rights and duties that obtain in Chapter 3's trust power relationship. Thus, any arrangement where the trustees hold distributive discretions is best conceptualised under the administrative trust model.

Chapter 5 commences the analysis of the core of the administrative model, which is the beneficiaries' procedural entitlements that regulate trustee decision-making with respect to distribution. It will be argued that this relationship is critically underdeveloped and lacks coherence. There are many uncertainties about the nature of constraints on the trustees' discretion. This chapter develops a nested structure of conceptual frameworks to comprehend the complex system of law that regulates this area. It then commences the application of those frameworks to analyse and describe the various duties that have been applied to distributive discretions. It demonstrates that there is considerable uncertainty about the existence and meaning of decision-making duties.

Chapter 6 continues the analysis of the core of the administrative model by considering additional factors that affect the regulation of trustees' distributive decision-

[27] Smith, 'Massively Discretionary Trusts' (n 15).

making. These factors include barriers to the effective enforcement of the decision-making duties and consideration of variables that affect whether the duties are applied or not. The cumulative effect of the overlapping uncertainties in trustee regulation is the impossibility of determining how a discretion will be constrained in any particular case. This underdevelopment means that there is a multiplicity of possible types of discretionary trust relationships. Unlike the fixed trust — where every beneficiary has the same type of right that differs only in how much benefit it secures — in discretionary trusts different beneficiaries may have completely different sets of rights. These different possible sets can be plotted roughly on a spectrum of high-accountability to low-accountability trusts. Moreover, the uncertainty in this field means that settlors cannot determine in advance exactly where on the spectrum their trusts will fall.

Finally, Chapter 7 argues that resolution of the incoherence that remains in the administrative model depends on higher-level theories of discretionary trusts. The chapter considers a contractarian theory, which would accept the multiplicity of discretionary trusts and resolve the current indeterminacy in favour of predictability for settlors. Contractarian theory does this by elevating the text of the trust instrument as the primary source of regulatory guidance. However, this theory raises the problem of the 'irreducible core'. It is then argued that the incoherence is better resolved by an alternative theory inspired by public law. The public law theory operates on the necessary and universal purpose of all discretionary trusts, which is that the trustees' discretion is intended to benefit the beneficiaries. This purposive approach supports high-accountability regulation as a mandatory feature of discretionary trusts and overrides any attempts in the trust instrument to reduce the trustees' accountability. This theory

resolves the incoherence identified in Chapter 5, while maintaining the legitimacy of discretionary trusts as an institution.

## IV THESIS SCOPE

The argument set out above does not consider all interesting or relevant questions related to the research questions. In the interests of space and focus, the argument is limited by four decisions about the scope of the project.

First, the jurisdictions considered in the project will be limited to Australia, New Zealand, England and Wales, and Canada. These are chosen because judges in Australia routinely refer to these jurisdictions' trust law cases[28] and a broad consistency in trust practice has been observed between those countries.[29] Other common law jurisdictions such as India, the United States of America and South Africa will not be considered because citation of their law is less common in Australia.[30] 'Offshore'[31] jurisdictions will be referred to on occasion, but no claims will be made about the nature of trusts within them because they have been altered by legislation more than 'onshore' jurisdictions.

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[28] This can partly be explained by the historical links that existed through sharing the Privy Council as the highest appellate court: see *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250, 273 [45] (Lord Neuberger PSC for the Court).

[29] *Breakspear v Ackland* [2009] Ch 32, 44 [32] (Briggs J).

[30] This tendency not to look at jurisdictions further afield is sometimes lamented: William Gummow, 'Knowing Assistance' 87(5) *Australian Law Journal* 311, 311.

[31] There is of course a debate about what this means. It is arguable that New Zealand shares several characteristics with more typical offshore jurisdictions: see, eg, Neil Chenoweth, 'The Panama Papers: NZ: The Quiet Tax Haven Achiever', *Australian Financial Review* (online, 4 April 2016) <https://www.afr.com/companies/financial-services/the-panama-papers-nz--the-quiet-tax-haven-achiever-20160401-gnvw7s>; John Shewan, *Government Inquiry into Foreign Trust Disclosure Rules* (Report, 20 June 2016) 6 <https://treasury.govt.nz/publications/information-release/government-inquiry-foreign-trust-disclosure-rules>. However, for this thesis it means small states where trust law is primarily shaped to attract foreign capital.

Second, the thesis is restricted to express trusts and excludes consideration of constructive and resulting trusts. This is because constructive and resulting trusts are subject to additional debates about whether they are truly 'trusts' and the extent to which they are coherent concepts.[32] Although I agree with Ben McFarlane that constructive and resulting trusts are trusts,[33] this thesis will set aside that question in order to provide a deeper analysis of express trusts. 'Express trusts' are defined as those arising from an intention of the parties to create a binding relationship that the law characterises as a trust. However, it does not imply any particular standard of evidence. The intention can be proven by inference from circumstances as well as from documents.[34]

A point must be made about the content of the settlor's intention. This is not an intention to create what the settlor believes to be a trust. It is an intention to create a relationship or status that can be characterised[35] or construed[36] as a trust. It is useful here to emphasise that law is an interpretive practice: a meaning-making practice.[37] Facts,

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[32] See Keith Mason, 'Deconstructing Constructive Trusts in Australia' (2010) 4(2) *Journal of Equity* 98; Elise Bant and Michael Bryan, 'Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials' (2011) 5(3) *Journal of Equity* 171; William Swadling, 'The Fiction of the Constructive Trust' (2011) 64(1) *Current Legal Problems* 399; Elise Bant, 'Constructive Trusts, Unconscionability and the Necessity for Working Criteria' (2014) 8(3) *Journal of Equity* 259.

[33] Ben McFarlane, 'The Centrality of Constructive and Resulting Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 183.

[34] See, eg, *Paul v Constance* [1977] 1 WLR 527 ('*Paul*'); *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 618–9 (Mason CJ and Dawson J).

[35] See Paul Finn, 'Fiduciary Reflections' (2014) 88(2) *Australian Law Journal* 127, 142–3; James Allsop, 'Characterisation: Its Place in Contractual Analysis and Related Enquiries' (2017) 91(6) *Australian Law Journal* 471.

[36] See Lawrence B Solum, 'The Interpretation-Construction Distinction' (2010) 27(1) *Constitutional Commentary* 95.

[37] On interpretive practice and meaning-making see Dvora Yanow, 'Thinking Interpretively: Philosophical Presuppositions and the Human Sciences' in Dvora Yanow and Peregrine Schwartz-Shea (eds), *Interpretation and Method: Empirical Research Methods and the Interpretive Turn* (ME Sharpe, 2006) 5. On law as a product of social meaning-making in which we are all engaged see Naomi Mezey, 'Out of the Ordinary: Law, Power, Culture, and the Commonplace' (2001) 26(1) *Law and Society* 145, 149.

including a settlor's intentions, do not speak for themselves, but are only given legal meaning or significance as the 'result of viewing the act through a legal system'.[38] Thus, the creation of a trust requires both the settlor's actions and the 'reasonable person' that observes those actions through a legal frame and interprets, or characterises, them to mean the creation of a trust.[39] The settlor's subjective intention that the relationship should be interpreted as a trust, or not, is not determinative.[40] Moreover, while the settlor's intention is necessary to the creation of an express trust, many of the rights and duties established by the trust will not be directly derived from that intention, but from the characterisation.[41] As stated by Barrett JA: 'The terms of the trust have, in the eyes of equity, an existence that is independent of the provisions of the deed that define them.'[42] This all means that the blunt distinction between express and implied trusts in *Cook v Fountain* is not entirely correct.[43] Express trusts are not 'raised and created by act of the parties'[44] alone but, exactly like non-express trusts, require 'the application of established equitable principle

[38] Margaret Davies, *Asking the Law Question* (Lawbook, 4th ed, 2017) 6.

[39] On the reasonable person generally see John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131(Oct) *Law Quarterly Review* 563.

[40] Settlors may create relationships that are characterised as trusts without being subjectively aware of the legal meaning of their actions: see, eg, *Paul* (n 34). Alternatively, they may subjectively believe they are creating a trust, but objectively create a relationship that cannot be characterised in law as a trust. This is the 'illusory trust' problem: see *Clayton v Clayton* [2016] 1 NZLR 551 (SC), 583 [123]; Mark Bennett, 'Competing Views on Illusory Trusts: The *Clayton v Clayton* Litigation in Its Wider Context' (2017) 11(1) *Journal of Equity* 48. See generally Finn (n 35) 143; Häcker (n 9) 38–45.

[41] See Chapter 2 Part IV and Chapter 7 Part III(B)(2) where arguments are made about the characterisation of facts as fixed trusts and discretionary trusts.

[42] *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753, 763 [42].

[43] *Cook v Fountain* (1676) 3 Swans 585; 36 ER 984, 987:

> All trusts are either, first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law…

[44] Ibid.

to a particular set of facts'.[45] Likewise, non-express trusts are also raised and created, in part, by the acts of the parties. The distinction between express and non-express trusts is that the facts that can be characterised as an express trust must include the settlor voluntarily inviting a duty to hold assets for the benefit of others.

Third, this thesis will distinguish between the two primary roles or functions that trustees perform: management and distribution.[46] A large part of express trust law and commentary is focused on the exercise of managerial discretions such as investment. This makes sense because the provision of management services — protecting and growing the trust fund — is one of the important functions of trusts.[47] However, this thesis will focus on the distributive role, which is the gratuitous disposal of assets to beneficiaries.[48] This focus is for two reasons: it is through distribution that the economic value accumulated in trusts is made available to individuals, which means it is necessary to understand this side of trusts to understand how they are used; and it is the distributive flexibility of trusts that distinguishes them from other structures like companies and gifts.

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[45] Thomson Reuters, *Ford and Lee: The Law of Trusts* (online at 25 October 2019) [22.040] ('*Ford and Lee*'). The quoted phrase is used by the authors in an attempt to distinguish constructive trusts from express trusts.

[46] A more common way of framing this distinction is between administrative and dispositive discretions: see, eg, *Pearson v Inland Revenue Commissioners* [1981] AC 753, 774–5 (Viscount Dilhorne). This thesis uses the term 'management' instead of 'administrative' because in discretionary trusts the descriptor 'administrative' is equally well suited to the trustees' dispositive discretions as to the management discretions. See also Chapter 2 Part II(A).

[47] Indeed, Brooke Harrington has found many trust managers see their role of protecting and growing the trust fund as an end in itself, which is divorced from any goal of benefiting beneficiaries. That is, trust managers may see their role as preventing distribution: *Capital without Borders: Wealth Managers and the One Percent* (Harvard University Press, 2016) 215–7.

[48] There is no sharp distinction between distribution and management. For example, a sale of trust assets to a beneficiary at less than the market value has features of both roles. See Chapter 2 Part II(A).

Fourth, Quistclose trusts are excluded from the thesis. There is a clear distinction between the relationship in *Barclays Bank Ltd v Quistclose Investments Ltd* ('*Quistclose*')[49] and other types of trusts. The difference is that a Quistclose trustee is intended to transfer assets in exchange for a release of debt owed by the trustee, rather than as a gratuitous transfer to benefit the beneficiary. In *Quistclose*, the trustee, Quistclose Investments Ltd, was obliged to transfer the funds to its shareholders in satisfaction of debts that the trustee owed them with respect to a dividend.[50] This difference raises difficult issues about whether Quistclose trustees are charged with using the trust assets to benefit others or primarily charged with using them for the trustees' own benefit.[51] While further analysis may overcome this distinction, it requires more attention than can be bestowed in this thesis.

## V LITERATURE SURVEY

A range of academic literature has directly or indirectly addressed the above research questions. First, there is doctrinal work that analyses the formal structure of trusts. This literature can be divided into five main conversations: trust definitions; the rise of discretionary trusts after *Baden*;[52] the obligational or proprietary nature of trusts; the irreducible core of trusts; and the regulation of trustee decision-making. Second, there is significant work at a higher level of theory that analyses trust law through external

[49] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 ('*Quistclose*').

[50] Ibid 580.

[51] See JE Penner, 'Distinguishing Fiduciary, Trust and Accounting Relationships' (2014) 8(3) *Journal of Equity* 202, 220 ('Distinguishing').

[52] *Baden* (n 26).

normative principles. This type of work requires an account of the formal nature of trusts, and it also acknowledges that doctrinal work benefits from external perspectives.[53]

The first area of literature is the textbooks and scholarship that offer definitions or descriptions of the trust form. Common features of the trust highlighted in these definitions include: a duty on the trustee; equitable enforcement of that duty; a connection between the duty and assets the trustee owns or holds title to; and that the content of the duty is to hold that interest for the benefit of someone.[54] The limitation of most definitions is that they do not explore the ambiguity of that last feature. Some definitions reverse the duty's content: the idea of trustees benefiting others' becomes the idea of trustees not benefiting themselves.[55] This heightens the ambiguity as it requires the disclaimer that this is only a default duty that can be completely excluded by authorising the trustees to benefit themselves.[56] One definition that admirably recognises the ambiguity is Simon Gardner's; he identifies trustees as those obliged 'to handle [property] in a certain way'.[57] Unlike these monist general definitions, the pluralist account presented in this thesis

[53] On internalist and externalist accounts of private law see Alan Brudner, *The Unity of the Common Law* (Oxford University Press, 2nd ed, 2014) 56–58.

[54] See the definitions in *Ford and Lee* (n 45) [1.010]; JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) [1-01]; Penner, 'Distinguishing' (n 51) 202; Geraint Thomas and Alastair Hudson, *The Law of Trusts* (Oxford University Press, 2nd ed, 2010) [1.01]; David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (LexisNexis, 18th ed, 2010) [1.1]; Walter G Hart, 'What Is a Trust?' (1899) 15(Jul) *Law Quarterly Review* 294, 301.

[55] See, eg, McFarlane (n 33) 184.

[56] Ibid.

[57] Simon Gardner, *An Introduction to the Law of Trusts* (Oxford University Press, 3rd ed, 2011) 2:

> A trust is a situation in which property is vested in someone (a trustee), who is under legally recognized obligations, at least some of which are of a proprietary kind, to handle it in a certain way, and to the exclusion of any personal interest.

produces two distinct definitions for fixed and discretionary trusts. This resolves the ambiguities to allow more precise definitions of the trustee's duty to hold.

The second academic conversation lies in articles commenting on the House of Lords decision in *Baden*.[58] Much commentary and many case notes concentrate on the test of certainty that was the most obvious issue in the case.[59] However, several important papers identify, that underneath the certainty issue, Lord Wilberforce's acceptance of broad discretionary trusts revolutionised the trust concept. They include articles by Yuri Grbich, JW Harris, RL Congreve, and Susan Fradley, among others.[60] Following on from this conversation is a broader debate about the variety of forms of trusts by JD Davies and Patrick Parkinson.[61] Chapter 3 adopts the claim in this literature that *Baden*[62] was revolutionary. It then builds on the literature by presenting an analysis of discretionary trusts as a distinct type of trust relationship. This thesis builds on Davies and Parkinson's work in that it argues that plural conceptions of the trust form can reduce the chaos in trust law.

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[58] *Baden* (n 26).

[59] See, eg, John Hopkins, 'Certain Uncertainties of Trusts and Powers' (1971) 29(1) *Cambridge Law Journal* 68; L McKay, 'Re Baden and the Criterion of Validity' (1973-75) 7(3) *Victoria University of Wellington Law Review* 258; RP Austin, 'Discretionary Trusts: Conceptual Uncertainty and Practical Sense' (1980) 9(1) *Sydney Law Review* 58; Paul Matthews, 'A Heresy and a Half in Certainty of Objects' [1984] (Jan-Feb) *Conveyancer and Property Lawyer* 22; Peter Creighton, 'Certainty of Objects of Trusts and Powers: The Impact of *McPhail v Doulton* in Australia' (2000) 22(1) *Sydney Law Review* 93.

[60] Yuri Grbich, 'Baden: Awakening the Conceptually Moribund Trust' (1974) 37(6) *Modern Law Review* 643; JW Harris, 'Trust, Power and Duty' (1971) 87(Jan) *Law Quarterly Review* 31; RL Congreve, 'Trust-Powers and Trusts' (1973-75) 7(4) *Victoria University of Wellington Law Review* 393; Susan Fradley, 'A Bird's Eye View of Baden' (1975) 4(4) *Anglo-American Law Review* 442; JD Davies, 'Trusts' in HWR Wade and Harold L Cryer (eds), *Annual Survey of Commonwealth Law 1970* (Butterworths, 1971) 187.

[61] JD Davies, 'The Variety of Express Trusts' (1986) 8(3) *University of Tasmania Law Review* 209; Patrick Parkinson, 'Chaos in the Law of Trusts' (1991) 13(2) *Sydney Law Review* 227.

[62] *Baden* (n 26).

The third conversation is about the conceptualisation of trusts as proprietary or obligational. Although it can be treated as one conversation[63] it deals with two distinct questions. First, there is a very long-standing debate about the characterisation of beneficiaries' rights as personal or proprietary. The subject of the debate is the exigibility of beneficiaries' rights against third parties and whether, like legal property rights, they are rights *in rem*, against the world generally,[64] or rights *in personam* that arise because third parties' consciences are impugned. Austin Scott and Harlan Stone famously debated this point in the *Columbia Law Review*.[65] This question has re-emerged in more recent debates: the scholarship that distinguishes between beneficiaries' exclusionary rights against third parties and positive rights against trustees, and only categorises the former as proprietary;[66] and the 'rights in rights' theory. The latter theory conceptualises beneficiaries' rights against third parties as attaching to the trustees' rights rather than

[63] See, eg, Peter Jaffey, 'Explaining the Trust' (2015) 131(Jul) *Law Quarterly Review* 377.

[64] The term *in rem* can be used with two distinct emphases. Some, like Hohfeld, insist that *in rem* means the number of strangers against whom the right may be exercised: Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710, 713–7. Others, however, emphasise that it means a right attached to a thing: see Henry E Smith, 'Property as the Law of Things' (2012) 125(7) *Harvard Law Review* 1691, 1706.

[65] Austin Wakeman Scott, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17(4) *Columbia Law Review* 269; Harlan F Stone, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17(6) *Columbia Law Review* 467, 477. See also JB Ames, 'Purchase for Value Without Notice' (1887) 1(1) *Harvard Law Review* 1, 9; CC Langdell, 'A Brief Survey of Equity Jurisdiction' (1887) 1(2) *Harvard Law Review* 55, 60; John W Salmond, *Jurisprudence* (Stevens & Haynes, 2nd ed, 1907) 230–32; FW Maitland, *Equity*, ed AH Chaytor and WJ Whittaker (Cambridge University Press, 1929) 111–21; Walter G Hart, 'The Place of Trust in Jurisprudence' (1912) 28(Jul) *Law Quarterly Review* 290; HG Hanbury, 'A Periodical Menace to Equitable Principles' (1928) 44(Oct) *Law Quarterly Review* 468; Valentine Latham, 'The Right of the Beneficiary to Specific Items of the Trust Fund' (1954) 32(5) *Canadian Bar Review* 520; DWM Waters, 'The Nature of the Trust Beneficiary's Interest' (1967) 45(2) *Canadian Bar Review* 219; Darrell Barnett, 'The Nature of a Beneficiary's Interest in the Assets of an Express Trust' (2004) 10(3) *Australian Property Law Journal* 169.

[66] Lionel Smith, 'Unravelling Proprietary Restitution' (2004) 40(3) *Canadian Business Law Journal* 317, 321–2; Richard Nolan, 'Equitable Property' (2006) 122(Apr) *Law Quarterly Review* 232.

directly attaching to the trust assets.[67] Second, the distinction between a proprietary and an obligational conception of trusts is used to make sense of changes brought about by *Baden*.[68] This was pioneered by David Hayton and Patrick Parkinson,[69] and can be found in work by James Penner, Jessica Palmer, Peter Jaffey and Charles Rickett.[70] The two debates overlap;[71] however the latter debate is much broader. This thesis only engages with the first debate to the extent of rejecting the sharp boundary between personal and property rights. This thesis accepts that personal rights, such as choses in action, can be understood as proprietary in a meaningful sense.[72] Otherwise it is agnostic about how beneficiaries' rights against third parties should be characterised, because its prime focus is the relationship between the trustees and beneficiaries, rather than that between beneficiaries and third parties. In contrast, this thesis is closely engaged with the second debate, which uses the distinction between property and obligation to make sense of the

[67] For the rights in rights analysis see Lionel Smith, 'Trust and Patrimony' (2009) 28(4) *Estates, Trusts & Pensions Journal* 332, 342–4; Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4(1) *Journal of Equity* 1; Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 219, 240–2; James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129(Jan) *Law Quarterly Review* 66, 72–4. For critique of the rights in rights analysis: see JE Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27(2) *Canadian Journal of Law and Jurisprudence* 473; Jaffey (n 63) 383–5.

[68] *Baden* (n 26).

[69] David Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117(Jan) *Law Quarterly Review* 96; Patrick Parkinson, 'Reconceptualising the Express Trust' (2002) 61(3) *Cambridge Law Journal* 657.

[70] JE Penner, 'Exemptions' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 241; Jessica Palmer, 'Theories of the Trust and What They Might Mean for Beneficiary Rights to Information' [2010] (3) *New Zealand Law Review* 541; Jaffey (n 63); Jessica Palmer and Charles Rickett, 'The Revolution and Legacy of the Discretionary Trust' (2017) 11(2) *Journal of Equity* 157.

[71] See Palmer and Rickett (n 70) 160. A particular point of overlap is the question whether a discretionary beneficiary has the same rights against third parties as a fixed beneficiary: Nolan, 'Equitable Property' (n 66) 256–7; Smith, 'Massively Discretionary Trusts' (n 15) 22; Richard Nolan, 'Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2017) 151 ('Invoking').

[72] See Chapter 2 Part III(A).

rise of discretionary trusts. For example, like Palmer and Rickett, this thesis accepts that *Baden*[73] led to a revolution in the trust form that has moved trusts away from a proprietary conception towards a non-proprietary conception, with significant consequences for trust law.[74] However, the thesis departs from this literature on several key points. First, by not engaging with the question whether beneficiaries have genuine property rights that attach to trust assets, the thesis can move away from the property-obligation framework. Instead, the thesis starts from the assumption that analysis of the trustee-beneficiary relationship is necessarily an analysis of the trustee's obligations. The thesis argues that some beneficial interests can be understood as proprietary because it is possible for personal rights against trustees to 'counterfeit' a proprietary function.[75] Second, this exposes a weakness in the property-obligation dichotomy, which is that obligation is an extremely broad concept. That is, Palmer and Rickett's obligational conception of trusts contains a multitude of possibilities; it is not limited to the contract-like conception to which they allude.[76] Thus, the thesis abandons the property-obligation framework in favour of an obligation-obligation framework: equitable proprietary obligations contrasted with administrative obligations. The contrast is not between obligations and non-obligations, but between different types of obligations owed by the trustees. Thus, this thesis moves the debate forward.

The fourth conversation engages with the question of the irreducible core of the trust relationship. Pioneered again by David Hayton,[77] this scholarship is conceptual analysis

[73] *Baden* (n 26).

[74] Palmer and Rickett (n 70).

[75] Milsom (n 24) xi.

[76] Palmer and Rickett (n 70) 157.

[77] David Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47.

of the essentialist variety,[78] which seeks the core of the trust relationship.[79] The distinctiveness of this work is that it pays great attention to a settlor's ability to modify and contract out of the terms of a trust. While this thesis also pays attention to contracting out and the essence of the trust form, it uses a 'central case' or 'typical case' type of analysis,[80] which the irreducible core literature does not. The irreducible core approach is what might be called an 'extreme case' analysis that focuses on cases that are close to the boundary of a category. This is useful because it can help identify the precise point at which the category ceases to apply. However, the extreme case may also not authentically represent the category. Therefore, if its qualities, or lack of qualities, are generalised to the rest of the category, that may weaken the conception of the entire category. Thus, the risk of too close a focus on the absolute minimum core is that it supports the diminishing, or stripping, of the trust.[81] In contrast, a central case analysis focuses on representative examples of the category. Thus, it can recognise that there is fuzziness at the boundary between categories. Instead of focusing on precisely pinpointing the boundary it focuses on developing a robust distinction between the centres of the two categories. The position taken in this thesis is that questions about the precise

[78] See, generally, Teresa Robertson and Philip Atkins, *The Stanford Encyclopedia of Philosophy*, ed Edward N Zalta (online at 4 September 2019) 'Essential vs Accidental Properties' <https://plato.stanford.edu/archives/spr2018/entries/essential-accidental/>.

[79] See also Alexander Trukhtanov, 'The Irreducible Core of Trust Obligations' (2007) 123(Jul) *Law Quarterly Review* 342; T Zhong Wei Tan, 'The Irreducible Core Content of Modern Trust Law' (2009) 15(6) *Trusts & Trustees* 477; David Fox, 'Non-Excludable Trustee Duties' (2010) 17(1) *Trusts & Trustees* 17; Daniel Clarry, 'The Irreducible Core of the Trust' (LLM Thesis, McGill University, 2011).

[80] On central case analysis see John Gerring, 'Case Selection for Case-Study Analysis: Qualitative and Quantitative Techniques' in Janet M Box-Steffensmeier, Henry E Brady and David Collier (eds), *The Oxford Handbook of Political Methodology* (Oxford University Press, 2008) 645, 648–50; George Pavlich, SAGE, *Encyclopedia of Case Study Research*, ed Albert J Mills, Gabrielle Durepos and Elden Wiebe (online at 27 August 2019) 'Paradigmatic Cases'; HLA Hart, 'Discretion' (2013) 127(2) *Harvard Law Review* 652, 653; Aleardo Zanghellini, 'A Conceptual Analysis of Conceptual Analysis in Analytic Jurisprudence' (2017) 30(2) *Canadian Journal of Law and Jurisprudence* 467.

[81] See Hofri-Winogradow (n 16).

boundary of a category are secondary to questions about the overall nature of categories and robust distinctions between them. The irreducible core scholarship can be contrasted with James Penner's connective analysis,[82] where he analyses trust, fiduciary and accounting relationships by identifying their differences.[83] Despite its methodological differences, this thesis is a novel addition to the irreducible core scholarship in that it argues trusts are two distinct categories that do not share an irreducible core.

The fifth conversation is about trustee decision-making and the courts' inherent jurisdiction. There has been a steady stream of work about the exercise of trustees' discretions that has over recent years become a flood.[84] A novel step taken in this thesis is to treat this area as directly relevant to the trust form. Trustee decision-making and the courts' jurisdiction to enforce trusts are not matters of enforcement or regulation separate

[82] Connective analysis analyses the relationships between concepts: see Michael Beaney, *The Stanford Encyclopedia of Philosophy*, ed Edward N Zalta (online at 26 October 2019) 'Conceptions of Analysis in Analytic Philosophy' <https://plato.stanford.edu/archives/sum2018/entries/analysis/> Parts 8-9.

[83] Penner, 'Distinguishing' (n 51).

[84] See Maurice Cullity, 'Judicial Control of Trustees' Discretions' (1975) 25(2) *University of Toronto Law Journal* 99; IJ Hardingham, 'Controlling Discretionary Trustees' (1975) 12(2) *University of Western Australia Law Review* 91; Yuri Grbich, 'Fraud on a Power: Judicial Control of Appointments by Discretionary Trustees' (1977) 3(3) *Monash University Law Review* 210; Lisa Butler, 'The Legitimate Bounds of a Trustee's Discretion' (1999) 11(1) *Bond Law Review* 14; Dimity Kingsford Smith, 'Who Knows Best? Review of Discretionary Powers in Superannuation Funds' (2000) 28(6) *Australian Business Law Review* 428; Lionel Smith, 'Can I Change My Mind? Undoing Trustee Decisions' (2008) 27(3) *Estates, Trusts & Pensions Journal* 284; RC Nolan, 'Controlling Fiduciary Power' (2009) 68(2) *Cambridge Law Journal* 293; Jonathan Evans, 'Challenging Trustee Decisions: Differing Approaches to the Supervision of the Exercise of Trustees' Powers' (2012) 26(2) *Trust Law International* 55; Jonathan Orpin, 'Reviewing "Unreasonable" Discretionary Decisions Made by Trustees' (2015) 21(2) *New Zealand Business Law Quarterly* 131; Michael Ashdown, *Trustee Decision Making: The Rule in* Re Hastings-Bass (Oxford University Press, 2015); Guy Newey, 'Constraints on the Exercise of Trustees' Powers' in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 36; Richard C Nolan, '"The Execution of a Trust Shall Be under the Control of the Court": A Maxim in Modern Times' (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 469 ('Maxim'); Mark Studer, 'Modern Trustee Decision-Making: Unpacking the Duty of Proper Consideration' (2016) 22(9) *Trusts & Trustees* 991; Nolan, 'Invoking' (n 71); JC Campbell, 'Exercise by Superannuation Trustees of Discretionary Powers' (2009) 83(3) *Australian Law Journal* 159; Daniel Clarry, *The Supervisory Jurisdiction over Trust Administration* (Oxford University Press, 2018).

from the nature of trusts; rather they are central to the trustee-beneficiary relationship. How the courts review trustee decisions is directly connected to what trusts are. This point is brought out in Chapters 5 and 6 where the regulation of trustee discretion is thoroughly analysed.

The scholarship outlined above is formalist in the sense that it engages with trust law largely on its own terms. It mostly uses principles and norms that are found within trust law itself and seeks to interpret the cases and statutes in a way that makes sense of the law. Another part of scholarship operates at a different level by looking outside trust law for illuminating insights. There are many potential sources of these external frames of interpretation. There are other areas of law; for example, JH Langbein uses contract law norms to argue that trust law's function is to provide a standard form contract with default terms.[85] There is commercial life and economics; for example, Henry Hansmann and Ugo Mattei argue that trusts have an economic function of facilitating asset partitioning and entity shielding.[86] Robert Sitkoff and MK Lau use law and economics analyses.[87] There is also sociological critique; for example, Roger Cotterrell critiques trusts as a technique for distancing owners from property power.[88] A contrasting theory is Penner's 'untheory' that claims trust law cannot be analysed with functionalist theories because

[85] JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105(3) *Yale Law Journal* 625.

[86] Henry Hansmann and Ugo Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) 73(2) *New York University Law Review* 434. See also Henry Hansmann, Reinier Kraakman and Richard Squire, 'Law and the Rise of the Firm' (2006) 119(5) *Harvard Law Review* 1333.

[87] Robert H Sitkoff, 'An Agency Costs Theory of Trust Law' (2004) 89(3) *Cornell Law Review* 621; MW Lau, *The Economic Structure of Trusts* (Oxford University Press, 2011). See also Avihay Dorfman, 'On Trust and Transubstantiation: Mitigating the Excesses of Ownership' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 339.

[88] Roger Cotterrell, 'Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship' (1987) 14(1) *Journal of Law and Society* 77.

trust law simply provides a form that can be adapted to a wide range of functions.[89] This thesis will contribute to this scholarship in Chapter 6, which will offer an alternative frame of interpretation found in public administrative law.

In addition to the literature surveyed, there are several related areas of scholarship that offer insights into the research questions. For example, comparative trust law finds important insights into the nature of trusts by comparing common law and civil law or mixed jurisdictions.[90] There has been considerable work on the nature of constructive trusts that parallels this thesis in asking whether the constructive trust category needs to be broken down into separate categories.[91] Also of interest is research on fiduciary relationships and whether the fiduciary concept has an irreducible core or multiple core meanings depending on context.[92] However, due to resource limitations, this thesis will not directly engage with this literature, although its insights into private law are appreciated.

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[89] Penner, 'Untheory' (n 10).

[90] See, eg, Maurizio Lupoi, *Trusts: A Comparative Study*, tr Simon Dix (Cambridge University Press, 2000); George L Gretton, 'Trusts Without Equity' (2000) 49(3) *International and Comparative Law Quarterly* 599; Rebecca Lee, 'Conceptualizing the Chinese Trust' (2009) 58(3) *International and Comparative Law Quarterly* 655; Smith, 'Trust and Patrimony' (n 67).

[91] See, eg, Mason, 'Deconstructing Constructive Trusts in Australia' (n 32); Bant and Bryan (n 32); Swadling (n 32); Bant (n 32); Ying Khai Liew, *Rationalising Constructive Trusts* (Hart Publishing, 2017).

[92] See, eg, Paul D Finn, *Fiduciary Obligations* (Law Book, 1977); Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010); Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7(2) *Journal of Equity* 87; Lionel D Smith, 'Can We Be Obliged to Be Selfless?' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 141 ('Selfless'); Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130(Oct) *Law Quarterly Review* 608; JD Heydon, 'Modern Fiduciary Liability: The Sick Man of Equity?' (2014) 20(10) *Trusts & Trustees* 1006.

## VI METHODOLOGY

The methodological school from which I[93] approach the research questions is private law doctrinal scholarship. However, the nature of doctrinal scholarship is highly contested and contains many traditions, movements and theoretical perspectives. For example, as Margaret Davies identifies, it can include common law 'first principles' reasoning, positivism, formalism, legal science, Dworkian interpretivism and legal realism.[94] A significant influence in private law has been Peter Birks' taxonomy project.[95] The intent of this section is to give a short summary of the theoretical perspective adopted in this thesis[96] by way of comment on analysis and interpretation.

### A *Analysis*

Doctrinal scholarship is founded on conceptual analysis, which is fundamental to legal reasoning.[97] Analysis is the detailed investigation of concepts to determine their nature, structure, essential features and connections to other concepts.[98] In private law, conceptual analysis is commonly framed as taxonomy or categorisation.[99] Taxonomy

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[93] In this section I will refer to myself in the first person to reinforce the point that the methodological assumptions and analysis in this thesis emerge from my particular standpoint: see Davies, *Asking the Law Question* (n 38) 11–2.

[94] Ibid chs 2-4. See also Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press, 2013).

[95] See Peter Birks, 'Definition and Division: A Meditation on *Institutes*' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 1.

[96] That is, I will summarise my interpretation of the type of doctrinal scholarship that I am doing: cf Hanoch Dagan, 'The Realist Conception of Law' (2007) 57(3) *University of Toronto Law Journal* 607, 609 n 18; Davies, *Asking the Law Question* (n 38) 11–2.

[97] See, eg, *Associated Alloys* (n 13) 595 [5] (Gaudron, McHugh, Gummow and Hayne JJ).

[98] See generally Beaney (n 82); Zanghellini (n 80).

[99] See David Cohen and Allan C Hutchinson, 'Of Persons and Property: The Politics of Legal Taxonomy' (1990) 13(1) *Dalhousie Law Journal* 20; Peter Birks (ed), *Classification of Obligations* (Clarendon Press, 1997); Geoffrey Samuel, 'Classification of Obligations and the Impact of Constructivist Epistemologies' (1997) 17(3) *Legal Studies* 448 ('Classification'); Geoffrey Samuel, 'Can Gaius Really Be Compared to

itself can involve three processes: distinguishing, unifying and essentialising. First, distinctions are made between different categories; for example, the central argument of this thesis that there is a distinction between fixed and discretionary trusts. Second, distinction is balanced by unification. Unification is the search for organising principles that combine or synthesise elements into unified coherent categories. Ernest Weinrib explains this unifying process:

> In the formalist view, a juridically intelligible relationship does not consist in an aggregate of conceptually disjoined or inconsistent elements that, like pebbles in a pile, happen to be juxtaposed. Rather, the relationship forms a normative unit, each feature of which expresses the unifying principle that pervades the entire relationship and that makes it a coherent juridical phenomenon.[100]

Third, both distinguishing and unifying can be aided by judicious use of 'central' and 'extreme' cases of a category.[101] For example, Chapter 2 applies the 'central case' of a fixed trust to draw out the key features and underlying principles applicable to fixed trusts as a category. Underlying these processes is the drawing out of deeper principles within the common law. Making a distinction or forming a unity requires determining what is

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Darwin?' (2000) 49(2) *International and Comparative Law Quarterly* 297; Stephen A Smith, 'Taking Law Seriously' (2000) 50(2) *University of Toronto Law Journal* 241; Stephen A Smith, 'A Map of the Common Law?' (2004) 40(3) *Canadian Business Law Journal* 364; Geoffrey Samuel, 'English Private Law: Old and New Thinking in the Taxonomy Debate' (2004) 24(2) *Oxford Journal of Legal Studies* 335; Darryn Jensen, 'The Problem of Classification in Private Law' (2007) 31(2) *Melbourne University Law Review* 516; Michael Lobban, 'Common Law Reasoning and the Foundations of Modern Private Law' (2007) 32 *Australian Journal of Legal Philosophy* 39; Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008); Kelvin FK Low, 'The Use and Abuse of Taxonomy' (2009) 29(3) *Legal Studies* 355; Emily Sherwin, 'Legal Taxonomy' (2009) 15(1) *Legal Theory* 25; Michael Lobban, 'Mapping the Common Law: Some Lessons from History' [2014] (1) *New Zealand Law Review* 21; Gerald J Postema, 'Law's System: The Necessity of System in Common Law' [2014] (1) *New Zealand Law Review* 69; Peter Watts, 'Taxonomy in Private Law: Furor in Text and Subtext' [2014] (1) *New Zealand Law Review* 107; Duncan Sheehan and TT Arvind, 'Private Law Theory and Taxonomy: Reframing the Debate' (2015) 35(3) *Legal Studies* 480.

[100] Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, rev ed, 2012) 29.

[101] On typical case analysis: see Gerring (n 80) 648–50; Pavlich (n 80); Hart, 'Discretion' (n 80) 653; Zanghellini (n 80).

relevant or important in the mass of case law, which requires generalisation towards abstract principles.

The abstract, theoretical reasoning entailed in conceptual analysis is a necessary part of common law reasoning.[102] However, the courts have sometimes criticised overly 'conceptualist' reasoning.[103] For example, the High Court of Australia has extensively criticised 'top-down' reasoning, particularly Peter Birks' taxonomy.[104] Carmine Conte and Keith Mason have argued this criticism must be treated with some scepticism, because the High Court has not been clear or consistent about what 'top-down' and 'bottom-up' mean.[105] On its face, the Court's sanctioning of 'top-down' reasoning would proscribe any deductive reasoning from abstract principles. However, the Court has accepted that general principles, which necessarily imply deductive reasoning, have a legitimate place, such as in reasoning by analogy and distinguishing precedent.[106]

Overall, discomfort with conceptualist reasoning will be reduced by the modest scope of taxonomy that I undertake in this thesis. First, the categorisation is localised, like

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[102] See Cohen and Hutchinson (n 99) 22–9; Smith, 'Taking Law Seriously' (n 99) 242–4; Keith Mason, 'Do Top-down and Bottom-up Reasoning Ever Meet?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 19; Dagan (n 94) ch 6; Bant (n 32); Carmine Conte, 'From Only the "Bottom-up"? Legitimate Forms of Judicial Reasoning in Private Law' (2015) 35(1) *Oxford Journal of Legal Studies* 1.

[103] See, eg, *Quistclose* (n 49) 581 (Lord Wilberforce); *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 224 [16] (Lord Steyn).

[104] *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544 [72]-[73] (Gummow J) ('*Roxborough*'); *Harriton v Stephens* (2006) 226 CLR 52, 102 [163] (Hayne J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 158 [154]; *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 662 [77] (Gummow, Hayne, Crennan and Kiefel JJ); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 300-1 [90]-[94].

[105] Mason, 'Do Top-down and Bottom-up Reasoning Ever Meet?' (n 102); Conte (n 102); Keith Mason, 'Strong Coherence, Strong Fusion, Continuing Categorical Confusion: The High Court's Latest Contributions to the Law of Restitution' (2015) 39(3) *Australian Bar Review* 284.

[106] See *Roxborough* (n 104) 544 [72] (Gummow J).

Hanoch Dagan's realist approach to taxonomy.[107] Therefore, it should not attract the criticism drawn by projects that categorise broader swathes of private law.[108] Second, I do not propose an idealist, universal taxonomy, but only propose a contingent categorisation that acknowledges the law's dynamism and historical development.[109] Third, I make no commitment to hermetically sealed categories,[110] but accept that categories may overlap or merge into one another.[111] For example, I accept that there is no clear sharp boundary between fixed and discretionary trusts, or between trusts and other types of duties relating to assets. These commitments do expose my methodology to other criticisms, such as indeterminacy and mixing law and morality, which I believe are met by the constraints of interpretation.[112]

### B *Interpretation*

At this point, it is necessary to acknowledge my theoretical assumption that doctrinal scholarship, which is tasked with identifying the law of a particular area, is interpretive.

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[107] See Dagan (n 94) 66.

[108] See, eg, Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1; Peter Birks (ed), *English Private Law* (Oxford University Press, 2000); Ernest Joseph Weinrib, *Corrective Justice* (Oxford University Press, 2012). Even those who are sceptical of Birksian taxonomy agree that categorising and analysing are essential steps in acquiring knowledge of law: Samuel, 'Classification' (n 99) 448–9; Samuel, 'Can Gaius Really Be Compared to Darwin?' (n 99) 229; Joachim Dietrich, 'What Is "Lawyering"?: The Challenge of Taxonomy' (2006) 65(3) *Cambridge Law Journal* 549, 576.

[109] Sheehan and Arvind describe this type of taxonomy as developmental: Sheehan and Arvind (n 99) 496–500. See also Cohen and Hutchinson (n 99); Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003); Lobban, 'Mapping the Common Law: Some Lessons from History' (n 99); Postema (n 99) 80.

[110] One result of Peter Birks' commitment to separate categories was the argument that the proper level for taxonomy is claims directly vindicated in court rather than underlying or superstructural concepts, which were more likely to overlap: see Birks, *Classification of Obligations* (n 99) 11–2; Lobban, 'Mapping the Common Law: Some Lessons from History' (n 99) 25; Watts (n 99) 125.

[111] See Dagan (n 94) 140–2.

[112] See below text to n 117.

As noted above, the application of law by judges is an interpretive practice, in that it gives legal meaning to facts.[113] I suggest that the same relationship applies to scholarship, in that it is a practice of giving meaning to the aggregate of judgments and legislation. Legal texts need to be given meaning in order to be relevant to any question of what the law is. For example, as Margaret Davies has pointed out, if judgments have no value as precedent then they have no meaning for anyone beyond the parties involved.[114] At a narrow level, common law doctrinal scholarship attempts to explain what a judgment means given the background of all other meaningful judgments and legislation.[115] At a wider level, it attempts to explain what broader areas of legal texts mean when assessed together. For example, what do the cases and statutes mean for the conception of trusts? In terms of taxonomy, drawing out distinctions or unified categories from the legal materials is an interpretation of those materials.

Interpretation lies in a middle ground between description and prescription. It is not purely description of the law, because it goes beyond repetition of the legal materials and description of what people do with them. It involves generalisations about the law that inevitably claim that some decisions are incorrect.[116] On the other hand, it is also not purely invention because it is constrained.[117] A critical question is what provides the constraint. One constraint is the documentary foundation: there is usually no

[113] See above text to nn 35–45.

[114] Davies, *Asking the Law Question* (n 38) 69. Compare Michael S Moore's claim that the non-binding nature of precedent in the United States of America means earlier judgments are not texts to be interpreted in later cases: 'Interpreting Interpretation' in Andrei Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press, 1995) 1, 24–5.

[115] Cf Davies, *Asking the Law Question* (n 38) 144.

[116] Cf Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 230.

[117] Dagan (n 96) 609 n 18. But see Brudner (n 53) 338.

disagreement about what words are recorded in the law reports or statutes,[118] only disagreement about what they mean in the aggregate. Another constraint is language, which is neither completely determinate or indeterminate.[119] Finally, for interpretivists operating in the common law system, the doctrine of precedent is the most important constraint but may give way to other considerations. This is the question of how well a doctrinal interpretation fits the law reports.[120] At one extreme, an interpretation may attempt to fit, or explain, every reported case that has not been overruled, which will inevitably produce a contorted or incoherent account. At the other extreme, an interpretation may generalise from a few cases to claim that many others were decided incorrectly. While the goal of most doctrinal scholars is to achieve as close a fit with the cases as possible, that goal must partly give way to other values. For example, Dworkin argues that any interpretation must satisfy a threshold test of a certain degree of fit.[121] However, there is no accepted means of determining what degree of fit is required or when generalisations become too broad. Thus, there is no 'bright line blocking the slide down the slippery slope to fully instrumental reasoning, ignoring the text entirely'.[122] As Peter Cane, Leighton McDonald and Kristen Rundle explain, the interpretive drawing out of values immanent in the law is hard work that requires judgement about levels of

[118] These disagreements are resolved by the conventions of law reporting and promulgation.

[119] Davies, *Asking the Law Question* (n 38) 161–2.

[120] See, eg, Dworkin (n 116) 255–6.

[121] Ibid.

[122] Moore (n 114) 19. See also Brudner's argument that the 'conservative' position, which relies on conventional constraints to distinguish legal interpretation from political advocacy, 'seems an unstable half-way house between interpretive objectivism and interpretive nihilism': Brudner (n 53) 339.

abstraction, weighing changes over time, and the reality that a plurality of values shape law.[123]

The question for interpretivists then becomes identifying the values to which fitness should be subordinated in order to show the law in its 'best possible normative light'.[124] A popular competing value is coherence.[125] A significant amount of doctrinal scholarship is concerned with how far fit should be sacrificed in order to improve the law's coherence.[126] A coherent system is consistent and congruous with 'harmonious connection of the several parts so that the whole "hangs together"'.[127] Jessica Hudson proposes that, in law, coherence means consistency between a doctrinal rule and its rationale.[128] Andrew Fell provides a broader understanding of coherence as consistency between the normative reasons or justifications that underlie overlapping areas of doctrine.[129] Coherence is demanded by the aspect of the rule of law that demands relevantly similar cases to be decided in the same way.[130] Thus, there must be a logical

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[123] Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 348–50.

[124] See, eg, Dagan (n 94) 65.

[125] *Miller v Miller* (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Barbara Baum Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3(3) *Law and Philosophy* 355; Dworkin (n 116) ch 6; Gerald J Postema, 'Melody and Law's Mindfulness of Time' (2004) 17(2) *Ratio Juris* 203; Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43(1) *Georgia Law Review* 1, 32–6; Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *UNSW Law Journal* 367; Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160. But see OW Holmes, *The Common Law* (Little, Brown and Co, 1881) 1–2; Brian Hawkins, 'The Life of the Law: What Holmes Meant' (2012) 33(2) *Whittier Law Review* 323.

[126] Indeed, whole schools of law have developed based on the principle of conceptual coherence, such as European conceptual positivism that 'postulated the logical consistency of the legal system as a whole': Renner (n 12) 9 (O Kahn-Freund).

[127] *Oxford English Dictionary* (online at 17 December 2019) 'coherence' (def 4a).

[128] Jessica Hudson, 'The Price of Coherence in Estoppels' (2017) 39(1) *Sydney Law Review* 1, 1.

[129] Fell (n 125) 1179–87.

[130] Waldron (n 125) 32–6; Bant (n 125) 391. Cf Dworkin (n 116) ch 6.

and persuasive reason for cases to be decided differently. However, coherence is not the only alternative value to fit. Many values can be suggested by the legal materials or by external sources. For example, judges sometimes refer to economic or social concerns.[131] Elegance is frequently criticised as a tempting value to be avoided.[132] One school of interpretivism would reject any value that is not derived from legal materials itself.[133] This 'internalist' position appears to exist in opposition to functionalists who 'seek to impose an external order on legal materials'.[134] I do not accept the internalist position because it does not provide a workable constraint. Almost any external source can be found reflected in the legal materials if one looks hard enough. For example, Weinrib claims Kantian philosophy as part of the internal structure of private law, despite the fact that judges rarely invoke it.[135] Functionalists could also, if they chose, frame the function of a particular area of law as being drawn from the legal materials. After all, references to economic and social concerns are not rare in judgments,[136] and where they do not exist they could be inferred. Although this thesis is formalist in the sense that it analyses legal form, it is not formalist in the sense that it claims to be free from non-legal influences.

The admission of interpretivism means that my claims about the nature of express trusts are not that they are the objectively correct, or uniquely right, interpretation of this area.[137] I accept the realist and critical legal scholars' claim that interpretations are

[131] See, eg, *Finch* (n 5) 271 [34].

[132] See Postema (n 99). See also FW Maitland, 'Trust and Corporation' in HD Hazeltine, GT Lapsley and PH Winfield (eds), *Maitland: Selected Essays* (Cambridge University Press, 1936) 141, 182.

[133] See, eg, Weinrib (n 100).

[134] Conte (n 102) 16.

[135] Weinrib (n 100).

[136] See generally Steve Hedley, 'The Rise and Fall of Private Law Theory' (2018) 134(Apr) *Law Quarterly Review* 214.

[137] Cf Dworkin (n 116) 266–74.

indeterminate to a not insignificant extent.[138] However, interpretation still has value. It allows us to produce abstract models of an area of law that can be evaluated on a range of criteria such as, inter alia, fit, coherence, elegance and justice.

## VII CONTRIBUTION TO THE LITERATURE

This thesis is the first thorough pluralist analysis of the law of express trusts. It shows that this is a viable and important perspective on trust law that contributes to the coherence of the law, imagines alternative paths for future development, and facilitates analysis of the social effects of trust law as it changes.

First, the thesis contributes to a coherent understanding of trust law. Chapters 2 through 4 present a distinction between fixed and discretionary trusts that shows trust law in a more coherent light. It explains how the rights and duties in these two relationships are distinct and governed by different principles. This is important because theories of the nature of trusts are necessary to determine the boundaries of the trust. For example, these trust models can be used to determine whether or not the relationship intended by the parties is properly characterised as a fixed or discretionary trust.[139] Moreover, categorisation as a 'trust' currently leads to a strong presumption that fundamental trust law rules apply.[140] Categorisation as a fixed or discretionary trust opens a space to reconsider what fundamental rules should apply as a consequence. In Chapter 4, the interpretation sacrifices the degree to which it fits older cases, in order to improve overall

[138] Dagan (n 94) 18–24, 130–2; Davies, *Asking the Law Question* (n 38) 155–62.

[139] See, eg, Michael Bryan, 'The Inferred Trust: An Unhappy Marriage of Contract and Trust?' (2016) 69(1) *Current Legal Problems* 377.

[140] For example, one such fundamental rule is that assets held on trust are not accessible to the trustees' creditors in bankruptcy or through execution: see Tobias Barkley, 'Trustees' Bare Legal Title: Concept or Misconception?' (2017) 26(1) *Australian Property Law Journal* 44.

coherence. It does this by exposing how the older tradition creates a tension between trust and power that can be resolved through the discretionary trust model. In Chapters 5 and 6 the thesis abandons the pursuit of coherence because the departure from fit would be too great. This step is important because obscuring disorder within the law of discretionary trusts, through a too ambitious pursuit of coherence, would be a disservice to the law.[141]

Second, in Chapter 7 the thesis contributes to the existing literature through imagining an alternative path. An exclusively monist taxonomy may exclude our ability to perceive or imagine different paths by which the law may develop.[142] Thus, the reordering of trusts into two models opens imaginative space to conceive a new path towards coherence. This path, which draws from public administrative law, is presented as a way to resolve the current disorder in discretionary trusts. Inevitably, the choice of this new path was influenced by my personal moral and political convictions; however, it remains an internalist frame of interpretation and satisfies questions of coherence and fit.

Third, the original interpretation of trust law presented in this thesis facilitates analysis of the social impact of trusts. Chapter 3 exposes the effect of the non-proprietary discretionary trust on assumptions of ownership that subsist throughout the law. Chapters 6 and 7 expose the effect of low-accountability discretionary trusts in moving effective power over trusts from the courts and trustees to settlors or other interested beneficiaries.

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[141] See also Steve Hedley, 'The Shock of the Old: Interpretivism in Obligations' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 205, 212.

[142] Cf Oliver Wendell Holmes, *Collected Legal Papers* (Constable, 1920) 211; Davies, *Asking the Law Question* (n 38) 10–1.

# CHAPTER 2

# TRADITIONAL TRUSTS: A PROPRIETARY FIXED TRUST MODEL

## I INTRODUCTION

The heart of trust law is a relationship between trustee and beneficiary. An intention to create a trust is an intention to create a relationship between trustee and beneficiary. Without a trust relationship there is no trust and trust law does not apply. All other trust law doctrine is secondary to the trust relationship, in that it is dependent on it. However, the importance of the trustee-beneficiary relationship is sometimes overlooked due to a focus on the beneficiaries' interests. For example, the first edition of *Snell's Equity* defines express trusts entirely as a type of beneficial estate.[1] The rights that beneficiaries have against third parties, rather than the trustees, are often afforded preeminent status in descriptions of trusts.[2] On the other hand, Underhill's classic definition of a trust is focused on the trust relationship:

> A trust means an obligation under which some person is bound, or has bound himself, to deal with the beneficial interest in real or personal property which is vested in him, in a particular manner and for a particular purpose, either wholly in favour of another or others, or partially in favour of another or others conjointly with himself.[3]

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[1] Edmund Henry Turner Snell, *The Principles of Equity* (Stevens & Haynes, 1868) 48.

[2] See, eg, Edwardo Coke, *Institutes of the Laws of England*, ed Francis Hargrave and Charles Butler (16th rev ed, 1809) vol 2, 272b; Austin Wakeman Scott, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17(4) *Columbia Law Review* 269; Harlan F Stone, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17(6) *Columbia Law Review* 467.

[3] Arthur Underhill, *A Concise Manual of the Law Relating to Private Trusts and Trustees* (Butterworths, 1878) 1.

The starting point for the analysis of trust relationships is the central duty, as expressed by Dixon J, that trustees hold an asset subject to 'an obligation to hold it for the benefit of others'.[4] The first research question set for this thesis is, what does it mean to hold assets for the benefit of others?[5] An original contribution made by this thesis is the answer that there are two distinct versions of this core trust duty. What it means to hold assets for the benefit of others means different things depending on whether there is a fixed trust or a discretionary trust. Trustees and beneficiaries in these two types of relationships are characterised by conceptually distinct rights and duties.

The question for this chapter is to understand what it means to hold assets for the benefit of others in one familiar type of trust: the fixed trust. Lord Neuberger expressed the core of the answer when he said that the trustee is 'a person who accepts property expressly (or impliedly) on the basis that he is to hold it for the benefit of another, a classic definition of a trustee.'[6] This presents a narrower conception of the trust than Dixon J's statement because Lord Neuberger's single beneficiary must have an individual right against the trustee.

The answer presented in this chapter explains the fixed trust relationship in two steps. First, a paradigm case of a fixed trust will be used to draw out three key features of the trustee-beneficiary relationship. These are 1) the trustees' management role in preserving and protecting the assets, 2) the trustees' distributive role in distributing the benefit of trust assets to the entitled beneficiaries, and 3) the beneficiaries' entitlement to be distributed the benefit of the assets, which are strict rights that are immune from

[4] *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614, 622 (Dixon J).

[5] See Chapter 1 Part II.

[6] *Williams v Central Bank of Nigeria* [2014] AC 1189, 1213 [54] (Lord Neuberger PSC) ('*Williams*').

divestment apart from a limited judicial jurisdiction. Second, the three key features will be accounted for by the development of an interpretive model that explains these features in accordance with unifying principles of a proprietary nature. Third, there is consideration of how the proprietary model can be applied.

The proprietary model that is developed will be familiar from the literature. It is, for example, similar to James Penner's proprietary analysis of trusts.[7] Indeed, fixed trusts are the archetypal form of express trusts. The 19th century trust theorists used the proprietary concept of the conveyancer's trust to transform trust law into a discrete body of doctrine.[8] As Gregory Alexander has argued, equity judges transformed the law of trusts both by isolating the trust as a distinct doctrine and by assimilating beneficiaries' interests with property law principles.[9] However, the proprietary model presented in this chapter is original because it presents a narrower, more refined conception of a fixed trust than found in the literature. This is possible because the thesis is a pluralist account, which means that express trusts need not all be explained by one model. Thus, this chapter excavates express trusts to find a simpler trust model that is not affected by the complications that arise from distributive discretions. This means that 'fixed trust' is more than a descriptive label: it is a doctrinally significant category.[10]

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[7] See, eg, JE Penner, 'Exemptions' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 241; JE Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27(2) *Canadian Journal of Law and Jurisprudence* 473 ('(True) Nature').

[8] See Patrick Parkinson, 'Chaos in the Law of Trusts' (1991) 13(2) *Sydney Law Review* 227, 228–9; Stuart Anderson, 'Property' in *The Oxford History of the Laws of England: Volume XII 1820–1914 Private Law* (Oxford University Press, 2010) 1, 239–43.

[9] Gregory S Alexander, 'The Transformation of Trusts as a Legal Category: 1800-1914' (1987) 5(2) *Law and History Review* 303, 322–7.

[10] Cf *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547, 552 (Gummow J) ('*Vegners*'); *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 234 [8] ('*Buckle*').

The distinction between fixed and discretionary trusts is also familiar in the literature,[11] where it is often presented through the framework of proprietary and obligational models.[12] This common framework tends to present property and obligation as competing alternatives, where the proprietary model involves rights *in rem*, or exercisable against third parties, and the obligational model involves rights *in personam*, exercisable against the trustees.[13] This thesis eschews this path and instead agrees with Peter Jaffey that express trusts have both proprietary and obligational dimensions.[14] Any proprietary claims to the trust assets exigible against third parties are intimately connected to the personal rights against the trustees. However, this thesis builds upon Jaffey's synthesis to make the original contribution that there are significant distinctions in the character of the personal rights that different beneficiaries hold against trustees. This chapter will argue that the rights of fixed beneficiaries obtaining *in personam* against the trustees have a proprietary nature. This utilises a broader conception of 'proprietary' that is not subsumed by rights *in rem*.[15]

## II PARADIGM CASE: KEY FEATURES OF THE FIXED TRUST MODEL

The paradigm case of a fixed trust is simple. The holder of title to assets, either as a condition of receipt of the assets or voluntarily, undertakes to hold and use them for the benefit of a class of people according to fixed shares. For example, the holders of title

[11] See, eg, Mark Leeming, 'What Is a Trust?' (2008) 31(2) *Australian Bar Review* 211, 213.

[12] Penner, 'Exemptions' (n 7); Patrick Parkinson, 'Reconceptualising the Express Trust' (2002) 61(3) *Cambridge Law Journal* 657; Jessica Palmer and Charles Rickett, 'The Revolution and Legacy of the Discretionary Trust' (2017) 11(2) *Journal of Equity* 157.

[13] Palmer and Rickett (n 12) 159–60.

[14] Peter Jaffey, 'Explaining the Trust' (2015) 131(Jul) *Law Quarterly Review* 377, 393–4.

[15] Using the same term for different meanings is unfortunate but cannot be avoided: see below text to n 167–176.

might be joint landowners who declare that they hold their estate in land for the benefit of their children. The landowners are the settlors and trustees, the children are the beneficiaries. From this core example, and with reference to the case law, we can draw out three key features.

### A *Trustees' Management Role*

The first feature recognises that the trustees in the paradigm case have two roles: first, they are to hold the assets and, second, use them for the benefit of the beneficiaries. The first role is 'management', whereby the trustees are responsible for managing the assets until they can be used for the benefit of the beneficiaries. If the settlors' intention to benefit the beneficiaries is to be achieved, then the trustees must preserve and protect the assets and, depending on the economy, grow them. The second role is 'distributive', where the trustees ultimately pass on the benefit of the assets to others.[16]

The management role typically includes discretion in the trustees to sell trust assets and invest the proceeds.[17] Investment discretions are part of the management role because they should not involve the distribution of the benefit of the assets. A power to sell trust assets is a power to exchange them for appropriate consideration because the trustees have a duty to not sell them at an undervalue.[18] The same analysis applies to any rights the

[16] This distinction is identical to that between administrative and dispositive powers: see Chapter 1 n 46.

[17] See *Trustee Act 1925* (ACT) s 14; *Trustee Act 1925* (NSW) s 14; *Trustee Act 1893* (NT) s 5; *Trusts Act 1973* (Qld) s 21; *Trustee Act 1936* (SA) s 6; *Trustee Act 1898* (Tas) s 6; *Trustee Act 1958* (Vic) s 5; *Trustees Act 1962* (WA) s 17; *Trustee Act 1956* (NZ) s 13A; *Trustee Act 2000* (UK) s 3.

[18] *Re Tebbs; Redfern v Tebbs* [1976] 1 WLR 924; *Sargeant v National Westminster Bank plc* (1990) 61 P&CR 518, 523 (Nourse LJ). A sale at an undervalue may be consented to by the beneficiary: see Matthew Conaglen, 'A Re-Appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules' (2006) 65(2) *Cambridge Law Journal* 366, 378–9.

trustees acquire to recoup or exonerate their personal liabilities from the trust assets.[19] While these rights do authorise trustees to apply trust assets to benefit themselves, not the beneficiaries,[20] they only exist to the extent that the trustees have already contributed value to the trust by properly incurring expenses on behalf of the trust.[21] Therefore, they are not a right to distribute the net benefit of the trust assets to anyone other than the beneficiaries.

However, the boundary between the management and distributive roles is not always clear. It is not, as Michael Ashdown suggests, a question of the form of a power, but of the substance of a power.[22] For example, a case arising from the failure of Lehman Brothers involved a trust with a power of sale, which in form was within the trustee's management role. However, the trust provided that cash proceeds received from sale were not held on trust,[23] which meant that the power of sale was in substance part of the trustee's distributive role. Another example is *Purcell v Deputy Commissioner of Taxation*,[24] where a trust of a grazing business purported to grant fixed interests to three beneficiaries. The settlor-trustee retained extensive management powers to control the business and to sell the assets, but without accountability or responsibility and with the intention that none of the beneficiaries would have the right to complain about his

[19] For example, see the rights in *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 ('*CPT*').

[20] See *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 368 ALR 390, 404 [32] (Kiefel CJ, Keane and Edelman JJ) ('*Carter*').

[21] Ibid 403-4 [29]-[31].

[22] Michael Ashdown, *Trustee Decision Making: The Rule in* Re Hastings-Bass (Oxford University Press, 2015) 73.

[23] *Re Lehman Brothers International (Europe) (admin apptd); Lomas v RAB Market Cycles (Master) Fund Ltd* [2009] EWHC 2545 (Ch), [11]-[13] (Briggs J).

[24] (1920) 28 CLR 77.

decisions.[25] While the majority held that there was nothing objectionable in a settlor retaining management powers,[26] Isaacs J held in dissent that the powers were so extensive that they were repugnant to a trust. He grounded this objection on the proprietary idea that a trust is a gift to the beneficiaries and the powers allowed the settlor-trustee to dispose of the assets freely.[27]

The trustees' management role is not the focus of this thesis, but it is important to define the scope of the distributive role, which is.

### B *Trustees' Distributive Role*

The second feature is the trustees' distributive role. The trustees have a duty to ensure that all of the benefit or utility that can be derived from the assets is received by the beneficiaries in their correct shares.[28] They have a duty to distribute the benefits as soon as the beneficiaries are entitled and without waiting for a demand.[29] The trustees' duty is 'is properly to preserve the trust fund, [and] to pay the income and the corpus to those who are entitled to them respectively'.[30]

The typical conception of the trustees' distributive role is a duty to transfer title in the assets directly to the individual beneficiaries. This duty can be traced back to the trust's predecessor, the use, as seen in Lord Bacon's summary of its three elements from around

[25] Ibid 80–1 (Knox CJ, Gavan Duffy J).

[26] Ibid 85.

[27] Ibid 94–5.

[28] See, eg, *Byrnes v Kendle* (2011) 243 CLR 253, 270 [42] (Gummow and Hayne JJ) ('*Byrnes*'); *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431, 455 [124] (Gleeson JA) ('*Segelov*').

[29] *Hawkesley v May* [1956] 1 QB 304, 322 (Havers J) ('*Hawkesley*').

[30] *Low v Bouverie* [1891] 3 Ch 82, 99 (Lindley LJ).

1600. Here the feoffor[31] is both the settlor and cestui que use, or beneficiary, and the feoffee is equivalent to the trustee:

> The first, that the feoffee will suffer the feoffor to take the profits.
>
> The second, that the feoffee upon request of the feoffor, or notice of his will, will execute the estates to the feoffor, or his heirs, or any other by his direction.
>
> The third, that if the feoffee be disseised, and so the feoffor disturbed, the feoffee will re-enter, or bring an action to re-continue the possession; so that those three, pernancy of profits, execution of estates, and defence of the land, are the three points of trust.[32]

Of these three elements, the third element contains the feoffee's management role. The second element contains the distributive role, which is performed by transferring the assets to the beneficiary or to third parties at the beneficiary's direction. This element continues in today's trust. Interestingly, the first element contains a distinction that developed between trusts and uses in the aftermath of the *Statute of Uses*.[33] It grants the cestui que use the right to seize the income of the assets directly, in contrast to the trust beneficiary's right to be given the income by the trustees. This distinction was important in distinguishing trusts from uses and avoiding execution by the statute.[34]

In some circumstances, the trustees may perform their distributive role by purchasing services for the beneficiaries, for example, where a beneficiary does not have full legal

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[31] The person, equivalent to a settlor, who enfeoffs (transfers) land to the feoffees (trustees): *Oxford English Dictionary* (online at 2 November 2018) 'feoffor', 'enfeoff', 'feoffee'.

[32] Francis Bacon, *Reading Upon the Statute of Uses*, ed William Henry Rowe (1804) 10. See also Lord Chief Baron Gilbert, *The Law of Uses and Trusts*, ed Edward Burtenshaw Sugden (3rd ed, 1811) 1; Lord Nottingham, *Prolegomena of Chancery and Equity*, ed DEC Yale (Cambridge University Press, 1965) 236 [1].

[33] *Statute of Uses 1535*, 27 Hen 8, c 10.

[34] See Lord Nottingham (n 32) 237–8 [7]. See also *Nevil v Saunders* (1686) 1 Vern 415; 23 ER 555; Tobias Barkley, 'Trustees' Bare Legal Title: Concept or Misconception?' (2017) 26(1) *Australian Property Law Journal* 44, 48–50.

capacity.[35] However, historically, the courts of equity limited the power of trustees to pay assets to third parties for the benefit of fixed beneficiaries. Income could be applied for the benefit of minor beneficiaries,[36] but capital was allowed only rarely, with the courts' permission.[37] For adult beneficiaries of full capacity, trustees required a specific power of advancement to apply assets 'over the head' — that is, without the request and consent of the beneficiary.[38] These restrictions were lifted when statutory powers of advancement were legislated.[39] Even where the trustees have a power of advancement, they have a duty to ensure that the funds advanced to a third party are, in fact, applied for the benefit of the beneficiary.[40]

The trustees' distributive role exists even where there are no individual beneficiaries in existence to hold rights that correlate to the trustees' duties. For example, if the paradigm case defines the beneficiaries as the settlors' children, and the settlors may have more children, then the trustees will remain in their management role until they know to whom to distribute the assets. The trustees' distributive duties exist in a dormant form

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[35] See *Dawson v Howard* [1999] NSWSC 729.

[36] *Walker v Wetherell* (1801) 6 Ves Jr 473; 31 ER 1150 ('*Walker*'). In 1925 this was formalised in statutory powers: *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 31. See also *Trustee Act 1925* (ACT) s 43; *Trustee Act 1925* (NSW) ss 43-43A; *Trustee Act 1893* (NT) s 24; *Trusts Act 1973* (Qld) s 61; *Trustee Act 1936* (SA) s 33; *Public Trustee Act 1930* (Tas) s 34; *Trustee Act 1958* (Vic) s 37; *Trustees Act 1962* (WA) s 58; *Trusts Act 2019* (NZ) s 62.

[37] *Barlow v Grant* (1684) 1 Vern 255; 23 ER 451; *Walker* (n 36); *Ex parte Green* (1820) 1 Jac & W 253; 37 ER 372. See also *Chapman v Chapman* [1954] AC 429, 451, 455 (Lord Morton) ('*Chapman*'), where the House of Lords recognised that the courts had inherent jurisdiction to vary trusts for the accumulation of income to allow maintenance for minors out of that income.

[38] *Re Pilkington's Will Trusts; Pilkington v Inland Revenue Commissioners* [1964] AC 612, 637 (Viscount Radcliffe). See also *Trusts Act 2019* (NZ) s 63(2).

[39] *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 32. See also *Trustee Act 1925* (ACT) s 44; *Trustee Act 1925* (NSW) s 44; *Trustee Act 1893* (NT) s 24A; *Trusts Act 1973* (Qld) s 62; *Trustee Act 1936* (SA) s 33A; *Trustee Act 1898* (Tas) s 29; *Trustee Act 1958* (Vic) s 38; *Trustees Act 1962* (WA) s 59; *Trusts Act 2019* (NZ) s 64.

[40] *Re Pauling's Settlement Trusts; Younghusband v Coutts & Co* [1964] Ch 303, 333–4 (Wilmer LJ for the Court).

and become enforceable in the future. An extreme case of future interests is *Thellusson v Woodford* where all trust assets, including accumulated income, were to be held until the end of a long perpetuity period and then conveyed to certain descendants at that time.[41] Trusts like this can exist for decades without any existing or known beneficiaries.[42] However, a trust will be invalid if no distributive role is defined. For example, in *Re Estate of Murphy* the settlor only provided for the distribution of income and not for the distribution of capital, which meant the trust was invalid for remoteness of vesting.[43]

### C *Beneficiaries' Distributive Entitlements*

The third feature of the fixed trust is the beneficiaries' distributive entitlements that correlate to the trustees' distributive duties.[44] The beneficiaries have individual rights against the trustees to receive the benefit of the trust assets in accordance with their share. Cozens-Hardy MR made this point in *Re Marshall; Marshall v Marshall*: 'Speaking generally, the right of a person, who is entitled indefeasibly in possession to an aliquot share of property, to have that share transferred to him is one which is plainly established by law.'[45]

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[41] (1805) 11 Ves Jr 112; 32 ER 1030.

[42] See also *Kinsela v Caldwell* (1973) 9 BPR 16.459, affd (1975) 132 CLR 458.

[43] [2005] NSWSC 104.

[44] It would also be possible to identify specific beneficiary management entitlements, such as a right to have trustees invest prudently. However, this thesis is focused on the trustees' distributive role so further analysis of the management side of the trust relationship is not necessary.

[45] [1914] 1 Ch 192, 199 (Cozens-Hardy MR). See also *Love v L'Estrange* (1727) 5 Bro Parl Cas 59; 2 ER 532; Francis Williams Sanders, *An Essay on the Nature and Laws of Uses and Trusts* (1791) 234.

The distributive side of the trustee-beneficiary relationship is, in Hohfeldian terms,[46] a right-duty relation. The trustees have a duty to distribute the benefit and the beneficiaries have individual correlating rights, or claims,[47] to receive the benefit. On some occasions, the right-duty relation may be overlain by a power-liability relation, as Tatiana Cutts has argued.[48] However, this will only be likely where trustees are unaware they are trustees.[49] Where trustees know their status they have a duty to distribute the assets without waiting for a demand from the beneficiaries.[50] The quality of the beneficiaries' distributive entitlements can be analysed with respect to four further points: their strict quality, their liability to be varied by the courts, their immunity from volitional divestment, and the protection they receive against other interests.

### *1 Quality of Strictness*

Rights have different qualities. A useful comparison is the distinction in terms of liability between strict liability and liability for carelessness.[51] Rights that correlate with different standards of liability have different qualities.

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[46] See Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16 ('Some Fundamental Legal Conceptions'); Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710; Albert Kocourek, 'Hohfeld System of Fundamental Legal Concepts' (1920) 15(1) *Illinois Law Review* 24.

[47] Hohfeld uses 'claim' to refer to rights that directly correlate to duties owed by individuals: Hohfeld, 'Some Fundamental Legal Conceptions' (n 46) 32.

[48] Tatiana Cutts, 'The Nature of "Equitable Property": A Functional Analysis' (2012) 6(1) *Journal of Equity* 44. It may be that, with a sufficiently fine-grained analysis, most right-duty relationships can be analysed as a power-liability relationship. For example, claim-rights could be construed as a power to seek a remedy in court: cf John W Salmond, *Jurisprudence* (Stevens & Haynes, 2nd ed, 1907) 193.

[49] Cutts provides examples where people were unwittingly vested with title to trust assets: Cutts (n 48) 51–2.

[50] *Hawkesley* (n 29) 322 (Havers J).

[51] *Encyclopaedic Australian Legal Dictionary* (online at 30 July 2019) 'strict liability'.

Fixed beneficiaries' distributive entitlements are, prima facie, strict.[52] Trustees are obliged to distribute the correct benefit to each beneficiary, which is more stringent than requiring them reasonably or honestly to try to distribute correctly. Each beneficiary has a 'claim of right'[53] to the performance of the trustees' duties and can enforce their rights by the action of account.[54] Trustees who fail to transfer property to the correct beneficiary will be personally liable.[55] Practically, this feature of the distributive duty means that the trustees have to draw up a complete list of the beneficiaries before distributing the assets. Unless the trustees have a complete list, they will not know the exact amount of assets to which each beneficiary is entitled. This requirement is related to the list-certainty test for a valid fixed trust: the trust instrument must designate the beneficiaries with sufficient certainty that it will be possible for the trustees to complete the list at the time of distribution.[56]

An example of the strictness of trust duties is *Re Evans; Evans v Westcombe* ('*Evans*').[57] A deceased's personal administrator, his daughter, held the deceased's property on trust for herself and her brother in equal shares. Her brother had been estranged from the family and had not been heard from for nearly 30 years. The trustee advertised her father's death but the brother was not discovered. After legal advice, and honestly believing her brother dead, the trustee reasonably concluded that she was the

[52] Thomson Reuters, *Ford and Lee: The Law of Trusts* (online at 23 January 2020) [10.050] ('*Ford and Lee*').

[53] *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 506 (Isaacs J) ('*Glenn*').

[54] *Byrnes* (n 28) 270 [42] (Gummow and Hayne JJ).

[55] See, eg, *Guardian Trust & Executors Co of New Zealand v Public Trustee of New Zealand* [1942] AC 115.

[56] See *Re Blyth* [1997] 2 Qd R 567, 574 (Thomas J). The relationship between the distributive duty and the list-certainty test is addressed below at text to nn 79–85 and 180–187.

[57] [1999] 2 All ER 777.

only person entitled under the trust. Thus, she retained all the property for herself (after obtaining insurance). Four years later her brother reappeared and demanded his share. The Court found the trustee had breached her strict duty:

> Clearly, the estate has been wrongly administered and distributions have been wrongfully made to the defendant at the expense of the plaintiff. Absent relief under the Act, therefore, the plaintiff is entitled to a remedy to the extent that he has been underpaid with regard to his proper entitlement.[58]

However, a robust assessment of the strictness of the beneficiaries' rights must take into account how their strict enforcement can be ameliorated. First, the courts have statutory powers to relieve trustees of liability for breaching their strict duties, if they have been fair and reasonable.[59] This occurred in *Evans* where the Court found that the trustee had taken reasonable steps to find her brother and had taken out insurance in case he returned.[60] The Court decided that the trustee ought not to be held personally liable when the insurance did not cover the full amount to which the brother was entitled.[61]

Second, the same relief of liability can be granted in advance of a distribution under the courts' inherent jurisdiction to give directions.[62] This allows trustees to ask a court to approve a scheme of distribution of the trust assets. If the court approves it, provided all material facts are disclosed, then the trustees will be protected from personal liability to

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[58] Ibid 786 [27] (McCombe DJ).

[59] See *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 61; *Trustee Act 1925* (ACT) s 85; *Trustee Act 1925* (NSW) s 85; *Trustee Act 1893* (NT) s 49A; *Trusts Act 1973* (Qld) s 76; *Trustee Act 1936* (SA) s 56; *Trustee Act 1898* (Tas) s 50; *Trustee Act 1958* (Vic) s 67; *Trustees Act 1962* (WA) s 75; *Trusts Act 2019* (NZ) s 131.

[60] *Evans* (n 57) 789 [38].

[61] Ibid 790 [40].

[62] *Re MF Global UK Ltd [No 3]* [2013] 1 WLR 3874, 3878-9 [14]-[15] (David Richards J) ('*MF*'). The inherent jurisdiction is incorporated in some statutory provisions that protect trustees who act under a court's direction: see *Trustee Act 1925* (ACT) s 63; *Trustee Act 1925* (NSW) s 63; *Trusts Act 1973* (Qld) s 97; *Administration and Probate Act 1919* (SA) s 69; *Trustees Act 1962* (WA) s 95; *Trusts Act 2019* (NZ) s 134. The New South Wales provision has been applied to decisions about distribution as well as administration: *West v Weston* (1998) 44 NSWLR 657, 665 (Young J) ('*West*').

the extent that the scheme departs from the strict trust duties.[63] As Balcombe LJ said in *Finers v Miro*, 'English law has always imposed strict liabilities on trustees but in return has been ready to allow trustees to come and seek the directions of the court if they need to do so.'[64] The approval of administrative schemes is usually referred to as a *Benjamin* order[65] and such applications are a regular occurrence in trust practice.[66] Relief may also be found in statutory provisions enabling trustees to advertise so that potential claimants bring their claims to the trustees' notice prior to distribution.[67] The purpose of these provisions is to protect trustees against tardy creditors and beneficiaries with disputable claims.[68]

The relief of liability for trustees is a practical necessity for the good administration of trusts because the trustees can never have absolute certainty that their distribution is correct. The difficulty of proving a negative means there can never be absolute certainty that there is not another eligible member of a defined class of beneficiaries.[69] Beneficiaries may also be impossible to locate. For example, the Australian Tax Office

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[63] *Re Grose* [1948] SASR 55, 60 (Mayo J).

[64] [1991] 1 WLR 35, 45.

[65] *Re Benjamin; Neville v Benjamin* [1902] 1 Ch 723. The *Benjamin* order jurisdiction has been legislated in Western Australia and New Zealand: *Trustees Act 1962* (WA) s 66; *Trusts Act 2019* (NZ) s 136.

[66] See, eg, *Re Estate of Sijakovic* [2012] NSWSC 1532, [23]-[25] (Hallen J); *Re Estate of Urso* [2013] NSWSC 903, [39]-[40] (Hallen J); *MF* (n 62) 3879-80 [16]-[21] (David Richards J); *Re Estate of Szczudlik* [2015] NSWSC 1529, [6] (Hallen J) ('*Szczudlik*'); *Re Worldspreads Ltd (admin apptd)* [2015] EWHC 1719 (Ch), [19] (Birss J).

[67] See *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 27; *Trustee Act 1925* (ACT) s 60; *Trustee Act 1925* (NSW) s 60; *Trustee Act 1893* (NT) s 22; *Trusts Act 1973* (Qld) s 67; *Trustee Act 1936* (SA) s 29; *Trustee Act 1898* (Tas) s 25A; *Trustee Act 1958* (Vic) s 33; *Trustees Act 1962* (WA) s 63; *Trusts Act 2019* (NZ) s 79.

[68] See *Ford and Lee* (n 52) [16.300].

[69] See *Bullas v Public Trustee* [1981] 1 NSWLR 641, 642 (Kearney J).

has identified that $17.5 billion is held in 6.2 million superannuation accounts that are lost or unclaimed.[70]

Both the statutory relief power and the power to give directions are limited in scope. The courts only have power to relieve the trustees of liability for a breach of their duties. They do not have the power to remove the duty itself.[71] Again, this is evident in *Evans* where the Court did not interfere with the brother's primary entitlement to his share of the assets. This meant that the brother could claim his share of the assets that remained in the hands of the trustee, even though she was not personally liable for the breach.[72] Naturally, this qualification to the courts' jurisdiction does not prevent it from materially affecting the beneficiaries' positions.[73] However, it helps to emphasise that the distributive entitlements remain relatively strong despite this jurisdiction.

Third, the beneficiaries' rights are not strict with respect to the timing of distribution. When the time arrives to distribute assets to adult beneficiaries the trustees usually have a duty to inform the beneficiaries.[74] If the assets are divisible then individual beneficiaries will have an immediate right to be transferred their share upon request.[75] However, a beneficiary will not have a right to transfer of a share in specie where division of the asset would unduly prejudice the other beneficiaries.[76] The beneficiary's entitlement will be

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[70] Australian Taxation Office, 'Check Now for Your Share of $17.5b in Lost Super' (Media Release QC 56998, 11 October 2018).

[71] See *Re Green's Will Trusts; Fitzgerald-Hart v A-G* [1985] 3 All ER 455, 462 (Nourse J) ('*Green*').

[72] *Evans* (n 57) [39].

[73] See Graham Virgo, *The Principles of Equity and Trusts* (Oxford University Press, 2012) 469.

[74] *Hawkesley* (n 29) 322 (Havers J). In one case the trustee deposited money in the beneficiary's nominated bank account without informing the beneficiary, which was full discharge of the duty: *Segelov* (n 28) [136].

[75] See *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882, 889–90 (Walton J).

[76] See *Beck v Henley* (2014) 11 ASTLR 457, 467-8 [37]-[42] (Leeming JA).

delayed until the trustees can prudently sell the assets and divide the proceeds. Even in the case of trusts for unincorporated societies, each member of a society has a right to demand a share of the trust assets.[77] However, the courts are likely to find that those distributive rights are subject to contractual rights between the members that prevent the members from exercising their trust rights.[78]

One final caveat on the strictness of beneficiary entitlements in Australia is *West v Weston*.[79] A testamentary trust defined the beneficiaries as all descendants of the testator's grandparents that were alive at the death of the testator. The trustee had identified at least 1,675 beneficiaries, but it was more likely than not that some beneficiaries remained unidentified[80] due to births being unregistered, ex-nuptial children, or disappeared beneficiaries still being alive or reproducing before they died.[81] Young J found that the trustee had acted commendably in identifying those that did exist and, after recommending certain advertisements, said that he would be able to give orders approving distribution.[82] Unfortunately, Young J purported to change the certainty rule that applied to fixed trusts from the strict list certainty rule to a rule founded on the 'balance of probabilities that the substantial majority of the beneficiaries have been ascertained and that no reasonable inquiries could be made which would improve the situation'.[83] Such a rule could suggest that the trustees do not have strict duties to

[77] See *Neville Estates Ltd v Madden* [1962] Ch 832, 849 (Cross J).

[78] Ibid 849. But see FW Maitland, 'Trust and Corporation' in HD Hazeltine, GT Lapsley and PH Winfield (eds), *Maitland: Selected Essays* (Cambridge University Press, 1936) 141, 196–7.

[79] *West* (n 62).

[80] Ibid 661.

[81] Ibid 665.

[82] Ibid 665–6.

[83] Ibid 664.

distribute the correct amount to each beneficiary. Young J's innovation has been criticised.[84] Later cases have explained it alongside consideration of the traditional *Benjamin* order jurisdiction.[85] This suggests that the list certainty test has not been changed in Australia; it has merely been recognised that the list certainty test is not applied absolutely but gives way to the courts' traditional jurisdiction to approve distributions even when there is some factual uncertainty about the existence of beneficiaries.

### *2 Liability to Variation by the Courts*

A qualification to the quality of the beneficiaries' distributive entitlements is that they can be varied by court intervention. This variation jurisdiction is different from the relief jurisdiction considered above, because it directly interferes with the beneficiaries' entitlements rather than their remedy against the trustees for breach. However, the courts only have this power in limited circumstances, and it does not seriously detract from the beneficiaries' rights.

The basic common law principle is that the courts' role is to enforce and protect the rights created by the settlor and not to alter them. This was settled in *Chapman v Chapman*, where only one true exception was identified, which was the jurisdiction to vary a trust to accumulate income.[86] The settlor's prescribed duty to accumulate could be varied in order to give the trustees a power to pay income for the maintenance of a

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[84] Peter Creighton, 'Certainty of Objects of Trusts and Powers: The Impact of *McPhail v Doulton* in Australia' (2000) 22(1) *Sydney Law Review* 93, 97–8; *Prosper v Wojtowicz* [2005] QSC 177, [34]-[35] (Wilson J).

[85] See *Re Estate of Meyerstein* (2009) 4 ASTLR 180, 182 [15]-[17] (Ross J); *Szczudlik* (n 66) [6] (Hallen J).

[86] *Chapman* (n 37) 455–6 (Lord Morton).

minor.[87] The other common law variation rules only applied to a trust's management provisions and did not allow any change to beneficiaries' distributive entitlements. For example, the courts' emergency jurisdiction to approve unauthorised transactions, where necessary to salvage trust assets, does not allow the courts to approve transactions that alter beneficial interests in the trust fund.[88]

Following the decision in *Chapman v Chapman*, many Parliaments moved to grant courts the very jurisdiction denied in that case.[89] For example, in Victoria the courts may consent to variations of beneficial interests on behalf of minor, incapacitated, contingent,[90] unascertained and unborn beneficiaries.[91] The existence of this jurisdiction does impact the beneficiaries' distributive rights. However, impact is limited because the courts can only vary a fixed beneficiary's interest in the beneficiary's favour.[92] This means the power cannot be used to overreach beneficiaries' rights without compensation.[93] Exceptions are the Queensland statute, which allows the courts to eliminate the interests of beneficiaries who are unlikely ever to receive an interest,[94] and the 2019 New Zealand statute that requires the courts merely to consider any consequential detriment alongside the intentions of the settlor.[95] Many jurisdictions have

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[87] Ibid.

[88] Ibid 452–5 (Lord Morton).

[89] See *Variation of Trusts Act 1958*, 6 & 7 Eliz 2, c 53; *Trusts Act 1973* (Qld) s 95; *Trustee Act 1936* (SA) s 59C; *Trustee Act 1958* (Vic) s 63A; *Trustees Act 1962* (WA) s 90; *Trusts Act 2019* (NZ) s 124.

[90] *Re Keysborough Blue Danube Soccer Club* [2003] VSC 119, [27]-[30] (Ashley J).

[91] *Trustee Act 1958* (Vic) s 63A.

[92] See, eg, ibid s 63A(1). The South Australia legislation requires that any variation not unfairly advantage or prejudice any class of beneficiaries, rather than individuals: *Trustee Act 1936* (SA) s 59C.

[93] See generally *Ford and Lee* (n 52) [15.030]ff; JE Penner, *The Law of Trusts* (Oxford University Press, 10th ed, 2016) 308-9 [10.70]-[10.73].

[94] *Trusts Act 1973* (Qld) s 95(1A).

[95] *Trusts Act 2019* (NZ) s 124.

also enhanced the courts' jurisdiction to vary management provisions.[96] However, even the broadest of these powers[97] does not allow the courts to 'subvert the beneficial disposition in the trust instrument'.[98]

### *3 Immunity from Volitional Divestment*

Apart from the courts' minimal variation authority, a critical aspect of the beneficiaries' distributive entitlements in the paradigm case of a fixed trust is that they are immune from divestment. That is, these rights are 'fixed'. They are fixed in the trust terms[99] and are then immune from full or partial divestment by the volitional act of other human actors. In the paradigm case, neither the trustees, nor any third party, is authorised to interfere with the beneficiaries' rights against the trustees to a distribution of the benefit of the assets. This aspect of the beneficiaries' distributive entitlements is seen in Gummow J's description of fixed trusts as 'a species of express trust where all the beneficiaries are ascertainable and their beneficial interest [sic] are fixed, there being no discretion in the trustee or any other person to vary the group of beneficiaries or the quantum of their interests'.[100]

The fixed nature of distributive entitlements is amenable to a Hohfeldian analysis through the distinction between claim-rights and immunities.[101] A claim-right is an

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[96] See, eg, *Trustee Act 1958* (Vic) s 63; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 57.

[97] *Trustee Act 1925* (NSW) s 81.

[98] *Arakella Pty Ltd v Paton* (2004) 60 NSWLR 334, 360 [112] (Austin J). See also *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753, 773 [92] (Barrett JA).

[99] See CT Emery, 'The Most Hallowed Principle: Certainty of Beneficiaries of Trusts and Powers of Appointment' (1982) 98(Oct) *Law Quarterly Review* 551, 559.

[100] *Vegners* (n 10) 551–2.

[101] Hohfeld, 'Some Fundamental Legal Conceptions' (n 46).

entitlement to have someone else do or not do something;[102] and an immunity is the absence of being subject to a power.[103] Thus, rights can be either 'immune rights' that are not subject to powers or 'defeasible rights' that are. According to Hohfeld, a power is an ability to change legal relations vested in 'the volitional control of one or more human beings'.[104] Neil MacCormick and Joseph Raz add the important supplement that a volitional action is only the exercise of a legal power if it is the type of action that is done in order to secure the change in legal relations. For example, an international move of domicile will change a person's legal relations, but is not an exercise of a legal power because moving domicile is not a type of action done primarily to secure that change.[105] The immune rights category is important in assessing the quality of a right: a right defeasible at the volition of another human being is significantly more fragile.

This distinction between immune and defeasible rights is the basis for this chapter's characterisation of a fixed trust. It provides the conceptual foundation for the unique nature of the trustee-beneficiary relationship in a fixed trust. Fixed beneficiaries have rights to receive a benefit that are immune from the volitional control of another person.

The distinction reflects the difference between contingent and discretionary interests. Hohfeld distinguishes between changes in legal relations that result from superadded facts under the volitional control of humans and those that result from non-volitional sources.[106] The former are changes resulting from a legal power, the latter are changes

[102] Ibid 32–3.

[103] See Kocourek (n 46) 34.

[104] Hohfeld, 'Some Fundamental Legal Conceptions' (n 46) 44.

[105] Neil MacCormick and Joseph Raz, 'Voluntary Obligations and Normative Powers' (1972) 46(1) *Aristotelian Society Supplementary Volume* 59, 80–1. See also HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 41.

[106] Hohfeld, 'Some Fundamental Legal Conceptions' (n 46) 44.

resulting from other events. For example, if assets are held on trust for those among a class who survive until 25 years of age, then the individual beneficiaries will have contingent interests. The events that determine the quantum of each beneficiary's entitlement are not under the volitional control of a human being in a relevant sense. The interests are subject to volitional control in the sense that a beneficiary who disclaims the interest will increase the shares of the other beneficiaries. However, this is not relevant because it is limited to the divestment of the beneficiary's own interest. If an individual beneficiary could disclaim on behalf of other beneficiaries, then she or he would have a distributive power and it would not be a fixed trust. In summary, the distinction between fixed beneficiaries' rights and other beneficiaries' rights is the difference in quality between a right that can be divested at the volition of another person and a right that may be divested by events that are not determined by human volition.[107]

This distinction is found in *Finch v Telstra Super Pty Ltd*,[108] which concerned a person with a right under a superannuation trust to a certain benefit in the event that they were totally and permanently disabled:

> The present is not a case involving a 'discretion'. The Trustee had to consider whether to reach two opinions. One was whether a Member had ceased to be an Employee. That is scarcely a discretionary decision. It is no more discretionary than the decision of a judge in conventional litigation about whether a contract of employment has come to an end. The second opinion was whether the Member was unlikely ever to engage in 'gainful Work'. In the forming of an opinion on that subject there are no doubt factors to be examined which are difficult to weigh, impressions to be formed, and judgments to be made, but the field is quite different from fields in which the competing claims of potential candidates for bounty are compared.[109]

[107] Contrast the definition of 'fixed entitlements' in the *Income Tax Assessment Act 1936* (Cth) sch 2F, sub-div 272-5, which excludes all defeasible interests.

[108] (2010) 242 CLR 254.

[109] Ibid 270 [29].

The trustee was deeply involved in determining whether, as a matter of fact, the beneficiary was entitled to a distribution, but it did not have volitional control to decide that he was not entitled. If the facts necessarily established that the beneficiary had ceased to be an employee and was unlikely ever to engage in 'gainful Work', then the beneficiary's interest was immune from divestment by the trustee.

Interests subject to volitional divestment by the trustees need to be distinguished from fixed interests subject to divestment under a trustee's right of recoupment or exoneration.[110] These rights of indemnity do give trustees priority interests that detract from the beneficiaries' entitlements.[111] However, the power of trustees to gain these rights is limited to the extent that they have a power to incur expenses on behalf of the trust, which must be incurred properly.[112] Thus, when the powers of recoupment and exoneration are considered with the power to incur expenses, together they represent a management power rather than a distributive power. Holistically, it is a power to benefit the trust fund through credit, not to extract any benefit from the trust fund.

### *4 Protected Entitlements*

The beneficiaries' distributive entitlements are associated with another notable feature of fixed trusts: the beneficiaries' rights against third parties. A beneficiary's entitlement to the benefit of the assets is enforceable against most people who obtain

[110] The right of trustees to recoup expenses incurred properly on behalf of the trust is now provided in legislation: *Trustee Act 1925* (ACT) s 59(4); *Trustee Act 1925* (NSW) s 59(4); *Trustee Act 1893* (NT) s 26; *Trusts Act 1973* (Qld) s 72; *Trustee Act 1936* (SA) s 35(2); *Trustee Act 1898* (Tas) s 27(2); *Trustee Act 1958* (Vic) s 36(2); *Trustees Act 1962* (WA) s 71; *Trusts Act 2019* (NZ) s 81; *Trustee Act 2000* (UK) s 31.

[111] *CPT* (n 19) 120-1 [49]-[51].

[112] *Nolan v Collie* (2003) 7 VR 287, 307-9 [53]-[57] (Ormiston JA); *Ireland v Retallack [No 2]* [2011] NSWSC 1096, [25] (Pembroke J).

rights in the assets that derive from the trustees.[113] The exception is any bona fide purchaser for value of the legal title without actual or constructive[114] notice[115] of the beneficiaries' rights.[116] Thus, the beneficiaries have direct claims against personal creditors of the trustees who execute trust assets,[117] gratuitous assignees, assignees with actual or constructive notice, and anyone deriving assets by inheritance or succession.[118] These rights do not increase beneficiaries' entitlement to trust assets but are a right to have the assets restored to the trust fund.[119] The function of these rights is to preserve the value of the beneficiaries' relationship of entitlement vis-à-vis the trustee.

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[113] These persistent or subsisting rights are not enforceable against people who derive rights independently of the trustee, such as adverse possessors or tortfeasors. They can be defined as 'rights in the trustee's rights': see Lionel Smith, 'Trust and Patrimony' (2009) 28(4) *Estates, Trusts & Pensions Journal* 332, 342–4; Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4(1) *Journal of Equity* 1.

[114] *Macmillan Inc v Bishopsgate Investment Trust plc [No 3]* [1995] 1 WLR 978, 1000 (Millett J). In many jurisdictions the concept of constructive notice has been legislatively constrained. In Victoria, notice is limited to information that would have become known from inquiries that ought reasonably to have been made: *Property Law Act 1958* (Vic) s 199.

[115] In Australia, the test of notice in the bona fide purchaser rule is not the same as the test of knowledge under the knowing receipt rule. The latter has a higher standard of *wilfully* or *recklessly* failing to make inquiries that ought reasonably to have been made: see generally Joachim Dietrich and Pauline Ridge, '"The Receipt of What?": Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31(1) *Melbourne University Law Review* 47. Lord Sumption JSC has stated that the tests in English law are the same: *Papadimitriou v Crédit Agricole Corpn and Investment Bank* [2015] 1 WLR 4265, 4281–2 [33].

[116] In typical accounts, the thing the purchaser must have notice of is the trust: see, eg, FW Maitland, *Equity*, ed AH Chaytor and WJ Whittaker (Cambridge University Press, 1929) 118. However, it is likely that a purchaser will only be subject to proprietary claims if they have notice both that the assets are held on trust and that they are receiving them in breach of trust, which is the test in a claim of knowing receipt: *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16, 105–6 (Hansen J). See also Dietrich and Ridge (n 115) 57 n 58.

[117] The creditors are not protected by the rule even if they are bona fide: see *Re Morgan; Pillgrem v Pillgrem* (1881) 18 Ch D 93; *Jennings v Mather* [1901] 1 QB 108, affd [1902] 1 KB 1. The reasons for this are not clear as creditors do provide value by writing off the trustees' debts. If a trustee uses trust assets to actively pay off their creditors, then those creditors are protected by the rule: *Taylor v Blakelock* (1886) 32 Ch D 560. The distinction is likely that the rule only applies to purchasers, which requires the trustees to be actively involved.

[118] See Maitland (n 116) 117–8.

[119] *Akers v Samba Financial Group* [2017] AC 424, 452 [46] (Lord Mance JSC) ('*Akers*').

The beneficiaries' collective right to terminate the trust and divide it between them, under the so-called[120] rule in *Saunders v Vautier* ('*Saunders*'),[121] also plays a supportive rather than a leading role. It enables beneficiaries to compromise amongst themselves to alter their individual interests and override the settlor's intentions. For example, it enables life beneficiaries and remainderpeople to compromise to escape the constraints of their time-divided interests and agree some other division of the assets.[122] It also enables the beneficiaries to terminate trusts if they do not like the management duties or powers, or the trustees' management.[123] However, it does not allow individual beneficiary's interests to be altered without their consent.

### D *Conclusion*

In summary, the key features of the paradigm case are as follows: 1) the trustees have a management role in which they may be authorised to make decisions other than distributing the benefit of the assets; 2) the trustees have a distributive role in which they are obliged to distribute the benefit of assets to the beneficiaries according to the beneficiaries' entitlements; and 3) the beneficiaries have correlating entitlements to be distributed the benefit of the assets that have a strict quality, are immune from divestment apart from the limited variation jurisdiction of the courts, and are protected by supporting rights.

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[120] See Paul Matthews, 'The Comparative Importance of the Rule in *Saunders v Vautier*' (2006) 122(Apr) *Law Quarterly Review* 266 ('*Saunders*').

[121] (1841) Cr & Ph 240; 41 ER 482.

[122] See *Barton v Briscoe* (1822) Jac 603; 37 ER 978.

[123] See *Re Brockbank; Ward v Bates* [1948] Ch 206, 208–9 (Vaisey J).

## III PROPRIETARY MODEL

The key features of the paradigm case of a fixed trust reveal a trustee-beneficiary relationship characterised by rights in individual beneficiaries, against the trustees, to demand and receive fixed benefits from the trust assets. A coherent account can be given of this relationship with a conceptual model made up of the key features identified above, unified by an underlying proprietary principle.

Proprietary accounts are familiar in trusts discourse. They are appropriately summarised by FH Lawson and Bernard Rudden: 'The private trust is basically a gift projected on the plane of time and, meanwhile, in need of management.'[124] The distributive role of trustees is to implement the gift by distributing the benefit of the assets to the beneficiaries. The beneficiaries' entitlements are comparable, although not identical, to receipt of a direct gift.

### A *Unifying Principle*

The fundamental principle that gives the fixed trust relationship conceptual unity is that fixed claims to economic benefit have a proprietary nature. A clear statement of the proprietary nature of beneficiaries' rights was given by the Lord Keeper in the leading judgment in *Burgess v Wheate*:

> It is true this court has considered trusts as between the trustee, *cestuy que trust*, and those claiming under them, as imitating the possession. … I think it a fallacy in this case to suggest that there is a doubt whether trusts should not imitate lands. In my opinion they have done so from the earliest times, without any distinction but what arose from the imbecility or strength of this jurisdiction. …

[124] FH Lawson and Bernard Rudden, *The Law of Property* (Clarendon Press, 2nd ed, 1982) 55.

> Where there is a trust, it should be considered in this court as the real estate, between the *cestuy que trust* and the trustee, and all claiming by or under them; and the trustee should take no beneficial interest that the *cestuy que trust* can enjoy …[125]

As the Lord Keeper makes clear, for the purposes of the relationship between trustee and beneficiary, the beneficiary's entitlement is equivalent to a property interest.[126] JB Ames described it as the beneficiary owning the duty owed by the trustee.[127]

The same principle is found in James Penner's defence of a proprietary model of trusts. He argues that a beneficiary's right to be distributed assets is sufficient for a defensible concept of beneficial ownership:

> We can now return to the question whether the trust beneficiary's rights as I have explained them — that is, as rights that the trustee exercises his power of title to give the beneficiary the legal benefit of the property either (1) in kind, as in the case where the beneficiary himself gets the right to immediate, exclusive possession of the trust asset, or (2) in the future, by way of transfer to him of the legal title to the trust asset (whether of income or capital) — amount to what we can, without embarrassment, call 'beneficial ownership.' I think they do.[128]

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[125] (1759) 1 Eden 177; 28 ER 652, 680 ('*Burgess*'). In another report of the case the Lord Keeper is recorded as follows:

> It was as much a principle of this Court, that the use should be considered as the land, or as imitating the land, formerly as now …
>
> This Court has considered the trust, as between the trustees and cestuy que trust and those claiming under them, as imitating the possession …
>
> Trusts have imitated lands according to the strength of this jurisdiction always. My objection to the claim in the information is, not that it is to have a trust executed as if it were land; — but it is to claim the execution of a trust, that does not exist. If there was a trust, I should consider it merely as an estate, and determine accordingly.

*Burgess v Wheate* (1759) 1 Bl R 123; 96 ER 67, 92 (citations omitted).

[126] See also Maitland (n 116) 117; Paul Matthews, 'The New Trust: Obligations without Rights?' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 1, 1–2.

[127] JB Ames, 'Purchase for Value Without Notice' (1887) 1(1) *Harvard Law Review* 1, 9.

[128] Penner, '(True) Nature' (n 7) 486.

Chapter 3 will challenge Penner's application of this argument to discretionary trusts but it fits perfectly with this chapter's fixed trust model.

Kevin Gray provides an insightful explanation for the proprietary characterisation of equitable rights like these. He distinguishes between the concept of property as a force to exclude people from one's assets and the concept of property as a force that enables access to assets. Equitable interests typically grant one party a right to access assets held by another party.[129] Thus, it is not necessary for equitable interests to be absolute interests against all the world because they are rights to access property that another is protecting against all the world. As SFC Milsom famously said, 'equity has proved that from the materials of obligation you can counterfeit almost all the phenomena of property'.[130] Thus, equitable proprietary principles would fit the fixed trust relationship even if that relationship had no more proprietary features than being a right to a distribution.

The qualities of the beneficiaries' distributive entitlements identified above fit the proprietary characterisation. The courts have tended to preserve the stability of these rights, and as Lord Wilberforce said in *National Provincial Bank Ltd v Ainsworth*, 'some degree of permanence or stability' is an indicator of property interests.[131] The courts' reluctance to vary or overreach fixed beneficiaries' interests can be attributed to their

[129] Kevin Gray, 'Equitable Property' (1994) 47(2) *Current Legal Problems* 157. See also Avihay Dorfman, 'On Trust and Transubstantiation: Mitigating the Excesses of Ownership' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 339; Sarah Worthington, 'Revolutions in Personal Property: Redrawing the Common Law's Conceptual Map' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018) 227; Eric R Claeys, 'Property, Concepts, and Functions' (2019) 60(1) *Boston College Law Review* 3.

[130] SFC Milsom, *Historical Foundations of the Common Law* (Butterworths, 1969) xi.

[131] [1965] AC 1175, 1248.

proprietary nature.[132] For example, the courts are careful to note that *Benjamin* orders do not affect the beneficiaries' proprietary interests, but only their remedies against the trustees.[133] As Lord Millett said conclusively of traceable beneficial interests in *Foskett v McKeown*:

> Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is 'fair, just and reasonable'. Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.[134]

The fixed nature of beneficiaries' interests, and their immunity from divestment, is a convincing representation of Lord Millett's conception of equitable property.

The proprietary nature of beneficiaries' distributive entitlements against the trustees does not depend on a direct claim to particular assets. This means the entitlement remains proprietary even if the trustees have power to buy and sell trust assets. This 'softened' understanding of property as economic property,[135] can be conceptualised as a right in a fund.[136] This idea allowed Lord Morton to say in 1954: 'It is self-evident that a change in the nature of property to which an infant is absolutely entitled causes no change in the infant's beneficial interest'.[137] The proprietary nature also does not depend on the

[132] See *Chapman* (n 37) 455–6, 458 (Lord Morton).

[133] See *Green* (n 71) 462; *MF* (n 62) 3881 [26].

[134] [2001] 1 AC 102, 127 ('*Foskett*'). See also *Glenn* (n 53) 503 (Isaacs J); *Livingston v Commissioner of Stamp Duties (Qld)* (1960) 107 CLR 411 (HCA), 462–3 (Windeyer J) ('*Livingston*'); *Tinsley v Milligan* [1994] 1 AC 340, 371 (Lord Browne-Wilkinson) ('*Tinsley*').

[135] Karl Renner, *The Institutions of Private Law and Their Social Functions*, ed O Kahn-Freund, tr Agnes Schwarzschild (Routledge & Kegan Paul, 1949) 21 (introduction by O Kahn-Freund).

[136] See RC Nolan, 'Property in a Fund' (2004) 120(Jan) *Law Quarterly Review* 108.

[137] *Chapman* (n 37) 451.

interests being absolutely certain. Contingent interests, which were not accepted as proprietary for some time, are now firmly accepted as proprietary.[138]

### B *Fit with Trust Law*

There is a close fit between the case law and the proprietary model of fixed trusts. Proprietary principles played a significant role in the development of fixed trusts as fixed interests have become incrementally more like other property interests.

First, a general rule developed that equitable interests should be treated the same as legal interests — an application of the maxim that equity follows the law[139] — unless there was a reason not to.[140] For example, they were treated the same in matters of

[138] At the start of the 18th century, a contingent equitable interest was considered 'but a mere possibility' and not a proprietary interest capable of being devised or assigned: *Bishop v Fountaine* (1701) 3 Lev 427; 83 ER 764, 764. See also *Thomas v Freeman* (1706) 2 Vern 563; 23 ER 967. Gradually, the courts accepted contingent interests as sufficiently proprietary to be assignable in an expanding array of contexts: *Hobson v Trevor* (1723) 2 P Wms 191; 24 ER 695, [assignable for consideration]; *Higden v Williamson* (1731) 3 P Wms 132; 24 ER 1000, [interests capable of release assignable in bankruptcy]; *King v Withers* (1735) Tal 117; 25 ER 693, [can descend to personal representatives]; *Wright v Wright* (1750) 1 Ves Sen 410; 27 ER 1111, [assignable for love and affection]. Eventually, possibilities were characterised as interests in the land held on trust: *Goodtitle v Wood* (1740) Willes 211; 125 ER 1136; *Moor v Hawkins* (1765) 2 Eden 342; 28 ER 929. This allowed them to be devised as interests in land under the *Statute of Wills 1540*, 32 Hen 8, c 1: see *Jones v Roe* (1789) 3 D & E 88; 100 ER 470.

[139] Maitland (n 116) 112–5.

[140] Exceptions where equity did not follow the law included dower and contingent remainders: see ibid 114.

assignment,[141] devise,[142] descent,[143] execution for debt,[144] forfeiture,[145] disseisin,[146] and the interpretation of 'seisin' in statutes.[147] The rule in *Saunders*,[148] as it applies to individual beneficiaries,[149] provided that where a distributive entitlement was granted to one beneficiary additional provisions that derogated from the enjoyment of that proprietary entitlement were invalid.[150] Even opponents of broader conceptions of beneficial ownership, such as Maitland, nevertheless agreed that the character of the rights and duties internal to the trust — that is, those directly between trustee and beneficiary — was proprietary.[151]

Second, beneficial interests became more proprietary in the exclusionary sense as beneficiaries were progressively granted rights exigible against third parties that protected the primary distributive entitlements.[152] These rights allowed the beneficiaries' interests

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[141] See Thomas Lewin, *A Practical Treatise on the Law of Trusts* (A Maxwell, 1837) 498; Francis Williams Sanders, *An Essay on Uses and Trusts* (5th ed, 1844) vol 1, 283; Maitland (n 116) 113.

[142] See Lewin (n 141) 512; Sanders (n 141) 284; Maitland (n 116) 113. A devise is the transfer of interests in land by will. A bequest is the equivalent transfer of personal property.

[143] Lewin (n 141) 557; Sanders (n 141) 282. Descent is the transfer of land on death by rules of law rather than by will. For example, property may descend to different heirs depending on whether it was in the maternal or paternal line.

[144] See Lewin (n 141) 525–48; Sanders (n 141) 285–90; Maitland (n 116) 115.

[145] See Lewin (n 141) 550; Sanders (n 141) 291–93.

[146] See Lewin (n 141) 514. While disseisin technically means dispossession of legal estates, it was applied by analogy to equitable estates. For example, where an interloper received the income from a beneficial interest in place of the true beneficiary.

[147] See Sanders (n 141) 292–93.

[148] *Saunders* (n 121).

[149] See Matthews (n 120) 268.

[150] *Gosling v Gosling* (1859) John 265; 70 ER 423, 426; *Wharton v Masterman* [1895] AC 186, 198–9 (Lord Davey). See also Anderson (n 8) 242–4.

[151] Maitland (n 116) 117. See also *Burgess* (n 125) 679–80 (Lord Keeper); Scott (n 2) 271.

[152] See above Part II(C)(4).

to be characterised, to a certain extent, as rights against the trust assets themselves. As Hope JA recounted:

> After some hesitation, a trust interest in respect of land came to be regarded, not merely as some kind of equitable chose in action, conferring rights enforceable against the trustee, but as an interest in property. The fact that equitable estates were not enforceable against everyone acquiring a legal title to the property did not prevent them from being so regarded; a legal owner of land could lose his estate in, or become unable to enforce his rights in respect of, land in a number of ways. Although there has long been a controversy whether trust interests are true rights in rem, there can be no doubt that the interest of the cestui que trust is an interest in property.[153]

There is, as Hope JA notes, controversy about whether these ancillary rights are properly categorised as property rights or not.[154] However, the courts have accepted them as a type of property.[155]

Third, distinctly proprietary ideas found their way into the characterisation of the trustees' title to the assets in addition to the characterisation of the beneficiaries' interests. The trustees' legal or equitable interest was distinguished from that of an ordinary owner because the trustees were disabled from benefiting from it. As Millett LJ stated, a true trustee 'does not receive the trust property in his own right … His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it'.[156] The duties that the trust relationship imposes on the trustees transforms the trustees' title into a 'dry' or 'bare' title.[157]

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[153] *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510, 518 [14] (citations omitted).

[154] See below text to n 167–171.

[155] *Foskett* (n 134) 127 (Lord Millett). See also *Glenn* (n 53) 503 (Isaacs J); *Livingston* (n 134) 462 (Windeyer J); *Tinsley* (n 134) 371 (Lord Browne-Wilkinson).

[156] *Paragon Finance plc v DB Thackerar & Co* [1999] 1 All ER 400, 409, quoted in *Williams* (n 6) 1198-9 [11] (Lord Sumption JSC).

[157] See *Buckle* (n 10) 242 [37].

Fourth, the most controversial[158] proprietary principle is the traditional conception that a trust splits the ownership of trust assets into legal ownership and equitable, beneficial ownership.[159] Jaffey's defence of the split title model of trust law[160] was recently cited, with apparent approval, by Lord Mance JSC in the United Kingdom Supreme Court.[161] Generally, the concept of beneficial ownership remains strong.[162] For example, in *Re Lehman Bros International (Europe) [No 2]* Lord Neuberger MR and Patten LJ decided the administration scheme for corporations could not be used to wind up a trustee company because of the fundamental distinction between beneficiaries' proprietary interests and the personal interests of company creditors.[163] Lord Neuberger MR referred to a beneficiary owning the trust assets[164] and to the assets being the beneficiary's property.[165] The High Court of Australia has held that beneficial ownership can be an accurate term, but does not mean enjoyment of all the rights associated with legal ownership.[166]

However, associating proprietary ideas with fixed trusts is doctrinally controversial. For example, there have been centuries of debate about whether or not the beneficiaries'

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[158] See below text to n 170.

[159] See, eg, Salmond (n 48) 230–3.

[160] Jaffey (n 14).

[161] *Akers* (n 119) 442-3 [15]-[16].

[162] The concept of beneficial ownership is considered fundamental to constructive trusts: *Haque v Haque [No 2]* (1965) 114 CLR 98, 124 (Kitto J); *KLDE Pty Ltd (in liq) v Commissioner of Stamp Duties (Qld)* (1984) 155 CLR 288, 295 (Gibbs CJ, Mason, Wilson and Dawson JJ).

[163] [2010] Bus LR 489.

[164] Ibid 511 [76], 513 [82].

[165] Ibid 514 [84].

[166] *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592, 612 [52]-[53] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

rights against third parties are properly described as rights *in rem* or rights *in personam*,[167] or a combination of the two.[168] The latest development in this debate is the 'rights in rights' theory that characterises the beneficiaries' rights against third parties as a special type of right that attaches to the trustees' rights; thus, the interest is more than a right against the trustee's person, but does not directly attach to the trust assets.[169] Moreover, the concept of beneficial ownership is fiercely contested. Maitland famously objected to it on the grounds that one asset could not be owned by two different parties at the same time.[170] Moreover, the idea that beneficial ownership consists of rights that are carved out of the trustees' legal rights and granted to the beneficiaries has been rejected in the courts.[171]

These objections need not be answered. While disagreements about the nature of property are valuable, the current thesis does not need to engage in them for two reasons. First, the core claim is that the beneficiaries' personal distributive entitlements have a proprietary nature. This claim depends neither upon the nature of the rights against third

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[167] See, generally, Ames (n 127) 9; CC Langdell, 'A Brief Survey of Equity Jurisdiction' (1887) 1(2) *Harvard Law Review* 55, 60; Salmond (n 48) 230–32; Maitland (n 116) 111–21; Walter G Hart, 'The Place of Trust in Jurisprudence' (1912) 28(Jul) *Law Quarterly Review* 290; Scott (n 2); Stone (n 2); HG Hanbury, 'A Periodical Menace to Equitable Principles' (1928) 44(Oct) *Law Quarterly Review* 468; Valentine Latham, 'The Right of the Beneficiary to Specific Items of the Trust Fund' (1954) 32(5) *Canadian Bar Review* 520; DWM Waters, 'The Nature of the Trust Beneficiary's Interest' (1967) 45(2) *Canadian Bar Review* 219.

[168] See Lionel Smith, 'Unravelling Proprietary Restitution' (2004) 40(3) *Canadian Business Law Journal* 317, 317–22; Richard Nolan, 'Equitable Property' (2006) 122(Apr) *Law Quarterly Review* 232.

[169] For the rights in rights analysis: see Smith (n 113) 342–4; McFarlane and Stevens (n 113); Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 219, 240–2; James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129(Jan) *Law Quarterly Review* 66, 72–4. For critique of the rights in rights analysis see Penner, '(True) Nature' (n 7); Jaffey (n 14) 383–5.

[170] Maitland (n 116) 17–8.

[171] *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, 311 (McLelland J); *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431. See also William Swadling, 'Trusts and Ownership: A Common Law Perspective' (2016) 24(6) *European Review of Private Law* 951.

parties nor on whether there can only ever be one owner of an asset. Rights that are grafted on to the trustees' legal rights, even if they are not carved out of it, satisfy the conception of beneficial ownership adopted in this thesis.[172] Second, the proprietary language used in the case law in relation to these latter features supports the core claim — that the beneficiaries' rights against the trustees are proprietary — even if that use of language is not established as sound in each particular case.

However, one objection must be answered. This is the objection that personal rights, which include beneficiaries' distributive entitlements against the trustees, should not be characterised as proprietary, because they are merely personal rights.[173] This objection, while it enables a coherent theoretical distinction between property rights and personal rights, does not fit long-standing case law that has accepted personal rights, such as choses in action, as a type of property in both law and equity.[174] No apology is needed for categorising personal rights as 'proprietary' where those rights are distributive entitlements that are strict, immune from divestment, economically valuable and worth protecting. It is acknowledged that this conception of proprietary is wider than some, and that it is important to clarify how the language of property is being used,[175] nevertheless

[172] See above text to n 128.

[173] See, eg, Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) 21–2, 32–3; Douglas and McFarlane (n 169) 239–40; Edelman (n 169) 70–1. Cf Nolan (n 168) 253.

[174] See *Smith v Coffin* (1795) 2 H Bl 444; 126 ER 641, 650; *Loxton v Moir* (1914) 18 CLR 360, 379 (Rich J). See, generally, Howard W Elphinstone, 'What Is a Chose in Action?' (1893) 9(Oct) *Law Quarterly Review* 311; WS Holdsworth, 'History of the Treatment of Choses in Action by the Common Law' (1919) 33(8) *Harvard Law Review* 997.

[175] See Elise Bant, 'Trusts, Powers and Liens: An Exercise in Ground-Clearing' (2009) 3(3) *Journal of Equity* 286, 289; Edelman (n 169) 74.

it is normatively sound. We will return to theories of property in Chapter 3 when we consider whether a proprietary model can account for discretionary trusts.[176]

### C *Conclusion*

In summary, proprietary principles provide conceptual unity to the features of the paradigm fixed trust. The beneficiaries' distributive entitlements are tailored to give each beneficiary a fixed entitlement that is immune from divestment at the hands of the trustees, third parties or, to a significant extent, the courts. This entitlement has a proprietary nature that is stronger than a chose in action and is protected from interference by rights against third parties. The fact that the beneficiaries' interests depend on the trustees' duties to distribute the benefit of the assets exclusively to the individual beneficiaries means they are proprietary, provided that property is understood as economically valuable, stable interests. Together this model accounts for fixed trusts as a proprietary legal form.

## IV APPLYING THE PROPRIETARY MODEL

The final task for this chapter is to consider key doctrinal implications of a proprietary model. Under the model, fixed trusts are more than a descriptive label of a trust with certain characteristics.[177] They are a doctrinally significant category that plays an important role in the characterisation of facts created by settlors.

[176] See Chapter 3 Part III.

[177] Cf *Vegners* (n 10) 552; *Buckle* (n 10) 234 [8].

The fixed trust relationship is not always found fully formed in the settlor's expression of intention. The settlor's words do not speak entirely for themselves but must be imbued with legal meaning by a process of characterisation.[178] That is, settlors create facts, but do not themselves give those facts legal meaning. In the paradigm case above, the settlor's words express an intention that the benefit of the assets is to pass to the beneficiaries in equal shares. However, it does not decree exactly how they are to benefit. These words must be characterised as a trust for them to have legal meaning. The process of characterisation is summarised in the foundational case, *Knight v Knight*:

> As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, *to dispose of that property in favour of another*, the recommendation, entreaty, or wish shall be held to create a trust.[179]

Here we see Lord Langdale characterising the settlor's imposed obligation to distribute assets as a fixed trust.

The process of characterisation, which brings together the proprietary fixed trust model and the facts created by the settlor, can lead to at least three different outcomes. First, application of the model may lead to the conclusion that there was no intention to create a fixed trust or that the intended trust fails for lack of certainty. An example is *Curtis v Lukin*, which designated three beneficiaries, but provided no certainty about what share each was entitled to.[180] This unresolvable uncertainty meant the settlor's words could not be given a legal meaning conforming to the proprietary model and no fixed trust

[178] See Chapter 1 text to nn 35–45.

[179] (1840) 3 Beav 148; 49 ER 58, 68 (emphasis added).

[180] (1842) 5 Beav 147; 49 ER 533, 536.

was created.[181] Another example is where a contract deals with custody of assets but does not address whether a trust was intended.[182] In *Korda v Australian Executor Trustees (SA) Ltd*, money was received as proceeds by a company and held with the intention of eventual payment to investors, which raised the question whether the money was held on trust for them.[183] The terms of the custody arrangement could not be characterised as a fixed trust because the company was under no duty to distribute the benefit of the money to the purported beneficiaries, but could apply it for its own purposes.[184] Where this conclusion is reached the consequence must be either that there is no trust or that a non-fixed type of trust exists.

Second, not all uncertainty in the settlor's definition of beneficiaries causes the trust to fail. As Lord Upjohn has stated, it is the duty of the courts to give meaning to the settlor's language if that can be achieved 'without doing complete violence to it'.[185] Trust models are important in this process as they can fill gaps left by the settlor's words. For example, if a settlor settles assets for a class of beneficiaries but does not specify their individual shares, then the courts may supplement the settlor's words by presuming that the beneficiaries take in equal fixed shares.[186] The proprietary model demands fixed entitlements and the courts can supply them where appropriate. Another area is where trusts are created informally. In *Paul v Constance* the husband told his wife that certain

[181] Ibid.

[182] See Michael Bryan, 'The Inferred Trust: An Unhappy Marriage of Contract and Trust?' (2016) 69(1) *Current Legal Problems* 377.

[183] (2015) 255 CLR 62.

[184] Ibid 101 [110]-[111] (Gageler J).

[185] *Re Gulbenkian's Settlements; Whishaw v Stephens* [1970] AC 508, 522.

[186] See *Greville v Greville [No 1]* (1859) 27 Beav 594; 54 ER 235; *Liddard v Liddard* (1860) 28 Beav 266; 54 ER 368; *Re Bower's Settlement Trusts; Bower v Ridley-Thompson* [1942] Ch 197; *Re Steel (dec'd)* [1979] Ch 218.

money was 'as much yours as mine'.[187] These facts were given legal meaning by characterisation as a declaration of trust under which the husband undertook to distribute the benefit of half of the money to his wife.

Third, the model can render certain terms that the settlor has included unenforceable. Once there is sufficient evidence that the settlor intended to create a fixed trust relationship with distributive entitlements, and not some other relationship, then characterisation of that relationship imposes the rights and duties that exist in a fixed trust.[188] An example is the rule in *Saunders* as it applies to individual beneficiaries.[189] Where a settlor grants entitlement to a distribution, then any attempt by the settlor to burden that entitlement will be repugnant and unenforceable.[190] The typical example is that settlors cannot grant a beneficiary an entitlement to income but direct that it be accumulated until a certain age.[191] The proprietary nature of the distributive entitlements were fundamental to why the courts' decided that these type of rights could not be diminished.[192] However, the acceptance of contingent interests as proprietary means that settlors can achieve a similar result by granting contingent interests to more than one beneficiary, which postpones all distributive entitlements until the contingency is resolved.[193] Another example is *Re Bowes; Earl Strathmore v Vane,* where the settlor intended that a sum of money be held for the purpose of planting trees on certain land.

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[187] [1977] 1 WLR 527, 532 (Scarman LJ).

[188] See *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588, 605 [34] (Gaudron, McHugh, Gummow and Hayne JJ).

[189] *Saunders* (n 121).

[190] *Brandon v Robinson* (1811) 18 Ves Jr 429; 34 ER 379, 381 (Lord Eldon) ('*Brandon*').

[191] See, eg, *Smidmore v Makinson* (1908) 6 CLR 243, 247–50 (Griffiths CJ).

[192] Anderson (n 8) 246–52.

[193] See *Brandon* (n 190) 433–4.

North J was able to characterise those facts as a fixed trust for the owners of the land, because there were no other people who would benefit from the intended tree planting. This characterisation was applied even though it meant the tree planting provision was unenforceable. The landowners had the distributive entitlements associated with fixed trusts and could demand transfer of the money regardless of how they used it.[194] The same reasoning should limit the extent to which the trust instrument can limit the trustees' liability.[195] To be consistent with the fixed trust model any limitation or exclusion clauses should not reach further than the courts are willing to ameliorate the strictness of the trustees' duties.

It can be noted here that the jurisdictions in the United States of America developed fixed trusts according to a less proprietary model. They largely rejected the rule in *Saunders*[196] and allowed settlors to place a variety of restrictions on beneficiaries' interests that rendered them less proprietary.[197] For example, spendthrift trusts allow settlors to prohibit a trustee from paying any trust assets to creditors of a beneficiary, which prevents beneficiaries from selling their interests.[198]

## V CONCLUSION

This chapter has presented a familiar, yet in some respects novel, model of a trust relationship. The proprietary fixed trust model contains familiar features of trust law:

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[194] [1896] 1 Ch 507.

[195] Cf *Armitage v Nurse* [1998] Ch 241 (CA); *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194, 224–5 [61] (Lord Clarke JSC).

[196] *Saunders* (n 121).

[197] See Matthews (n 120) 282–7.

[198] See generally Thomas P Gallanis, 'The New Direction of American Trust Law' (2011) 97(1) *Iowa Law Review* 215.

trustees with duties owed to individual beneficiaries regarding the distribution of assets; beneficiaries with rights to the distribution of the benefit of assets against the trustees. It is a trustee-beneficiary relationship where the beneficiaries' rights can properly be characterised as a form of property. There is a long tradition in trust law that is consistent with this model of the trust. The original contribution of this chapter is to limit this traditional model of the trust to a conceptually secure foundation where beneficiaries' distributive entitlements are immune from divestment at the volition of others. The next step is to consider a type of trust where the beneficiaries have no individual rights to the distribution of the benefit of the assets: the discretionary trust.

# CHAPTER 3

# REVOLUTION IN *BADEN*: AN ADMINISTRATIVE DISCRETIONARY TRUST MODEL

## I INTRODUCTION

There is a significant challenge to any attempt to unify express trusts under a proprietary model. Trusts have always coexisted with discretionary powers to dispose of or distribute assets, including assets held on trust.[1] These 'distributive powers' or 'distributive discretions'[2] challenge the fixed trust model because they do not fit the idea that a trustee owes duties to particular individuals to apply the assets for their benefit. This challenge is intensified when these powers are granted to trustees, which has occurred since at least the 17th century.[3] The existence of distributive powers fundamentally changes the answer to the first research question of what it means for trustees to be subject to 'an obligation to hold [assets] for the benefit of others'.[4] The trustee can be obliged to hold assets for others without being obliged to distribute the assets to any particular other. This fundamentally changes the beneficiaries' rights against the trustee.

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[1] Equitable powers of appointment over assets held by feoffees existed in the law of uses prior to the *Statute of Uses 1535*, 27 Hen 8, c 10. Legal and equitable powers continued to be used after the statute: see John Baker, *The Oxford History of the Laws of England: Volume VI 1483–1558* (Oxford University Press, 2003) 677–8.

[2] The first part of this chapter will use the terminology of distributive powers as it is more traditional. In section IV there is a move to the language of distributive discretions for the reasons given there.

[3] *Mosely v Moseley* (1673) Fin 53; 23 ER 28; *Clarke v Turner* (1694) 2 Freeman 198; 22 ER 1158 ('*Clarke*').

[4] *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614, 622 (Dixon J).

Tracing the development of distributive powers answers the second research question, which asks how the trustees' duty to hold assets for others has changed in meaning. As this chapter and Chapter 4 will demonstrate, over the 19th and early 20th centuries trust doctrine attempted to reconcile proprietary conceptions of fixed trusts with the existence of distributive powers.[5] However, the reconciliation was strained. In 1970, in *Re Baden's Deed Trusts; McPhail v Doulton* ('*Baden*'),[6] the House of Lords abandoned reconciliation. This pivotal decision released trust doctrine from the confines of the fixed proprietary model. Yuri Grbich wrote shortly after the decision that *Baden* amounted 'to the first significant conceptual development in the law of trusts since'[7] the turn of the century and had 'caused a revaluation of the whole conceptual basis of this peculiarly British creation, the trust'.[8] He saw it as establishing an entirely new type of trust that was not bound 'by a rigid conception of a framework of fixed equitable interests and correlatively narrow obligations'.[9] This was a revolution in the nature of the trust.[10] To adapt Lawson and Rudden's language, the new discretionary trust is not a gift of assets requiring management on the plane of time; it is the management of assets that will in time require a gift.[11]

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[5] See below Part III(A); Chapter 4 Part II(A).

[6] [1971] AC 424.

[7] Yuri Grbich, 'Baden: Awakening the Conceptually Moribund Trust' (1974) 37(6) *Modern Law Review* 643, 655.

[8] Ibid 656.

[9] Ibid 655.

[10] Graham Moffat, 'Trusts Law: A Song Without End?' (1992) 55(1) *Modern Law Review* 123, 128. See also Patrick Parkinson, 'Reconceptualising the Express Trust' (2002) 61(3) *Cambridge Law Journal* 657; JE Penner, 'Exemptions' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 241; Jessica Palmer and Charles Rickett, 'The Revolution and Legacy of the Discretionary Trust' (2017) 11(2) *Journal of Equity* 157.

[11] FH Lawson and Bernard Rudden, *The Law of Property* (Clarendon Press, 2nd ed, 1982) 55. This must be contrasted with the reading back doctrine in the rule of perpetuities that reads an exercise of power as if it

This chapter will develop Grbich's insight that discretionary trusts are a significant doctrinal category that is distinct from fixed trusts. Its object is to explain what holding assets for the benefit of others means when trustees have distributive powers. First, it will draw out and describe the key features of the paradigm case of a discretionary trust power,[12] as found in *Baden*.[13] Second, it will build on Grbich's argument that the beneficiaries of these trusts ('discretionary beneficiaries') do not have proprietary interests, in the sense that they do not have positive rights to a distribution against the trustees.[14] It will be argued that these trusts cannot be satisfactorily explained by proprietary accounts available in the literature. Third, the chapter will move beyond Grbich's analysis. It will present a new, original model to account for discretionary trusts that is founded on administrative principles. This administrative model draws on principles of discretion, accountability, authority and oversight that satisfactorily accounts for the trustee-beneficiary relationship in trust powers. Fourth, the new administrative model will be demonstrated to be doctrinally significant through its ramifications for trust law doctrine and the coherence of the legal system.

The analysis in this chapter uses a paradigm case of a discretionary trust, which is like that found in *Baden*.[15] While Grbich preferred the language of a 'modern exhaustive discretionary trust',[16] other terms, as used in *Baden*, include 'powers coupled with a

were a term of the original instrument: see, eg, *Re Pilkington's Will Trusts; Pilkington v Pilkington* [1961] Ch 466, 488 (Upjohn LJ), affd [1964] AC 612.

[12] See below text to nn 15–20.

[13] *Baden* (n 6).

[14] Grbich (n 7) 646.

[15] *Baden* (n 6).

[16] Grbich (n 7) 645.

duty',[17] 'powers in the nature of a trust', 'discretionary trusts' and 'trust powers'.[18] 'Trust power' will be used in this thesis for its brevity and distinctiveness. Other types of trustee distributive power, such as mere powers,[19] and direct gifts subject to a power of selection[20] will be considered in Chapter 4. The intent of this chapter is to describe the least complicated type of discretionary trust in order to draw out its key features and unifying principles. It will use 'discretionary beneficiary' to refer to the beneficiaries of trust powers and 'discretionary object' to refer to the object of a mere power.

## II PARADIGM CASE: KEY FEATURES OF TRUST POWERS

The paradigm case of a discretionary trust is a trust power like that found in *Baden*.[21] Assets are owned by trustees who undertake to hold them, and any accumulated income, for a period of time. The trustees are empowered to manage the assets as a fund. The trustees undertake to apply the assets for the benefit of a defined class of people: the 'discretionary beneficiaries'. The trustees are empowered to determine which of the discretionary beneficiaries to benefit, when to benefit them and in what proportions. At the end of the designated period the trustees must exercise their power and distribute any assets that remain in the trust fund to the discretionary beneficiaries.

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[17] *Baden* (n 6) 430 (John Vinelott QC during argument).

[18] Ibid 452 (Lord Wilberforce).

[19] Trustee mere powers are discretions that the trustees are not obliged to exercise. If they choose not to exercise the power, then the trust assets will be distributed under a default trust provision: see *Re Sayer; MacGregor v Sayer* [1957] Ch 423.

[20] *Burrough v Philcox* (1840) 5 Myl & Cr 72; 41 ER 299 ('*Burrough*'). See also Stuart Anderson, 'Property' in *The Oxford History of the Laws of England: Volume XII 1820–1914 Private Law* (Oxford University Press, 2010) 1, 243; John Hopkins, 'Certain Uncertainties of Trusts and Powers' (1971) 29(1) *Cambridge Law Journal* 68, 74.

[21] *Baden* (n 6).

A concrete example of the paradigm case is the Matthew Hall staff trust fund in *Baden*.[22] Various investment assets were transferred to trustees who undertook to apply the income 'in making at their absolute discretion grants to or for the benefit of any of' a selection of beneficiaries.[23] These discretionary beneficiaries included current and former employees and officers of Matthew Hall & Co Ltd and their relatives and dependants. The trust was to end either upon the liquidation of the associated company, if the trustees decided to terminate it, or at the end of the perpetuity period.[24] On termination, the assets were to be applied to benefit the same beneficiaries or resettled on other trusts for the employees.[25] A complicating factor was that the trustees had the option to accumulate income, rather than apply it as it arose, which caused disagreement in the courts about whether the direction to apply income to the beneficiaries was a trust or a power.[26] For present purposes, we will set aside this question of a trust subject to a power and return to it in Chapter 4.

The trust power, and its concrete manifestation in *Baden*,[27] allows us to draw out three key features of the paradigm case of discretionary trusts.

First, the trustees' management role is indistinguishable from those in fixed trusts as considered in Chapter 2.[28] The trustees' undertaking implies duties to preserve and protect the assets until disposition. Like the fixed trust, management powers to sell or

[22] Ibid 427.

[23] Ibid 428.

[24] Ibid 428, 447 (Lord Wilberforce).

[25] *Re Baden's Deed Trusts; Baden v Smith* [1969] 2 Ch 388, 390–1 ('*Baden* (CA)').

[26] *Re Baden's Deed Trusts; Baden v Smith* [1967] 1 WLR 1457; *Baden* (CA) (n 25); *Baden* (n 6).

[27] *Baden* (n 6).

[28] See the distinction between management and distributive discretions: Chapter 1 text to nn 46–8.

invest the trust assets do allow trust assets to be transferred to third parties, but only for consideration. Therefore, the trust fund as a whole is preserved through the acquisition of substitute assets and the trustees' duty to hold the assets is a duty to hold a mutable fund.[29]

Second, the central distinction between fixed trusts and trust powers is that the trustees' distributive role cannot comprise a simple right-duty relation as it includes a power.[30] A 'power may be defined as ability conferred upon a person by the law to determine, by his own will directed to that end, the rights, duties, liabilities, or other legal relations, either of himself or of other persons.'[31] The trustees have the power to decide which beneficiaries benefit from the trust assets and, thus, they have no duty to benefit any individual beneficiary.[32] The trustees do have a duty to distribute all the assets to one or more beneficiaries,[33] but this duty is not fixed or strict in relation to individual beneficiaries. Correlatively, none of the beneficiaries has a right against the trustees to benefit from the trust assets, either immediately or at any point in the future.[34] Instead they have hopes and expectations of receiving a transfer, but these are dependent on the trustees' exercise of power.[35] The technical definition of this power is a 'special' power of appointment, as it can only operate to benefit a defined class of beneficiaries. It is

[29] See Chapter 2 text to nn 135–7.

[30] See Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16.

[31] John W Salmond, *Jurisprudence* (Stevens & Haynes, 2nd ed, 1907) 194.

[32] *Baden* (n 6) 447 (Lord Wilberforce).

[33] In *Baden* (n 6), the Court found such a duty, even though there was a power to accumulate the income rather than distribute to the beneficiaries. This issue is the subject of Chapter 4.

[34] *Baden* (CA) (n 25) 401–2 (Russell LJ).

[35] *Gartside v Inland Revenue Commissioners* [1968] AC 553, 605–6 (Lord Reid) ('*Gartside*').

contrasted with a 'general' power that may operate to benefit anyone in the world, and a 'hybrid' power that may operate to benefit anyone apart from a defined class.[36]

Third, a trust power is not only a power in the trustees but is a more complex relationship that includes rights and duties. The trustees have duties that control how they exercise their distributive power. A critical aspect of Lord Wilberforce's judgment is his views on how 'reasonable and competent trustees would act, and ought to act'.[37] They ought to exercise their power in accordance with the power's purpose, after 'diligent and careful inquiries',[38] not capriciously and not in favour of non-beneficiaries.[39] This reflects Lord Wilberforce's earlier statement in *Gartside v Inland Revenue Commissioners* that discretionary objects have rights against the trustees to have the powers exercised properly and in accordance with objective criteria.[40] These duties are different from the duties under fixed trusts, but are nevertheless justiciable and can be enforced by the courts.[41] Lord Wilberforce drew on pre-19th century cases where the courts directly interfered in the exercise of powers.[42] He held that trustees' duties could be enforced by a change of trustees, review of a distributive scheme prepared by the parties, or by a court ordering that a specific distribution be made.[43]

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[36] See Geraint W Thomas, *Thomas on Powers* (Oxford University Press, 2nd ed, 2012) 7-11 [1.15]-[1.21].

[37] *Baden* (n 6) 449.

[38] Ibid.

[39] Ibid.

[40] *Gartside* (n 35) 617–8.

[41] *Baden* (n 6) 457.

[42] *Clarke* (n 3); *Warburton v Warburton* (1702) 4 Bro Parl Cas 1; 2 ER 1 ('*Warburton*'); *Richardson v Chapman* (1760) 7 Bro Parl Cas 318; 3 ER 206, 212 ('*Richardson*').

[43] *Baden* (n 6) 457.

These three features will be considered further below when we set out the administrative model of discretionary trusts. First, however, we must consider why the trust power does not fit the proprietary model that fits fixed trusts.

## III PROPRIETARY MODEL: AN INCOMPLETE FIT WITH TRUST POWERS

The first question for the paradigm trust power is whether the proprietary model that fits fixed trusts can provide a unified account of both fixed trusts and trust powers. If the distinctive trustee-beneficiary relationship that we observed in the paradigm case can nevertheless be explained by the same model that explained fixed trusts, then there is no case for a conceptual distinction between these types of trusts. However, the straightforward answer is that it cannot.

The proprietary fixed trust model does not fit the discretionary trust relationship observed in the paradigm case because the discretionary trustee has a power to decide the distribution of assets. As set out in Chapter 2, the proprietary model entails positive individual claims against the trustees for a distribution of benefit from the trust assets. It is these positive claims that James Penner identifies as rights of beneficial ownership:

> [R]ights that the trustee exercises his power of title to give the beneficiary the legal benefit of the property either (1) in kind, as in the case where the beneficiary himself gets the right to immediate, exclusive possession of the trust asset, or (2) in the future, by way of transfer to him of the legal title to the trust asset (whether of income or capital) …[44]

None of these positive claims can be found in the paradigm case of the discretionary trust identified above. An individual discretionary beneficiary does not have a right to be

[44] JE Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27(2) *Canadian Journal of Law and Jurisprudence* 473, 486 ('(True) Nature').

distributed any trust assets. No such right can exist when the trustees have a power to determine which of the beneficiaries receive a distribution.[45]

This analysis of trust powers has been recognised since *Baden*.[46] As Grbich identified, a trust power

> gives the objects only the narrow right to have an allocation of the entire discretionary fund made in accordance with the terms of the authorising instrument. It gives them a right to have the trust fund administered but no right, individually or collectively, to the trust fund itself.
>
> The modern exhaustive discretionary trust does not impose a 'trust' with finite vested proprietary interests in ascertained beneficiaries in the sense that a normal fixed trust does.[47]

Patrick Parkinson came to the same conclusion in a paper where he argued for the reconceptualisation of trusts as obligational rather than proprietary.[48]

This simple analysis is sufficient to conclude that no discretionary beneficiary has the type of individual distributive right that is required by the proprietary model in Chapter 2. Thus, there is a clear distinction between fixed trusts where those rights are present and discretionary trusts where they are not. However, before moving on to an alternative model of the trustee-beneficiary relationship, three further points require consideration. First, the historical development of trust powers supports the conclusion. Second, an alternative proprietary account in the literature, which is founded on collective proprietary rights, must be considered. Third, another proprietary account in the literature, which is founded on rights to exclude, must be considered. This thesis will

[45] *Gartside* (n 35) 607 (Lord Reid), 614 (Lord Wilberforce).

[46] *Baden* (n 6).

[47] Grbich (n 7) 654 (citations omitted).

[48] Parkinson (n 10) 660–1.

establish that the latter two alternative accounts do not provide a satisfactory account of the trustee-beneficiary relationship, and both rely on limited theories of property.

### A *Development of Trust Powers*

The history of trust powers is best interpreted as an ultimately unsuccessful attempt to reconcile powers with the proprietary model of trusts. The historical development can be divided into roughly four periods: 1) the early period; 2) the consolidation of the fixed trust model as the dominant paradigm, which required reconciliation with trust powers; 3) an increase the tension between trust powers and the fixed trust model caused by arbitrary consequences produced in certainty tests; and 4) the breakdown of the reconciliation with *Baden*.[49] This progression confirms that it is now impossible to explain the trustee-beneficiary relationship in a discretionary trust using the proprietary fixed trust model.

The first period covers the 17th and 18th centuries. During this period trusts and powers were not carefully distinguished but were both considered part of the law of conveyancing.[50] As seen in *Burgess v Wheate*, the dominant trust model was proprietary: between trustee and beneficiary, the beneficiary was considered to have the equivalent of a proprietary interest in land.[51] However, judges also displayed a paternalistic ethos

[49] *Baden* (n 6).

[50] See, eg, Blackstone, where a chapter on conveyances by deed discusses uses and trusts: William Blackstone, *Commentaries on the Laws of England* (13th ed, 1800) vol 2, 327–37. Powers are also included: ibid 335.

[51] (1759) 1 Eden 177; 28 ER 652, 680 ('*Burgess*').

towards the beneficiaries of powers,[52] and interfered in trustees' exercise of distributive powers.[53]

In the second period, over the 19th century, the attitude of equity judges became less paternal and the fixed trust model was consolidated. As Gregory Alexander has argued, trust law became established as a distinct area of doctrine, but also, paradoxically, beneficiaries' interests under trusts became even further assimilated with property law principles.[54] This meant that trusts had to be distinguished from powers.[55] Trust powers, which partook of both power and trust, were a particular problem for this rationalisation of the field.[56] Their categorisation as trusts was able to be partially reconciled with the fixed trust model through the rule that the courts would only positively enforce the power by ordering distribution to all discretionary beneficiaries in equal shares.[57] This reconciliation treated trust powers as the equivalent to a fixed trust in default of the trustees' discretionary power. John Chipman Gray argued influentially that all trust powers were in fact implied fixed trusts, subject to a power of selection between the beneficiaries.[58] Thus, when the courts are called to execute the trust, they do not exercise

[52] See Gregory S Alexander, 'The Transformation of Trusts as a Legal Category: 1800-1914' (1987) 5(2) *Law and History Review* 303, 321–2.

[53] See *Clarke* (n 3); *Warburton* (n 42); *Richardson* (n 42) 212.

[54] See Alexander (n 52) 322.

[55] See ibid 333–6.

[56] *Brown v Higgs* (1801) 8 Ves Jr 561; 32 ER 473, 476, affd (1813) 18 Ves Jr 192; 34 ER 290 ('*Brown*').

[57] *Harding v Glyn* (1739) 1 Atk 469; 26 ER 299; *Kemp v Kemp* (1801) 5 Ves Jr 849; 31 ER 891; *Longmore v Broom* (1802) 7 Ves Jr 125; 32 ER 51; *Fordyce v Bridges* (1848) 2 Ph 497; 41 ER 1035, 1041.

[58] John Chipman Gray, 'Powers in Trust and Gifts Implied in Default of Appointment' (1911) 25(1) *Harvard Law Review* 1. Ames, in contrast, suggests the courts enforced a constructive trust in the event the power was not exercised: JB Ames, 'The Failure of the "Tilden Trust"' (1892) 5(8) *Harvard Law Review* 389, 394 n 1. Contrast Thomas (n 36) 134-5 [3.74]-[3.76].

a power but enforce the fixed trust.[59] This account allowed trust powers to be reconciled with the fixed trust model, because the beneficiaries had contingent fixed distributive rights in the event the trustees failed to exercise their power.[60] However, this reconciliation was incomplete. It did not reconcile the inherent contradictions in a contingent distributive right that is entirely dependent on another's power. Thus, it contradicted any robust account of the proprietary model. This issue will be the subject of Chapter 4, which considers trusts that are subject to distributive powers.

The third period involved the development of certainty rules for the definition of beneficiaries that increased pressure on how trust powers were reconciled with fixed trusts. According to Lionel Sheridan, until the 1950s it was received wisdom that the list-certainty test[61] applied to both trusts and powers.[62] This was rejected in *Re Gestetner Settlement; Barnett v Blumka*,[63] which clarified that list-certainty was not required of mere powers and they could be drafted broadly. This new distinction meant the courts had to resolve the place of trust powers: were they more like a fixed trust or a discretionary power? In *Inland Revenue Commissioners v Broadway Cottages Trust* ('*Broadway Cottages*'),[64] Jenkins LJ decided they were to be treated the same as fixed trusts:

> In the former case [of a trust power in favour of an unascertainable class] (of which the trust now before the court is an example) no trust which the court can control and execute, or, in other words,

[59] *Burrough* (n 20) 307; *Re Hughes; Hughes v Footner* [1921] 2 Ch 208, 214. See also Sir George Farwell, *A Concise Treatise on Powers*, ed CJW Farwell and FK Archer (Stevens & Sons, 3rd ed, 1916) 528, 534; RL Congreve, 'Trust-Powers and Trusts' (1973-75) 7(4) *Victoria University of Wellington Law Review* 393, 397. But see *Brown* (n 56) 476, where Lord Eldon used language that suggested the courts would execute a trust power by exercising the power rather than by executing a distinct trust in default.

[60] Gray (n 58) 3–4.

[61] See Chapter 2 text to n 56 on the list-certainty test.

[62] LA Sheridan, 'Discretionary Trusts' (1957) 21(1) *Conveyancer and Property Lawyer* 55, 55.

[63] [1953] Ch 672 ('*Gestetner*'); *Re Gulbenkian's Settlements; Whishaw v Stephens* [1970] AC 508.

[64] [1955] Ch 20.

> no valid trust at all, is created, for there can be no trust in favour of the unascertainable class as a whole; no beneficial interest is conferred on any particular member or members of the class unless and until the trustees think fit to make some distribution to him or them, and the making or withholding of any such distribution rests on the uncontrolled discretion of the trustees, which the court can neither exercise nor compel to be exercised.[65]

Jenkins LJ's reasoning enshrines the fixed trust model — the requirement that distributive entitlements be conferred on individual beneficiaries. He concludes that the requirement is not satisfied where benefits are unknown prior to the trustees' decision to distribute.

The fourth period of development is marked by the bare majority decision in the House of Lords in *Baden*.[66] Lord Wilberforce accepted as valid a trust power that was so broad that there could be no implied gift in default to all beneficiaries equally. He held that the presumption a settlor intended such a 'whimsical execution' as equal distribution was a fiction.[67] And he rejected the idea that the courts were only capable of enforcing an equal distribution.[68] This decision ended the attempted reconciliation between trust powers and the fixed trust model. It accepted trusts where the beneficiaries did not have any rights that could be characterised as fixed distributive entitlements.[69]

### B *Collectivist Proprietary Account*

The conclusion that the proprietary fixed trust model from Chapter 2 does not fit discretionary trust powers does not clear the field of proprietary accounts. Since *Baden*

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[65] Ibid 32. The proprietary characterisation was not the only justification for the rule that all beneficiaries of a trust power must be ascertainable. In *Gestetner* (n 63), Harman J said that the trustees of a trust power could only exercise the power properly if they knew all of the eligible beneficiaries: at 685. See further below n 152.

[66] *Baden* (n 6).

[67] Ibid 451.

[68] Ibid 457.

[69] In Chapter 4 we will return to the question whether contingent fixed rights under the 19th century reconciliation could properly be characterised as fixed distributive entitlements.

some proprietary accounts have focused on the collective rights of discretionary beneficiaries, rather than their individual rights. For example, Peter Jaffey states that equitable or beneficial ownership means the right to all the benefit of trust property, regardless of how beneficial distribution is allocated to beneficiaries.[70] This account is incomplete because it does not explain what the right is and how it is held.

The collectivist proprietary accounts usually derive substance from the so-called rule in *Saunders v Vautier* ('*Saunders*'),[71] which holds that where all beneficiaries have legal capacity they can collectively demand transfer of the trust assets.[72] Several cases have held that the *Saunders* rule includes discretionary trusts and powers.[73] For example, in *Sir Moses Montefiore Jewish Home v Howell & Co (No 7) Pty Ltd*, Kearney J stated that discretionary beneficiaries may collectively invoke the rule because they are the only people interested in, and entitled to call for, the due administration of the trust.[74]

The first, and most significant, problem with any attempt to explain discretionary trust powers with a proprietary account derived from the *Saunders* doctrine is that it does not apply to all discretionary trust powers. It can only apply to ascertainable classes of discretionary beneficiaries. Where there is a broad trust power, as in *Baden* and the paradigm case, the discretionary beneficiaries are unascertainable and there can be no collective right to demand distribution of the benefit of the assets. As Jenkins LJ held in

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[70] Peter Jaffey, 'Explaining the Trust' (2015) 131(Jul) *Law Quarterly Review* 377, 387.

[71] (1841) Cr & Ph 240; 41 ER 482.

[72] See, eg, *Goulding v James* [1997] 2 All ER 239, 247.

[73] *Re Nelson; Norris v Nelson* [1928] Ch 920n ('*Nelson*'); *Re Smith; Public Trustee v Aspinall* [1928] 1 Ch 915 ('*Smith*'); *Re Beckett's Settlement; Eden v Von Stutterheim* [1940] Ch 279, 285 ('*Beckett*'); *Sir Moses Montefiore Jewish Home v Howell & Co (No 7) Pty Ltd* [1984] 2 NSWLR 406, 410 ('*Montefiore*'). For a non-proprietary account of this right see *Miskelly v Arnheim* [2008] NSWSC 1075 [39].

[74] *Montefiore* (n 73) 411.

*Broadway Cottages*, in such circumstances the right under *Saunders* is illusory.[75] Therefore, MW Lau's claim that all trusts, including discretionary trusts, are proprietary because beneficiaries have residual proprietary claims to the fund,[76] cannot be correct in relation to broad trust powers. These types of trusts are not explained by a collective proprietary interest.

Other accounts acknowledge this distinction. For example, Jessica Hudson argues that only under some trust powers will beneficiaries have collective equitable ownership through the *Saunders* doctrine.[77] This raises the possibility that there is a clear boundary between narrow and broad discretionary trust powers. Narrow discretions with ascertainable, sui juris beneficiaries can be explained by the proprietary model and are indistinguishable from fixed trusts, while only the broader discretions require an alternative explanation.

Contrary to this more limited claim, this thesis argues that the better conceptual distinction remains between fixed trusts and all discretionary trusts. It is acknowledged that narrow discretionary trusts, where all discretionary beneficiaries are ascertainable and have legal capacity, can be interpreted as containing a type of collective proprietary claim through the *Saunders* right to terminate.[78] However, for the reasons given below,

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[75] *Broadway Cottages* (n 64) 30–1. See also Parkinson (n 10) 660–1; Palmer and Rickett (n 10) 162–3.

[76] MW Lau, *The Economic Structure of Trusts* (Oxford University Press, 2011) 10.

[77] Jessica Hudson, 'Equitable Ownership and Restitution of Misapplied Trust Property' (2017) 11(3) *Journal of Equity* 245, 255–6. See also Nigel P Gravells, 'Discretionary Trusts and Powers of Appointment: Progressive Assimilation' (1992) 5(1) *Canterbury Law Review* 67, 71–2; Paul Matthews, 'The Comparative Importance of the Rule in *Saunders v Vautier*' (2006) 122(Apr) *Law Quarterly Review* 266, 273–5 ('*Saunders*'); Jaffey (n 70) 387; Lionel Smith, 'Massively Discretionary Trusts' (2017) 70(1) *Current Legal Problems* 17, 25.

[78] *Nelson* (n 73); *Smith* (n 73); *Beckett* (n 73) 285; *Montefiore* (n 73) 410.

this *Saunders* claim is wholly unique and much weaker than other proprietary claims, including other collective claims. It is not a true collective proprietary interest.

The weakness of the right under *Saunders* is that it is hampered by a coordination problem.[79] Coordination problems arise with collective property interests when the collective members must work cooperatively to realise benefits. Most property interests solve the coordination problem by governance structures that create enforceable horizontal relationships between all parties. For example, coordination failure between joint tenants can be resolved by application to the courts[80] or by severing the joint interest into individual interests.[81] However, there is no governance structure or horizontal relationship that can help discretionary beneficiaries coordinate; the courts will not assist them in realising any value from their collective power under *Saunders*. All the discretionary beneficiaries need to agree to make the claim. Therefore, any one of them can block the others from realising any benefit from the right. As Lord Reid said, they are not joint tenants or tenants in common who jointly hold a single right: '[C]learly objects of a discretionary trust do not have that: they each have individual rights: they are in competition with each other'.[82] This coordination problem creates what Michael Heller has defined as 'anticommons property' rather than private property.[83] Anticommons property exists when multiple individuals (the beneficiaries) can each exclude each other from a resource (the right to terminate the trust) so that no one can effectively use the

[79] See Simon Blackburn, *The Oxford Dictionary of Philosophy* (Oxford University Press, 3rd ed, 2016) 'coordination problem'.

[80] See, eg, *Property Law Act 1958* (Vic) Part IV.

[81] See, eg, *Real Property Act 1900* (NSW) s 97.

[82] *Gartside* (n 35) 605–6 (Lord Reid). See also *Sainsbury v IRC* [1969] 3 WLR 760, 724; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, 119 [46] ('*CPT*').

[83] Michael A Heller, 'Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111(3) *Harvard Law Review* 621, 670–1.

resource.[84] Therefore, the type of claim supported by the *Saunders* doctrine is quite distinct from the type of proprietary claims enjoyed by fixed beneficiaries. The latter is an entitlement, while the former is a possibility dependent on coordinated collective action with no supporting mechanisms to enable that action.

In summary, no collectivist proprietary account can explain all discretionary trusts. Broad discretionary trusts, like that in *Baden*, require an alternative account. Moreover, while the *Saunders* doctrine does provide the appearance of a collective proprietary claim for some discretionary trusts, it is a unique claim that does not fit with the proprietary account given in Chapter 2. The beneficiaries' rights under *Saunders* are too dependent on others to be comparable to the individual and collective entitlements enjoyed by fixed beneficiaries. Therefore, all trust powers, even narrow ones, require a new model to account for them.

### C *'Ring-fenced' Proprietary Account*

A further, alternative, proprietary account is found in the literature that emphasises the beneficiaries' right to exclude non-beneficiaries from benefiting from the trust assets. The exemplar for our purposes is Richard Nolan's account of equitable property. He argues that discretionary beneficiaries have the same proprietary rights as fixed beneficiaries because they can exclude non-beneficiaries from the trust assets, even though they have no positive claims to benefit from those assets.[85] The advantage of

[84] Ibid 667–9.

[85] Richard Nolan, 'Equitable Property' (2006) 122(Apr) *Law Quarterly Review* 232, 256–7. See also Henry Hansmann and Ugo Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) 73(2) *New York University Law Review* 434; Lionel Smith, 'Unravelling Proprietary Restitution' (2004) 40(3) *Canadian Business Law Journal* 317, 317–22.

Nolan's account is that it does provide a unified account of both fixed and discretionary trusts. Both types of beneficiaries have rights to exclude third parties from the trust assets, which produces a 'ring-fencing'[86] effect.

Whether or not this proprietary model is doctrinally sound need not be contested here, although the challenges to it will be noted. First, there is simply limited authority that discretionary beneficiaries have standing to recover trust assets directly from third parties.[87] Second, assuming that they do have standing, there is a question whether discretionary beneficiaries' rights are more similar to fixed beneficiaries or to the legatees of unadministered estates.[88] Fixed beneficiaries assert their own rights directly against recipients,[89] while legatees may achieve a similar result by bringing a personal claim,

[86] See Jonathan Law, *A Dictionary of Finance and Banking* (Oxford University Press, 6th ed, 2018) 'ring-fence'.

[87] Authority on discretionary beneficiaries' and discretionary objects' rights against third parties is sparse. In the Victorian Court of Appeal, Redlich JA said that it may be accepted that discretionary objects do have these limited rights: *Lygon Nominees Pty Ltd v Commissioner of State Revenue* (2007) 23 VR 474, [67] ('*Lygon*'). Lord Mance JSC cited Nolan with approval when stating that beneficiaries have rights to have the trust fund restored, without distinguishing between fixed and discretionary trusts: *Akers v Samba Financial Group* [2017] AC 424, 452 [46] ('*Akers*'). Nolan has also found authority that discretionary objects have standing to bring claims for breach of trustees' management duties, which strongly suggests that beneficiaries under trust powers should have such rights: Richard Nolan, 'Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2017) 151. Jessica Hudson has made a compelling case for why all types of beneficiaries should have rights to restore assets misapplied in breach of distributive duties: Hudson (n 77). As Hudson notes, the authorities that are most supportive of her argument involve beneficiaries that are fixed beneficiaries in default as well as being objects of a discretionary power: at 262-3. See also Lynton Tucker et al, *Lewin on Trusts* (Sweet & Maxwell, 19th ed, 2015) 1889-91 [39–073] ('*Lewin*').

[88] Cf *Jonsue Investments Pty Ltd v Balweb Pty Ltd* (2013) 9 ASTLR 460, 472 [44]-[45].

[89] *Foskett v McKeown* [2001] 1 AC 102, 108-9 (Lord Browne-Wilkinson) ('*Foskett*').

joining the executors, as a derivative action[90] against third parties.[91] Third, assuming discretionary beneficiaries are asserting their own direct rights against third parties, a question has been raised about whether those rights attach directly to the trust assets or only to the trustees' rights in those assets.[92] This challenge is less critical for Nolan's account because the latter 'rights in rights' analysis still supports a proprietary account, provided that property rights are defined as rights that subsist in things as those things change hands, rather than a right to exclude the world at large.[93]

Despite the challenges, Nolan's proprietary account is an important reconceptualisation of the proprietary nature of trust interests. It is able to explain all trust interests through the exclusionary rights that operate against strangers to the trust. However, this advantage of Nolan's account is also the source of its limitations. The first limitation is that it, while it explains the beneficiaries' relationship with third parties, it does not fully explain the relationship of beneficial entitlement between trustee and fixed beneficiary. Indeed, Nolan dismisses the positive, beneficial entitlements that

[90] Derivative actions are those where beneficiaries or legatees are allowed to bring proceedings on behalf of the trustees or executors. They are limited to special circumstances, such as when the trustees fail to perform their duties: *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109, 129-30 [55]-[56] (Gleeson CJ, Gummow and Hayne JJ).

[91] See *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 (PC), 712–3 ('*Livingston*'). Some support for this characterisation is found in the NSW Court of Appeal's suggestion that discretionary beneficiaries do not have automatic standing to bring claims to resolve questions about the administration of a trust: *El Sayed v El Hawach* (2015) 88 NSWLR 214, 223-5 [47]-[57]. Moreover, it may be suggested that all proprietary tracing claims are in essence a series of derivative personal unjust enrichment claims, but where liberal procedural rules do not require the joinder of intermediaries: see James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 98–105.

[92] See Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4(1) *Journal of Equity* 1; Jaffey (n 70).

[93] See, eg, AM Honoré, 'Rights of Exclusion and Immunities against Divesting' (1960) 34(3) *Tulane Law Review* 453, 463–5; Lionel Smith, 'Transfers' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 111, 120–1; JE Penner, 'Duty and Liability in Respect of Funds' in John Lowry and Loukas Mistelis (eds), *Commercial Law: Perspectives and Practice* (Butterworths, 2006) 207, 214–6; Matthews, '*Saunders*' (n 77) 273–4; McFarlane and Stevens (n 92).

beneficiaries have against trustees as irrelevant to a proprietary analysis because rights that are only exigible against a narrowly defined class are, by his definition, not truly property rights and may only be considered proprietary for discrete purposes.[94] This minimalist theory of property argues that the only proprietary account that is possible is an account of how the trust relationship ring-fences the trust fund from third party claims. This means the account is explaining a different aspect of the trust concept than the proprietary fixed trust model developed in this thesis.

The second limitation of Nolan's account is that it utilises a limited theory of property. It is part of the branch of property theory that emphasises a right to exclude strangers from a thing.[95] This branch is particularly interested in providing a clear distinction between property rights and personal rights, which can be achieved through the question of exigibility.[96] It is this question that has fuelled the ongoing scholarly debate about the correct categorisation of equitable interests as exclusionary property rights or merely personal rights against the trustees.[97] However, while exclusion rights

[94] Nolan, 'Equitable Property' (n 85) 236, 251–3.

[95] See Felix S Cohen, 'Dialogue on Private Property' (1954) 9(2) *Rutgers Law Review* 357, 370–1, 378–9; JE Penner, *The Idea of Property in Law* (Clarendon Press, 1997); Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77(4) *Nebraska Law Review* 730; Thomas W Merrill and Henry E Smith, 'The Property/Contract Interface' (2001) 101(4) *Columbia Law Review* 773; Henry E Smith, 'Property as the Law of Things' (2012) 125(7) *Harvard Law Review* 1691; Jesse Wall, 'The Functional–Formal Impasse in (Trust) Property' (2018) 14(3) *International Journal of Law in Context* 437; Ernest J Weinrib, 'Ownership, Use, and Exclusivity: The Kantian Approach' (2018) 31(2) *Ratio Juris* 123.

[96] See Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710, 718; McFarlane and Stevens (n 92) 1.

[97] Austin Wakeman Scott, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17(4) *Columbia Law Review* 269; Harlan F Stone, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17(6) *Columbia Law Review* 467; FW Maitland, *Equity*, ed AH Chaytor and WJ Whittaker (Cambridge University Press, 1929) chs 9-11; DWM Waters, 'The Nature of the Trust Beneficiary's Interest' (1967) 45(2) *Canadian Bar Review* 219; Lionel Smith, 'Trust and Patrimony' (2009) 28(4) *Estates, Trusts & Pensions Journal* 332, 342–4; McFarlane and Stevens (n 92); Penner, '(True) Nature' (n 44).

and exigibility are certainly significant, they are not the only important features in property theory.

Another branch of property theory is focused on positive rights to use, control, exploit or otherwise benefit from resources.[98] Indeed, many exclusionary accounts proceed on the basis that negative exclusion rights are critical because they secure positive use rights or liberties.[99] Moreover, as Kevin Gray has explained, equitable rights present a special case.[100] The primary feature of equitable rights is that they are rights to access resources controlled by another party, such as a trustee.[101] Indeed, beneficial interests do not require the same negative exclusionary rights as other types of interests, because the trustees hold exclusionary rights and are obliged to exercise them to protect the beneficial interests. Thus, a balanced view of property theory means that a bare right to exclude, which is divorced of any right to use or access resources, is a limited proprietary account.[102] This is all that an exclusionary account, like Nolan's, can provide when discretionary trust powers are included. Discretionary beneficiaries have no right to access resources and they do not have proprietary interests in a rich sense.

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[98] See, eg, Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58(3) *University of Toronto Law Journal* 275; Eric R Claeys, 'Exclusion and Private Law Theory: A Comment on *Property as the Law of Things*' (2012) 125(1) *Harvard Law Review Forum* 133; James Y Stern, 'What Is the Right to Exclude and Why Does It Matter?' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 38; Eric R Claeys, 'Property, Concepts, and Functions' (2019) 60(1) *Boston College Law Review* 3.

[99] See, eg, Weinrib (n 95).

[100] Kevin Gray, 'Equitable Property' (1994) 47(2) *Current Legal Problems* 157. See also Avihay Dorfman, 'On Trust and Transubstantiation: Mitigating the Excesses of Ownership' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 339; Jaffey (n 70) 400; Sarah Worthington, 'Revolutions in Personal Property: Redrawing the Common Law's Conceptual Map' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018) 227.

[101] Gray (n 100) 171–2.

[102] But see Wall (n 95) 452.

It is appropriate to point out here that Penner presents a similar proprietary account of discretionary trusts in his article 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust'.[103] Early in the article Penner defines beneficial ownership as the beneficiary's 'rights that the trustee exercises his power of title to give the beneficiary the legal benefit of the property'.[104] However, in the later discussion about discretionary trusts there is a subtle shift:

> I would argue that one of the advantages of my account, focussing as it does on the interest that a beneficiary has in *the powers of title* held by the trustee, not in any possessory interest in the trust assets themselves, clarifies the case of legatees, discretionary objects and so on, and that the usage 'beneficial interest' has an essential role to play here. Because the objects of a trust, as I have argued, never have any possessory interests in the trust assets just in virtue of their being the objects of a trust (though under the terms of a trust they may, as explained above, have the right to make the trustee put them in possession of tangible trust assets), it is not essential to a trust, or to the conception of a beneficial interest under a trust, that any object has any immediate, vested interests in the trust assets. As explained above, all beneficial interests under trusts (excepting, again, the case where the terms of the trust require the objects to be put in possession of tangible trust assets) are essentially future interests in the sense that they require the trustee to exercise his power of transfer to transfer the legal title to trust assets to the objects (title to money representing income, or the title to the trust assets themselves in the case of a capital distribution, either on the dissolution of the trust or by way of power of appointment). There is no problem of finding a 'beneficial interest' here that correlates with the trustee's absence of a beneficial interest, so long as it is understood that there can be interests which *exhaust* the beneficial interest in the trust assets, though such interests are future or contingent interests. The essential point to notice here is that the trustee can hold trust assets not to his own benefit yet at the same time so that the benefit will enure only to the benefit of others on a future, contingent basis. Those future and contingent interests absorb all the benefit the assets have. Thus it is a mistake to confine the notion of beneficial interest to *presently* vested or indefeasible interests; indeed, not so confining the notion is *entailed* by understanding the beneficiary's interest as an interest in the trustee's powers of title, for an interest in the exercise of a power is, in the requisite sense, always a future interest. So the

[103] Penner, '(True) Nature' (n 44).

[104] Penner, '(True) Nature' (n 44) 486.

> foregoing makes the discretionary trust perfectly compatible with the concept of 'beneficial interest', despite Swadling's qualms.[105]

In this later passage Penner shifts from talking about the beneficiary's distributive entitlement — the right to have the trustees use their powers to give the beneficiary the benefit of the assets — to the structural requirement that all trust assets will eventually be distributed to a beneficiary. This is a shift from the entitlement of individual beneficiaries to the disentitlement of the trustees. The fact that the beneficial interests will necessarily exhaust the beneficial interest in the trust assets does not mean that any beneficiary has a right to have the trustees use their powers to give her or him the benefit. Therefore, discretionary trusts are not explained using the same definition of 'beneficial ownership' that Penner applies persuasively to fixed trusts. Instead, Penner's explanation of discretionary trusts is an exclusionary account like Nolan's that depends upon the negative exclusion of non-beneficiaries from the trust assets, not the positive rights of the individual beneficiaries to have the trustees exercise their powers to grant them the benefit of the assets.[106] Like Nolan's account, it does not explain the internal relationship between trustees and individual beneficiaries prior to the trustees' exercise of discretion.

### D *Conclusion*

In conclusion, trust powers do not fit with the proprietary account provided by the fixed trust model where beneficiaries have positive individual claims to benefit from assets. There are valuable alternative proprietary accounts to the fixed trust model: the collectivist account based on *Saunders* and the ring-fence account based on exclusionary rights. These accounts draw out some important aspects of the nature of trusts. However,

[105] Ibid 495–6 (emphasis in original).

[106] See also Penner, 'Exemptions' (n 10) 254.

both of these accounts are based on limited theories of property that are distinguishable from the robust proprietary account set out in Chapter 2. They do not represent the entire trustee-beneficiary relationship in discretionary trusts. As Nolan has recently argued, understanding the trust relationship requires a research agenda focused on non-proprietary concepts.[107]

## IV ADMINISTRATIVE MODEL

To fully account for the trustee-beneficiary relationship created by the trust power we need an alternative to a proprietary model. We need a model that recognises that the relationship between trustees and beneficiaries does not contain fixed rights to the distribution of the benefit of the trust assets. The model must also recognise that the relationship does contain rights and duties. Discretionary beneficiaries have more than a mere expectancy or hope of receiving a benefit;[108] they have rights in relation to the exercise of the trustees' distributive power.[109]

This focus on the rights and duties of the relationship suggests an obligational model for discretionary trusts, as has been suggested in the literature.[110] For example, Penner has identified that trust law is on a trajectory to a primarily obligational model, where the trust would be regarded 'as a constellation of rights and duties attaching to a special

[107] Richard C Nolan, '"The Execution of a Trust Shall Be under the Control of the Court": A Maxim in Modern Times' (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 469, 493–5 ('Maxim').

[108] *Gartside* (n 35) 618 (Lord Wilberforce); *Cridland v Federal Commissioner of Taxation* (1977) 140 CLR 330, 341 (Mason J). Contrast *Hunt v Muollo* [2003] 2 NZLR 322 (CA), 325 [11] ('*Hunt*'). But see *Lewin* (n 87) 1890 [39–073] n 263.

[109] *Baden* (n 6) 449 (Lord Wilberforce).

[110] A variety of obligational models have been suggested that are based on contract or agreement principles: see JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105(3) *Yale Law Journal* 625; Jaffey (n 70) 378–9; Palmer and Rickett (n 10) 157.

patrimony.'[111] This chapter develops the insight of these obligational accounts to present an original interpretive model to fit the observable obligations found in discretionary trusts. In this model, the trust relationship is explained, not through property, but through administration. That is, obligations of a uniquely administrative nature. In Chapter 7, it will be argued that this administrative obligational model has advantages in terms of coherence over some other obligation-based models.

PG Turner defines administration as the management of affairs, meaning a practical process or task that affects the rights of others.[112] Law, particularly equitable law, relates to administration by both facilitating and regulating that practical action.[113] Turner identifies a variety of equitable techniques to facilitate administrative tasks;[114] however, we will focus on the facilitation and regulation of administrators' decision-making. This is most relevant to the distributive role of discretionary trustees who usually have a wide range of distributive choices in the management of trust affairs. Facilitation and regulation of decisions, through obligations of a uniquely administrative nature, are at the core of Lord Wilberforce's decision in *Baden* and they unify the features of the trustee-beneficiary relationship found in the paradigm case.

### A *Unifying Principles*

The unifying principles of an administrative model of discretionary trust distribution are discretion, accountability, authority and oversight. This section will explain these

[111] Penner, 'Exemptions' (n 10) 259.

[112] PG Turner, 'Equity and Administration' in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 1, 16–7.

[113] Ibid 2–3.

[114] Ibid 18–20.

principles, and demonstrate that they fit with discretionary trusts and cohere with the history of trust law.

The power of discretionary trustees to determine the distribution of trust assets is better described as a discretion, which is how it will be referred to from hereon in. Discretion is a critical concept in modern trust law, as shown by Nolan's call for a research agenda on understanding discretion in trust law.[115] Towards that end, a discretion involves a Hohfeldian power,[116] but it is more complex than a power alone. It is a complex relationship where exercise of the power is not free-ranging but limited by a variety of duties and disabilities.[117] While some volitional control is left to the discretion-holder it is constrained.[118] Discretionary trustees do not have a free-ranging power because, to summarise Lord Wilberforce, they can be expected to exercise it as reasonable and competent trustees.[119]

The concept of discretion has been critically analysed in the jurisprudential literature on judicial decision-making. A leading example is a recently rediscovered paper in which HLA Hart contrasted discretion with choice.[120] Choice denotes freedom: discretion denotes responsibility.[121] Discretion is thus much more than a decision made for personal reasons. An ideal exercise of discretion is wise, sound or gives effect to some rational

[115] Nolan, 'Maxim' (n 107) 493–5.

[116] A power exists where a human being has volitional control over a change in legal relations: Hohfeld (n 30) 44.

[117] For a Hohfeldian analysis of the concept of discretion see JH Grey, 'Discretion in Administrative Law' (1979) 17(1) *Osgoode Hall Law Journal* 107, 107–10.

[118] Hohfeld (n 30) 44.

[119] *Baden* (n 6) 449.

[120] HLA Hart, 'Discretion' (2013) 127(2) *Harvard Law Review* 652.

[121] Ibid 657–8.

principle.[122] In the paradigm case, the trustees must be responsible in how they exercise their discretion to choose between the eligible beneficiaries.[123] On its other boundary, discretion does involve some choice; it is not dictated to a degree that there is an obviously correct decision.[124] Thus, discretion is situated between free choice and clear rules. Ronald Dworkin defines discretion in similar terms. Dworkin argues that, even in hard cases, judicial decision-making does not involve a strong form of discretion, in which judges are free of duty, but only a weaker form of discretion, in which judges have a duty and responsibility to apply principle.[125]

The concept of discretion can be further understood through the related concepts of authority and accountability. Dworkin links the constraints on discretion with the authority that granted the discretion:

> The concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority. It makes sense to speak of the discretion of a sergeant who is subject to orders of superiors, or the discretion of a sports official or contest judge who is governed by a rule book or the terms of the contest. Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, 'Discretion under which standards?' or 'Discretion as to which authority?'[126]

[122] Ibid 657.

[123] Contrast Michael Ashdown who argues that the exercise of management powers is characterised by reviewability and distributive powers by choice: Michael Ashdown, *Trustee Decision Making: The Rule in* Re Hastings-Bass (Oxford University Press, 2015) 73.

[124] Hart (n 120) 658.

[125] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 69–71.

[126] Ibid 31.

The constraints on discretion must also be linked to the relationship of accountability created by the grant of discretion. This relationship has been explained in public law accounts of discretion:

> [I]n general one principle, of particular importance in democratic systems, is that officials to whom powers have been delegated must account for their actions to the community. The underlying assumption is that all government powers, whether the sovereign powers of legislatures or the delegated powers of administrative officials, are held on behalf of the community and therefore account must be made to it.[127]

Likewise, an administrative model characterises the trustee-beneficiary relationship as a relationship of accountability that derives from the trustees holding a discretion on behalf of others and not for their own purposes.

The relationship of accountability demanded by the administrative model coheres with the trust's historical foundations in equity. Equity has been a fertile source of administrative principles through the role that courts of equity have played in facilitating and regulating practical administration of estates, receivers and business associations.[128] The strongest example is of course trusts. It is a fundamental axiom of trust law that the trust must be capable of being enforced by the courts.[129] It is this principle that separates trustees, who are subject to enforceable duties, from ordinary owners. As Grant MR put it in his seminal judgment in *Morice v The Bishop of Durham* ('*Morice*'): 'There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust'.[130] This was

[127] DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1986) 4.

[128] Turner (n 112) 2–4.

[129] *Morice v The Bishop of Durham* (1805) 10 Ves Jr 522; 32 ER 947 ('*Morice* (Ch)').

[130] (1804) 9 Ves Jr 399; 32 ER 656, 658, affd (1805) 10 Ves Jr 522; 32 ER 947 ('*Morice* (Rolls)'). See also *Gibbs v Rumsey* (1813) 2 Ves & B 294; 35 ER 331; *Ellis v Selby* (1835) 7 Sim 352; 58 ER 872.

recently reaffirmed by the Privy Council: 'It is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust.'[131] This affirms the principle that trustees must be accountable for the distribution of assets. The fixed trust model provides this accountability through the fixed duty to distribute, along with the remedy of an account. The revolution in *Baden* was to recognise that the courts could hold discretionary trustees accountable for exercises of discretion and not solely through strict duties. As discussed,[132] a key feature of trust powers is found in Lord Wilberforce's decision that the courts can facilitate and regulate the trustees' distributive tasks through expecting trustees to act responsibly[133] and making orders to regulate the trustees' discretion.[134] Indeed, Lord Wilberforce restored an older line of cases that embody equity's administrative tradition.[135]

### B *Constraints on Discretion*

When applying administrative principles in a particular context like discretionary trusts, the critical question is the relationship between freedom and responsibility in the exercise of discretion. Grey's summary is that

> discretion is a power that is almost always or always is attached to some level of duty. Review of discretion means determining how far the power extends and at what point the 'duty' is ignored and the correlative 'right' violated. As soon as that point is reached, the courts can interfere; before that they will abstain from doing so. …

[131] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 724 [36] ('*Schmidt*').

[132] See above text to n 37.

[133] *Baden* (n 6) 449.

[134] Ibid 457.

[135] Ibid 451–2.

> The 'weaker' the discretion, the closer the point at which a 'duty' exists. Conversely, the 'stronger' the discretion, the more distant and more nebulous the duty.[136]

Detailed consideration of this question will be set aside until Chapters 5 and 6. In those chapters we will examine what duties constrain trustees' distributive discretions and the beneficiaries' ability to hold trustees accountable. However, for present purposes it will be helpful to consider some types of constraints that control the discretion.

In *Baden*, the first constraint on the trustees' discretion is the definition of the eligible beneficiaries of the trust power. This definition provides an objective fixed external boundary on the trustees' distributive discretion. A purported distribution to a non-beneficiary is void in equity as an excessive execution.[137] Any transfer of legal title made on the authority of the void transfer can be reversed unless it is protected by the bona fide purchaser for value rule.[138] This external constraint is fixed and objective in a similar manner to the fixed trust duty, albeit with a lower definitional certainty threshold.[139] The external boundary provided by the definition of discretionary beneficiaries maps directly onto the ring-fenced proprietary account.[140]

A question raised in *Baden*, which remains unresolved, is whether the law imposes limits on the extent of this external boundary. That is, is the external boundary solely determined by the trust instrument or also by the legal form of the discretionary trust? Lord Wilberforce suggested the latter when he stated in obiter that a discretionary trust

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[136] Grey (n 117) 108–9 (citations omitted).

[137] *Kain v Hutton* [2008] 3 NZLR 589 (SC), 606 [37], 607 [41].

[138] This follows general principles on beneficiaries' proprietary claims for unauthorised dispositions: *Foskett* (n 89).

[139] *Baden* (n 6).

[140] See above Part III(C).

would be invalid for administrative unworkability if the beneficiaries failed to form 'anything like a class'.[141] This dictum has been accepted in some cases[142] but also rejected.[143] Its reception in the literature has been similarly mixed.[144] One of the benefits of an administrative trust model is that it provides a clearer conception of the trustees' duties and could inform the administrative unworkability test.

A second type of constraint is found in Lord Wilberforce's suggestion that trustees are subject to duties to exercise their discretion reasonably, competently, responsibly, and for proper purposes.[145] These *internal* constraints do not form an objective external boundary to the trustees' discretion but apply to the process by which the trustees go about exercising that discretion. The distinction between the *external* and the *internal* constraints will be returned to in Chapters 5 and 6, which conduct a thorough analysis of the regulation of the trustees' distributive discretions.

### C *Conclusion*

In summary, the key features of the paradigm discretionary trust power when understood through the administrative model are as follows: 1) on the management side,

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[141] *Baden* (n 6) 457.

[142] See *Re Manisty's Settlement; Manisty v Manisty* [1974] Ch 17, 27; *R v District Auditor; ex parte West Yorkshire Metropolitan County Council* (1986) 26 RVR 24; *McCracken v A-G (Vic)* [1995] 1 VR 67, 72; *Re Blyth* [1997] 2 Qd R 567, 577; *Gibbs v Harding* [2008] Ch 235, 240 [15].

[143] In *Horan v James* [1982] 2 NSWLR 376, 383–4, Mahoney JA held that a hybrid trust power exercisable in favour of anyone other than the executors was not hopelessly wide. See also *Re Hay's Settlement Trusts; Greig v McGregor* [1982] 1 WLR 202, 212.

[144] L McKay, '*Re Baden* and the Third Class of Certainty' (1974) 38(4) *Conveyancer and Property Lawyer* 269; CT Emery, 'The Most Hallowed Principle: Certainty of Beneficiaries of Trusts and Powers of Appointment' (1982) 98(Oct) *Law Quarterly Review* 551, 557–9; IM Hardcastle, 'Administrative Unworkability: A Reassessment of an Abiding Problem' [1990] (Jan-Feb) *Conveyancer and Property Lawyer* 24.

[145] *Baden* (n 6) 449.

the trustees have the same protective duties as fixed trustees; 2) on the distributive side, the core of the trustee-beneficiary relationship is a power in the trustees to decide to whom the assets should be transferred; 3) the power is a discretion, in that the trustees do not have free choice, but are subject to constraints; 4) some constraints are external fixed boundaries, such as the definition of beneficiaries; 5) some constraints are internal limits that control the decision-making process, such as any duty to act responsibly; and 6) the beneficiaries likely have exclusionary rights that operate to ring-fence the trust fund from non-beneficiaries.

This model of discretionary trust powers presents a distinct understanding of the trustee-beneficiary relationship from that found in fixed trusts. The relationship is not characterised by distributive entitlements, but by the *procedural entitlements* that correlate to the constraints on the trustees' discretion. The beneficiaries are not entitled to any particular distributive outcome, but only to have the trustees properly engage in a distributive procedure. The procedural entitlements can be summed up as the distributive aspect of a beneficiary's right to due administration of the trust.[146] The beneficiaries also have, in a sense, negative distributive entitlements that correlate to the external constraints on the discretion, but they operate to ring-fence the trustee-beneficiary relationship from the world rather than characterising the relationship itself.

## V RAMIFICATIONS

The administrative model has broad implications for legal doctrine. First, the model is immediately useful to identify relationships as trusts or not-trusts. Like the proprietary

[146] See *Schmidt* (n 131) 729 [51]; *Kennon v Spry* (2008) 238 CLR 366, 394 [77] (French CJ), 407–8 [125] (Gummow and Hayne JJ), 415 [154] (Heydon J).

model it can be applied to facts generated by settlors to characterise them as discretionary trusts. For example, a relationship that cannot be characterised as a fixed trust under the proprietary model may be characterised as a discretionary trust. It also means that an instrument that uses the word 'trust' is likely to be interpreted as expressing an intention to create a trust[147] but provides no indication about what type of trust.

The administrative model has additional ramifications for the coherence of the legal system. The proprietary model fits much of traditional trust law doctrine;[148] however, the new trust model presented in this thesis means that this doctrine needs to be reassessed to determine if it fits discretionary trusts. The centrality of the trustees' discretion and the beneficiaries' procedural entitlements generates a very different context for the resolution of the many questions that arise in trust law.

While many areas of doctrine deserve reconsideration in light of the administrative model, here we will divide a limited selection of examples into three categories. First, there are ramifications for the internal coherence of trust law doctrine. Some trust law doctrine fits one trust model but not the other. Indeed, the distinction between the models is useful to resolve current issues in trust law. Second, there are ramifications for the relationship between trust law and other equitable doctrine. Third, there are ramifications for the relationship between trust law and the legal system more generally. This analysis supports the conclusion that the distinction between the two models is analytically important.

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[147] *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588, 605 [34] (Gaudron, McHugh, Gummow and Hayne JJ); *Byrnes v Kendle* (2011) 243 CLR 253, 291 [117] (Heydon and Crennan JJ); *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62, 100–1 [109] (Gageler J).

[148] See Penner, 'Exemptions' (n 10) 255.

### A *Ramifications for Trust Law*

The proprietary and administrative models have a number of ramifications for coherence within the doctrines of trust law itself. Three examples will be considered here to demonstrate the analytical power of the distinction between the two models.

Two ramifications of the models are well traversed in the case law and literature: certainty of objects and rights to information. For example, on the latter, when faced with a discretionary trust, the Privy Council in *Schmidt v Rosewood Trust Ltd*[149] famously discarded the proprietary entitlement account of rights to information in favour of a procedural entitlement account that is consistent with the administrative model.[150] On certainty of objects, it may seem backwards to include this as a ramification of the discretionary trust model, given that it drove the acceptance of discretionary trusts in *Baden*.[151] However, the discretionary model was a necessary pre-condition for Lord Wilberforce to reassess the certainty test in that case. Moreover, a fully developed administrative model is likely to produce further reassessment of the certainty test,[152] because the degree of certainty required should align with the trustees' decision-making duties. A trust should only be invalid for uncertainty if there is insufficient information

[149] *Schmidt* (n 131).

[150] On the proprietary account of rights to information see *O'Rourke v Darbishire* [1920] AC 581; *Re Londonderry's Settlement* [1965] Ch 918; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.

[151] *Baden* (n 6).

[152] Reassessment of the certainty test has already been considerable: see, eg, JW Harris, 'Discretionary Trusts: An End and a Beginning?' (1970) 33(6) *Modern Law Review* 686; L McKay, 'Re Baden and the Criterion of Validity' (1973) 7(3) *Victoria University of Wellington Law Review* 258; RP Austin, 'Discretionary Trusts: Conceptual Uncertainty and Practical Sense' (1980) 9(1) *Sydney Law Review* 58; Paul Matthews, 'A Heresy and a Half in Certainty of Objects' [1984] (Jan-Feb) *Conveyancer and Property Lawyer* 22; Dennis R Klinck, '*McPhail v Doulton* and Certainty of Objects: A Semantic Criticism' (1988) 20(2) *Ottawa Law Review* 377; Peter Creighton, 'Certainty of Objects of Trusts and Powers: The Impact of *McPhail v Doulton* in Australia' (2000) 22(1) *Sydney Law Review* 93.

for the trustees to carry out their duties,[153] which will depend on what those duties are.[154] As we will see in Chapter 5, there is considerable uncertainty about the extent of these duties.

A less well-traversed example is the beneficiary principle. This is a useful example to illustrate the coherence of the distinction because the two interpretations of the beneficiary principle map directly on to the two models. The basic principle is from *Morice*: 'There must be somebody, in whose favour the Court can decree performance.'[155] Thus, the trustees' duties must be of such a nature that they can be executed by a court in the event of maladministration.[156] The 'proprietary' interpretation of the beneficiary principle, as suggested in *Re Horley Town Football Club*,[157] is that it requires beneficiaries with equitable proprietary interests so that the courts can execute the trust by ordering distribution to those entitled.[158] This fits the fixed trust model perfectly, which requires beneficiaries who are not only individual legal persons,[159] but who have beneficial proprietary claims to the benefit of the assets.

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[153] Of course, trustees can ask for the courts' assistance to resolve most uncertainties created by settlors: see, eg, *Re Benjamin; Neville v Benjamin* [1902] 1 Ch 723; *Re Golay's Will Trusts; Morris v Bridgewater* [1965] 1 WLR 969.

[154] A key difference between *Gestetner* (n 63) and *Baden* (n 6) was that in the former Harman J reasoned that proper compliance with the trustees' duties required knowledge of every single beneficiary: 'there is much to be said for the view that [the trustee] must be able to review the whole field in order to exercise his judgment properly': at 685. In the latter, Lord Wilberforce took a more relaxed view of the trustees' duties: at 456.

[155] *Morice* (Rolls) (n 130) 658 (Sir W Grant MR).

[156] *Morice* (Ch) (n 129) 954 (Lord Eldon).

[157] [2006] EWHC 2386 (Ch) [99], [131] ('*Horley*').

[158] See Paul Matthews, 'The New Trust: Obligations without Rights?' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 1, 1–4; Palmer and Rickett (n 10) 168–70.

[159] See *Bowman v Secular Society Ltd* [1917] AC 406, 441 (Lord Parker).

Another interpretation of the beneficiary principle is the 'enforcement' interpretation, as found in *Re Denley's Trust Deed; Holman v H H Martin & Co Ltd* ('*Denley*').[160] Goff J decided that the beneficiary principle only required identifiable persons with standing to enforce the trustees' duties, such standing being found in those who were intended directly or indirectly to benefit from the trust.[161] The trust to provide recreational facilities to the company employees was a discretionary trust, because it was left to the trustees' discretion to determine the rules by which the benefit of the facilities would be provided to the employees.[162] This fits the administrative trust model because the employees have procedural entitlements to ensure the trustees exercise their discretion properly. However, while the administrative trust model fits *Denley*, this case does not support the inference drawn by some academics that the beneficiary principle is satisfied by the nomination of an enforcer to hold all procedural entitlements.[163] The administrative model is a model of a legal relationship between trustees who hold assets and beneficiaries who are eligible to benefit from those assets. The trustees must be accountable to those who are intended to benefit from the trust assets. For this relationship to exist the beneficiaries must hold procedural entitlements with respect to distribution. If the procedural entitlements are carved off and granted to a non-beneficiary enforcer, then the relationship that is created is not a trustee-beneficiary relationship and is, thus, distinguishable from a trust.

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[160] [1969] 1 Ch 373. See also Palmer and Rickett (n 10) 168–9.

[161] *Denley* (n 160) 382–4.

[162] Ibid 376. See also *Re Grant's Will Trusts; Harris v Anderson* [1980] 1 WLR 360, 370–1; *Horley* (n 157) [73], [111]. The trusts in *Denley* were also subject to a discretion in the trustees to let non-employees use the facilities, which Goff J interpreted as a mere power: at 387. This raises the further issue of a mere power with undefined objects.

[163] See, eg, David Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117(Jan) *Law Quarterly Review* 96, 98.

There are many other current trust problems where the distinction between proprietary and administrative trust models may prove a valuable source of insight. For example, the distinction's application to the beneficiary principle may prove useful in understanding the problem with purpose trusts.[164]

### B *Ramifications for Equity*

The distinction between the two models has ramifications for coherence between different areas of equitable doctrine. The example used to demonstrate this is the already fraught relationship between trust law and the concept of a fiduciary relationship.

Trustees are usually considered to be fiduciaries,[165] indeed the archetypal fiduciary.[166] However, as I have written elsewhere, the question of the fiduciary status of trustees is complicated by the fact that trustees are typically authorised to apply trust assets for their own benefit.[167] Some trustees are nominated as beneficiaries[168] and most trustees have a potential right to take trust assets to remunerate themselves for work completed or expenses incurred for the trust.[169] This practical reality means that the classical conception of fiduciaries as those who must solely and exclusively act in the

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[164] See, eg, JD Davies, 'The Variety of Express Trusts' (1986) 8(3) *University of Tasmania Law Review* 209.

[165] See JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 2 [1-02].

[166] PD Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Law Book, 1989) 1, 34.

[167] Tobias Barkley, 'Conceptions of the Fiduciary in Trust Law' (2019) 13(1) *Journal of Equity* 23.

[168] See, eg, *Cooper v Federal Commissioner of Land Tax* (1941) 65 CLR 320; *Clayton v Clayton* [2016] 1 NZLR 551.

[169] See, eg, *CPT* (n 82). Trustees have two rights to indemnity, a right of recoupment and a right of exoneration: *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 368 ALR 390, 403 [29]-[30] (Kiefel CJ, Keane and Edelman JJ) ('*Carter*').

interests of others and not in their own interests[170] does not easily apply to trustees.[171] The force of this reality means that the claim that trustees are fiduciaries cannot be analysed without resort to alternative conceptions of the fiduciary and the concept of the scope of fiduciary relationships. Important differences appear when we apply these to fixed and discretionary trusts.

Fixed trustees can be understood as fiduciary on two alternative bases, depending on the type of beneficial interest held by the trustee. First, where trustees are also fixed beneficiaries then we can characterise them as fiduciaries by identifying that a classical fiduciary relationship will arise in the future. That is, even though a trustee with a fixed interest is authorised to consider her own interests when exercising discretions,[172] at some point she will hold the other beneficiaries' fixed shares solely for them. At that point she will be a classical fiduciary in that she must act completely selflessly.[173] Thus, the fiduciary relationship has a residual or latent quality in that it only fully appears after the trustees' beneficial interests are satisfied. Second, where fixed trustees have rights to

[170] See *Guerin v The Queen* [1984] 2 SCR 335, 355 (Ritchie, McIntyre and Wilson JJ concurring), 387 (Dickson, Beetz, Chouinard and Lamer JJ). See also *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 72 (Gibbs CJ), 122–3 (Deane J), 145–6 (Dawson J); *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA), 23; *Alberta v Elder Advocates of Alberta Society* [2011] 2 SCR 261, 276-7 [30]-[31] (McLachlin CJ).

[171] The self-contradiction can be seen in any attempt to define trust duties as obligations on the trustees to not act for their own benefit. A robust definition must acknowledge that such duties only apply to the extent that the trustees are not authorised to act otherwise. While some definitions obscure the self-contradiction, others set it out with clarity: see, eg, Ben McFarlane, 'The Centrality of Constructive and Resulting Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 183, 184.

[172] For example, a trustee-beneficiary is entitled to consider her own interests when investing, although she must balance her interests fairly against the other beneficiaries': see *Re Mulligan (dec'd)* [1998] 1 NZLR 481 (HC).

[173] The trustee may not be left much discretion at that point, which would leave little application for fiduciary duties. The theory that fiduciary duties control discretion is a dominant theme in the literature: see, eg, Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130(Oct) *Law Quarterly Review* 608, 610; JE Penner, 'Distinguishing Fiduciary, Trust and Accounting Relationships' (2014) 8(3) *Journal of Equity* 202, 204.

remuneration or indemnity, they have a similar classical fiduciary relationship with a residual scope. For example, at the point where a trustee no longer has a right to exonerate her or his liabilities from the trust assets she or he will hold the assets 'upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries'.[174] However, in many cases the residual fiduciary relationship may never arise. For example, when trading trusts are wound up the trustees' right of indemnity may encompass all of the trust assets and leave nothing for the beneficiaries.[175] This means that wherever trustees have rights of indemnity there is no guaranteed classical fiduciary relationship, because that residual relationship may never arise.[176] However, these trustees can be considered fiduciary under an alternative conceptualisation in which a fiduciary's regard for self-interest is not completely denied, but contained by objectively determinable limits. For example, trustees' rights to use trust assets to reimburse or exonerate their own expenses are limited by the objective criterion that those expenses must have been properly incurred for trust purposes.[177] Thus, even though fixed trustees might never have to apply trust assets for the benefit of beneficiaries their ability to use the assets for their own benefit is limited by objective standards.

The characterisation of fixed trustees as fiduciaries can be contrasted with the characterisation of discretionary trustees. The difference arises where discretionary trustees are also discretionary beneficiaries and have the power to distribute trust assets

[174] *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 246 [48]. See also *CPT* (n 82) 121 [51]; Barkley (n 167) 33.

[175] See, eg, *Carter* (n 169).

[176] See Barkley (n 167) 30–3.

[177] See *Carter* (n 169) 401 [24] (Kiefel CJ, Keane and Edelman JJ).

to themselves.[178] In such cases, there is no guaranteed residual classical fiduciary relationship because there is no guarantee that the trustees will be obliged to exercise their discretions in favour of others. Neither is there necessarily a clear objective constraint on the trustees' power to benefit themselves. This is because the only constraints on the trustees' self-benefit are internal constraints: the decision-making duties that regulate the exercise of the trustees' discretion. As we will see in Chapters 5 and 6 there is much uncertainty in this area and there is a wide range of possible degrees of restraint that these duties could place on the trustees' self-interest. Whether any degree of restraint, however minimal and however lacking in objectivity, should qualify the trustee as a fiduciary is an open question.[179]

### C *Ramifications for the Legal System*

The advent of the administrative model has serious ramifications for a coherent relationship between trust law and the rest of the legal system. The problematic issue is the effect that discretionary trusts have on beneficial entitlement to trust assets. For example, tax law has changed significantly to respond to the effect that discretionary trusts have on entitlement to income and capital gains and, thus, on tax liability.[180] Broadly, this is a problem of beneficial ownership, which is a fraught concept. As Maitland observed, there are problems with the traditional[181] idea that fixed trusts split

[178] See, eg, *Warburton v Warburton* (1700) 2 Vern 420; 23 ER 869, affd (1702) 4 Bro Parl Cas 1; 2 ER 1; *Richardson* (n 42); *Supple v Lowson* (1773) Amb 729; 27 ER 471; *Re Beatty (decd); Hinves v Brooke* [1990] 1 WLR 1503.

[179] See Barkley (n 167).

[180] See, eg, *Pearson v Inland Revenue Commissioners* [1981] AC 753, 769 (Viscount Dilhorne); Ashton de Silva et al, *Current Issues with Trusts and the Tax System* (Independent Report Commissioned by the Australian Tax Office, 25 January 2019) <www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/General-research/Current-issues-with-trusts-and-the-tax-system/>.

[181] See, eg, Salmond (n 31) 230; Jaffey (n 70) 385–9.

ownership into legal and equitable title.[182] However, as Penner has argued, it is possible to talk about beneficial ownership sensibly, if one limits the concept to a right to have trustees distribute assets.[183]

A critical effect of the administrative model is that no individuals have distributive claims to the trust assets. The discretionary beneficiaries have no beneficial distributive rights.[184] The trustees have a bare legal title that is devoid of beneficial entitlement, except to the extent that they have beneficial rights to indemnity or remuneration.[185] As Hudson argues, in some trusts the beneficiaries do not have the types of rights that count as equitable ownership.[186] This lack of equitable ownership does not mean the assets are bona vacantia as the trustees' bare legal title is good against the Crown.[187] It simply means beneficial ownership, in the sense of anyone having a *right* to claim a benefit, is in suspense until the trustee decides to allocate assets to a beneficiary.[188]

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[182] Maitland (n 97) 17–8. See also Hudson (n 77).

[183] Penner, '(True) Nature' (n 44) 486. No claim is made that beneficiaries' entitlements are equivalent to legal ownership: cf *CPT* (n 82); PG Turner, 'Revolution?' (2006) 1(1) *Journal of Equity* 52, 79.

[184] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) [176]-[178] ('*Pugachev*').

[185] See Tobias Barkley, 'Trustees' Bare Legal Title: Concept or Misconception?' (2017) 26(1) *Australian Property Law Journal* 44.

[186] Hudson (n 77) 257. Hudson takes a different position on whether the rule in *Saunders* (n 71) provides the type of right that counts as equitable ownership.

[187] *Burgess* (n 51). Cf William Swadling, 'Trusts and Ownership: A Common Law Perspective' (2016) 24(6) *European Review of Private Law* 951, 970–2.

[188] The idea that beneficial ownership can be suspended or absent has been noted: *Kennon v Spry* (n 146) 386–7 [49] (French CJ); *Tibben v Tibben* [2013] FamCAFC 145 [21]; *Lygon* (n 87) 489 [52] (Redlich JA); Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana, 1987) 28; David Hayton, 'English Fiduciary Standards and Trust Law' (1999) 32(3) *Vanderbilt Journal of Transnational Law* 555, 609; Philip Henry Pettit, *Equity and the Law of Trusts* (Oxford University Press, 12th ed, 2012) 80; JE Penner, 'Purposes and Rights in the Common Law of Trusts' (2014) 48(2) *Revue Juridique Themis* 579, 580–1. But see Turner, 'Revolution?' (n 183) 76.

The lack of distributive entitlement typically means that trust assets fall outside the jurisdiction of any area of law that operates upon the type of rights we have described as beneficial ownership. For example, caveats under the Australian Torrens systems can be lodged where someone has an equitable proprietary interest in the nature of an estate or positive claim,[189] including some mere equities.[190] The Australian courts have concluded that discretionary beneficiaries do not have such interests and cannot lodge a caveat.[191]

This process affects the coherence of the legal system wherever that system depends upon an assumption that assets are subject to beneficial claims. The latter assumption will be referred to as the 'patrimonial assumption', which borrows from the French civil law tradition.[192] In that tradition, the patrimony concept connects all rights and liabilities of economic value to legal persons.[193] A person's patrimony is an abstract container that holds their assets and liabilities,[194] and in which the assets are automatically made available to satisfy the liabilities.[195] It includes a default assumption that there are no autonomous patrimonies in which property is not appropriated to a legal person,[196] although there are exceptions.[197] As is well known, patrimony concepts do not translate well to the common law world where equity divides proprietary interests without regard

[189] *Municipal District of Concord v Coles* (1905) 3 CLR 96, 107 (Griffith CJ).

[190] *Brooks v Brooks* [2015] 1 Qd R 105, 112 [37] (Henry J) ('*Brooks*').

[191] *Walter v Registrar of Titles* [2003] VSCA 122 [15]; *Brooks* (n 190) 113 [40].

[192] Cf Remus Valsan, 'The Trust as Patrimony: An Introduction' in Remus Valsan (ed), *Trusts and Patrimonies* (Edinburgh University Press, 2015) 3, 8.

[193] Nicholas Kasirer, 'Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimoine' (2008) 38(2) *Revue Générale de Droit* 453, 463.

[194] Smith, 'Trust and Patrimony' (n 97) 335.

[195] Charles Aubry and Frédéric-Charles Rau, 'Of Right Bearing on External Objects: Considered as Elements of a Person's Patrimony', tr Nicholas Kasirer (2008) 38(2) *Revue Générale de Droit* 471, 486–8.

[196] Kasirer (n 193) 465–6.

[197] Ibid 467–8.

for formal patrimonies.[198] However, the structure of our legal system does share the patrimonial assumption that assets are owned by individual legal persons. Private law claims are, by default, remedied by judgment debts, which are enforced by executing the judgment creditor's beneficially owned assets.[199] The common law has largely made the same choice as the French civil law: to enforce private law against property rather than against persons.[200] To this extent, the patrimonial assumption manifests in the common law.

The patrimonial assumption underlying private law means its effective enforcement is impacted by structures that defy the patrimonial assumption by segregating assets into autonomous funds that are not beneficially connected to any legal person. The proprietary trust model does not usually have this impact. Fixed trust assets are subject to the beneficiaries' distributive claims and can be drawn into the civil enforcement regime by equitable execution of the beneficiaries' interests.[201] However, there are some circumstances in which fixed trusts disrupt the patrimonial assumption. For example, for taxation, income in a fixed trust might not be connected to particular beneficial interests,

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[198] Ibid 466–7. See also Smith, 'Trust and Patrimony' (n 97).

[199] See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ords 66-76. Creditors cannot execute assets in which debtors do not have a beneficial interest: see *Farr v Newman* (1792) 4 Term R 621; 100 ER 1209; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367 (Stephen, Aickin, Mason and Wilson JJ).

[200] On French law see Aubry and Rau (n 195) 488. British legal systems gradually transitioned away from debtors' prisons, which enforced private law against the person, by expanding the application of the bankruptcy system, which enforced private law against property: see V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth-Century England* (Oxford University Press, 1995) ch 3. Imprisonment for debt was finally abolished in the United Kingdom by the *Administration of Justice Act 1970* (UK) s 11. It remains available in Australia in some circumstances: see Bruce Kercher, 'Imprisonment for Debt in the 1980s' (1987) 17(1) *University of Western Australia Law Review* 3.

[201] See Pettit (n 188) 684–5. Deliberate public policy excludes interests in Australian superannuation trusts from execution

and thus is taxed in the hands of the trustee.[202] In addition, trusts for accumulation and contingent interests mean that those individuals to whom the assets are connected may not be ascertainable until the distant future.[203] This impact is relatively small compared to the impact that the administrative model has on the patrimonial assumption. Neither discretionary beneficiaries nor trustees have beneficial distributive claims to the trust assets.[204] This means that the entire fund is disconnected from any legal person and impervious to creditor claims.[205] Even if a discretionary interest were executable by a beneficiary's creditors,[206] those creditors would not have a claim to the trust assets. Thus, discretionary trusts always impact the patrimonial assumption, while fixed trusts only sometimes impact it. Moreover, there is a qualitative difference between the two. In fixed trusts the connection or disconnection of assets to or from individual patrimonies occurs on impersonal events, and not through the volitional control of a human agent.[207] In contrast, the trustees of a discretionary trust have a very personal power to connect assets to a beneficiary's patrimony. This means that discretionary trusts can operate as a mechanism for deliberately moving assets in or out of relevance to the patrimonial assumption. The impact that discretionary trusts have on the patrimonial assumption has

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[202] See *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 497–8 (Griffith CJ); *Livingston* (n 91) 712.

[203] See, eg, *Thellusson v Woodford* (1805) 11 Ves Jr 112; 32 ER 1030.

[204] Except to the extent that the trustees obtain rights of indemnity in relation to debts incurred for the purpose of the trust.

[205] *Pugachev* (n 184) [178].

[206] Discretionary interests are not considered proprietary interests for most purposes similar to execution: see *Hunt* (n 108) 325 [11]; *Public Trustee v Smith* (2008) 1 ASTLR 488, 523 [138]; *Re Cooper Street Property Trust* [2016] VSC 756 [73]-[76]; *Swishette Pty Ltd v Australian Competition and Consumer Commission* (2017) 249 FCR 483, 493 [26]-[28]; *SA v Metro Vancouver Housing Corp* [2019] SCC 4 [35]-[48]. But see *Australian Securities and Investments Commission v Carey [No 6]* (2006) 153 FCR 509, 520 [36] (French J).

[207] See Chapter 2 Part II(C)(3).

been recognised as a serious problem in many areas.[208] For example, the international effort to foil money laundering and terrorism financing has led to extensive multilateral reforms that expand the concept of beneficial ownership in trusts.[209]

This analysis of the impact of the administrative model overlaps with Roger Cotterrell's sociological critique of trusts. Cotterrell argues that trusts operate to distance those with private power from the attributes or characteristics that grant that power. That is, the private ownership power of beneficiaries is disguised or mystified by their imprecise interests and dependent relationship with the trustee.[210] This critique is even more apt for discretionary trusts than fixed trusts. As the Privy Council has noted discretionary trusts are often deliberately designed to obscure the true intended beneficiaries of assets, often for tax purposes.[211] The distance that discretionary trusts impose between beneficiaries and the assets is effective for this purpose, even though in many cases the beneficiaries retain their private power through alternative controls or influence over the office of trustee.[212]

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[208] See, eg, Philip Hallen and Hayley P Bennett, '*Kennon v Spry* and the Elephant in the Room: Women, Divorce, and Discretionary Trusts in the 21st Century' (2011) 17(9) *Trusts & Trustees* 829; New Zealand Law Commission Te Aka Matua o te Ture, *Review of the Property (Relationships) Act 1976* (Report No 143, 28 June 2019) 265-6 [11.1]-[11.5].

[209] See, eg, Financial Action Task Force, *Beneficial Ownership* (FATF Report to the G20, September 2016) <www.fatf-gafi.org/publications/fatfrecommendations/documents/report-g20-beneficial-ownership-2016>; *Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU* [2018] OJ L 156/43.

[210] Roger Cotterrell, 'Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship' (1987) 14(1) *Journal of Law and Society* 77, 83–6.

[211] *Schmidt* (n 131) [34]. See also Lindsay GS Trotman, 'The Use of Discretionary Trusts in Tax Planning' (1988) 3(3) *Canterbury Law Review* 291, 293.

[212] *Pugachev* (n 184) [179]-[182]. Cf *SA v Metro Vancouver Housing Corp* (n 206) [37].

We will return to the effect that discretionary trusts have on the patrimonial assumption in Chapters 6 and 7 in relation to different types of discretionary trusts.

## VI CONCLUSION

This chapter has distinguished discretionary trust powers from fixed trusts. Discretionary trusts cannot be accounted for by the proprietary trust model but can be accounted for by the administrative trust model. The critical distinction between the two models is that the trustee-beneficiary relationship in a discretionary trust is not characterised by fixed distributive entitlements but by procedural entitlements that regulate the trustees' power to distribute the assets. These entitlements correlate to the trustees' duty of due administration. The complexity of this relationship is not captured by proprietary principles but by the administrative principles of discretion, accountability, authority and oversight. Proprietary principles are only relevant to regulating the relationship between third parties and the trust parties through the exclusionary ring-fencing effect. This distinction has been shown to be doctrinally robust and analytically useful.

This chapter has focused on discretionary trusts of the type found in *Baden*[213]: exhaustive trust powers. It did so because exhaustive trust powers are the least complicated form of discretionary trusts and *Baden* is the critical case that revealed the alternative administrative model. However, the administrative model is not limited to trust powers. The next chapter will consider a much more common type: the mere power with a trust in default.

[213] *Baden* (n 6).

# CHAPTER 4

# MERE POWERS WITH TRUSTS IN DEFAULT: EXTENDING THE ADMINISTRATIVE MODEL

## I INTRODUCTION

It is now necessary to acknowledge a substantial gap in the account presented in Chapters 2 and 3. Those chapters distinguished between completely fixed trusts and completely discretionary trusts. They showed how *Re Baden's Deed Trusts; McPhail v Doulton* ('*Baden*')[1] broke new ground by introducing a new type of trust relationship: the discretionary trust. The missing part in this account is those trust structures that appear to include both fixed and discretionary elements. This is where the law of trusts and the law of powers of appointment collide. This chapter investigates the first two research questions — what it means for a trustee to hold assets for the benefit of others and how that meaning has changed — when a trust structure appears to include fixed and discretionary elements.

For our purposes, the paradigm case of a trust structure that combines fixed and discretionary elements is the mere power followed by a fixed trust in default. An illustrative example is trustees who undertake to hold assets for the benefit of the grandchildren of the settlor in equal shares, but who are also empowered to distribute trust assets to one or more of the settlor's children. This mere power of appointment is exercisable for a fixed term of years before the trust for the grandchildren takes effect.

[1] [1971] AC 424.

There is no limit on how many assets can be distributed to the children and no duty to leave anything for the grandchildren. The grandchildren are 'default beneficiaries' under a trust in default,[2] subject to a discretionary mere power of appointment in favour of the children, whom we call 'discretionary objects'.[3] The label 'mere power' is typically used to distinguish these powers from the discretionary trusts explained in Chapter 3, labelled by the House of Lords as 'trust powers'.[4] Unlike a trust power, there is no duty to exercise the mere power in favour of the class of discretionary objects: the children. If the trustees choose not to exercise the mere power the assets will pass to the second class of default beneficiaries: the grandchildren.[5] The interests of the default beneficiaries are 'defeasible' as they may be defeated by the exercise of the power.[6] There can be much more complex mixtures than this paradigm case,[7] however, the paradigm case is sufficient to draw out the issues.[8] The analysis in this chapter will also apply to *Burrough v Philcox*-style trust powers where there is a direct gift to all the beneficiaries in equal shares, subject to a power of selection between them.[9]

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[2] See, eg, *Lygon Nominees Pty Ltd v Commissioner of State Revenue* (2007) 23 VR 474, 491 [60] ('*Lygon*').

[3] See *Gartside v Inland Revenue Commissioners* [1968] AC 553, 564 (Lord Denning MR) ('*Gartside*').

[4] *Re Gulbenkian's Settlements; Whishaw v Stephens* [1970] AC 508, 525 (Lord Upjohn) ('*Gulbenkian*').

[5] See ibid.

[6] *Lutheran Church of Australia South Australia District Inc v Farmers' Co-operative Executors & Trustees Ltd* (1970) 121 CLR 628, 654 (Windeyer J).

[7] For example, it is common for there to be multiple discretionary powers exercisable in succession. There may also be a resulting trust for the settlor rather than an express trust: see, eg, *Re Sayer; MacGregor v Sayer* [1957] Ch 423 ('*Sayer*').

[8] This thesis will not consider trusts where a third-party non-trustee holds a distributive discretion over the trust assets. Analysis is limited to trustees who hold title to the assets as well as the distributive discretion to dispose of those assets. The trilateral relationship between trustees, beneficiaries, and third-party donees of powers is likely a fruitful space for research, but will not affect the results of the present research.

[9] (1840) 5 Myl & Cr 72; 41 ER 299.

The traditional characterisation of these types of trusts — the 'orthodox position' — is that the trust in default for the grandchildren is an ordinary fixed trust under the proprietary model, despite the defeasibility of the beneficiaries' interests. The orthodox position was clearly expressed in the first trust law text book:

> A mixture of trust and power [a trust power] is not to be confounded with a common trust to which a power is annexed; for, in the latter case, the trust itself is complete, and the power being but an accessory, may be exercised or not as the trustee may deem it expedient …[10]

This statement of the orthodox position also reveals its core tension. It claims that the trustee is subject to both the law of trusts and the law of powers. This necessarily creates a conflict because the very person charged with the trust can end it by exercise of a discretionary power. This tension has long bedevilled trust law. As we already observed in Chapter 3, the history of trust powers reveals the tension between the trustees' discretion and the limited fixed trust style remedy.[11]

Against this orthodoxy this chapter presents an original argument for an 'alternative position', which offers a more coherent interpretation of the case law. First, it is argued that the orthodox position is fatally flawed. The idea that trustees can owe a fixed trust duty to the default beneficiaries, while also being vested with the power to distribute all benefits to the discretionary objects lacks coherence. A coherent orthodox position would require the default beneficiaries to have distributive entitlements that could override the trustees' power, such as through the rule in *Saunders v Vautier* ('*Saunders*'),[12] which is

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[10] Thomas Lewin, *A Practical Treatise on the Law of Trusts* (A Maxwell, 1837) 22. See also David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (LexisNexis, 18th ed, 2010) 99 [5.3].

[11] See Chapter 3 Part III(A).

[12] (1841) Cr & Ph 240; 41 ER 482. This case provided the name for the rule, but is not the primary authority for the rule itself: see Paul Matthews, 'The Comparative Importance of the Rule in *Saunders v Vautier*' (2006) 122(Apr) *Law Quarterly Review* 266, 267 ('*Saunders*').

not supported in the case law. Second, it is argued that a coherent alternative position can be found in the case law, where the mere power and the trust in default are integrated in a holistic analysis and characterised as a discretionary trust. This is exemplified by the leading case of *Pearson v Inland Revenue Commissioners* ('*Pearson*'),[13] which expressly contradicts the orthodox position. Overall, the case law provides sufficient authority for even lower level courts to adopt the alternative position.

The argument for the alternative position utilises a dynamic, historically-minded application of the interpretive method. It accepts that the case law prior to *Baden*[14] largely espouses the orthodox position. It acknowledges that the alternative position only starts to fit with the cases from the 1970s. However, the alternative position also reveals that the orthodox position has been flawed ever since trustee distributive mere powers appeared in settlements. This illustrates that interpretive analysis of law recognises the dynamic processes where theoretical values like coherence, proportionality and fairness change the case law and the changing case law enables new theoretical interpretations. Thus, at present neither the orthodox nor alternative positions satisfactorily fit the cases. In these circumstances other values such as coherence have additional weight. The alternative position is a claim that the case law has changed in a way that supports a more coherent account of law than the orthodox position.

The debate between the orthodox and alternative positions is a debate about whether mere powers with trusts in default are best accounted for by the proprietary fixed trust model, or by the administrative discretionary trust model. The orthodox position

[13] [1981] AC 753.

[14] *Baden* (n 1).

characterises default interests as distributive entitlements that are aligned with the fixed trust model. The discretionary element is treated as part of the law of powers and, thus, quite distinct from the law of trusts. The alternative position characterises the combination of mere power and trust in default as giving rise to procedural entitlements, and not distributive entitlements, which aligns it with the administrative model. This resolves the longstanding tension between trust law and the law of powers by fully incorporating powers within trust law.[15]

To respect the core disagreement between the orthodox and alternative positions, this chapter sets out the orthodox position as found in cases and commentary first. Then the argument is made for the alternative position in opposition to the orthodoxy. Finally, there is a brief return to the orthodox position to consider whether equitable proprietary interests are necessary for trusts.

## II ORTHODOX POSITION

The orthodox position makes sense of the paradigm case by reconciling it with the fixed trust model. The fixed trust in default is conceptualised as essentially the same as other fixed trusts with the default beneficiaries having the same rights as other fixed beneficiaries. In contrast, discretionary objects have very different rights from fixed beneficiaries or discretionary beneficiaries under trust powers. The mere power is understood to have no effect on the rights and duties that exist under the trust in default

[15] Cf Gregory S Alexander, 'The Transformation of Trusts as a Legal Category: 1800-1914' (1987) 5(2) *Law and History Review* 303, 333–6.

unless and until the power is exercised. The orthodox position was summarised by Jenkins LJ when discussing a trust in default subject to a mere power:

> In the [trust in default] … there is a valid disposition of the beneficial interest which the court can control and execute in the shape of the trust in default of appointment and, although the execution of the power is beyond the control of the court, except in the negative sense that it can prevent any purported exercise of the power in favour of non-objects, it will nevertheless be a valid power operating, if and so far as exercised, as a defeasance in favour of the appointee or appointees of the interests given in default of appointment.[16]

The orthodox position will be explained in the following steps. First, we will foreground the historical context of these types of powers. Second, we will examine the orthodox position's characterisation of default interests as proprietary fixed trust interests. Third, we will examine the orthodox position's characterisation of the duties owed by the trustees to the default beneficiaries and discretionary objects. Fourth, the orthodox position is augmented with an important article by Lionel Smith.[17] Fifth, we consider two alternative ramifications of the orthodox position and argue that they reveal fatal flaws with that position.

### A *Historical Context*

To better understand how mere powers with trusts in default have been conceptualised it is helpful to trace the development of mere powers. As discussed in Chapter 3, in the 18th and 19th centuries the fixed trust model dominated trust law.[18] As repeatedly emphasised by Lord Keeper Henley in *Burgess v Wheate*, as between trustees and

[16] *Inland Revenue Commissioners v Broadway Cottages Trust* [1955] Ch 20, 31 ('*Broadway Cottages*'). The trust in default of a power discussed by Jenkins LJ was used as a contrast to the trust power that was the subject of the case.

[17] Lionel Smith, 'Massively Discretionary Trusts' (2017) 70(1) *Current Legal Problems* 17.

[18] See Chapter 3 Part III(A).

beneficiaries, beneficiaries' interests imitated fixed legal interests in land and were executed as such.[19] However, trusts have coexisted with certain types of distributive discretions since their earliest days.[20] For example, a central purpose of the medieval use was to give the aristocracy power to control the distribution of land upon death,[21] which effectively was a power of appointment exercised by will.[22] In the 18th and 19th centuries much of land law and conveyancing concerned legal and equitable powers and produced significant treatises such as those by Lord St Leonards and Sir George Farwell.[23]

The long history of association between distributive powers and proprietary estates in land gives the orthodox position intuitive appeal to common lawyers. However, much of this history is not directly relevant to trustee mere powers. For example, powers created by the *Statute of Uses*[24] were legal, not equitable.[25] In the 18th and 19th centuries it was typical for distributive powers to be granted to third parties rather than to the trustees who held title.[26] For example, marriage settlements typically granted powers of appointment to one or more of the married parties.[27] These powers might be legal powers over land

[19] (1759) 1 Eden 177; 28 ER 652, 679–80 ('*Burgess*').

[20] See Sir John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 308–9.

[21] John Baker, *The Oxford History of the Laws of England: Volume VI 1483–1558* (Oxford University Press, 2003) 653.

[22] According to John Baker this was achieved by obliging the feoffees to hold assets on trust for the settlor and his heirs: ibid 653 fn 4. Defining the cestui que use as heirs gave the settlor the power to appoint someone as beneficiary by will.

[23] Edward Burtenshaw Sugden, *A Practical Treatise of Powers* (H Sweet, 8th ed, 1861); Sir George Farwell, *A Concise Treatise on Powers* (Stevens & Sons, 2nd ed, 1893).

[24] *Statute of Uses 1535*, 27 Hen 8, c 10.

[25] Farwell (n 23) 2–3.

[26] See, eg, the trust in *Burgess* (n 19).

[27] Farwell (n 23) 2.

or equitable powers over trusts of personalty.[28] The donees of these powers were not trustees, except in the case of some trust powers considered below.

Alongside the history of granting distributive powers to third parties, there is a long history of management powers being granted to trustees, for example, powers of sale, exchange and partition.[29] Management powers are not directly relevant to the issues arising with distributive mere powers because they do not allow distribution of the benefit of trust assets, but only substitution of assets.[30] However, in form, the power of sale was a distributive power because it was effected by a power to revoke the trusts over the land and declare new trusts in favour of the purchaser.[31] Despite the distributive form these powers are distinct in substance.

The earliest trustee distributive discretions were trust powers. For example, in 1673 executors and trustees were given the power to nominate one of the three sons of Nicolas Mosely to be the sole beneficiary of land held in trust.[32] The courts were not always willing to sanction such discretion in the trustees. In *Read v Snell*, the Chancellor found a life interest rather than a discretion because the discretion would have given the trustees 'an ownership, and not an authority'.[33] Nevertheless, trust powers became widely

[28] Stuart Anderson, 'Property' in *The Oxford History of the Laws of England: Volume XII 1820–1914 Private Law* (Oxford University Press, 2010) 1, 232–3.

[29] Sugden (n 23) Ch 19.

[30] Ibid 862–4.

[31] See *Doe v Martin* (1790) 4 Term R 39; 100 ER 882, 897 ('*Martin*'); Sugden (n 23) 837, 865.

[32] *Mosely v Moseley* (1673) Fin 53; 23 ER 28. See also *Clarke v Turner* (1694) 2 Freeman 198; 22 ER 1158.

[33] (1743) 2 Atk 643; 26 ER 784, 786.

accepted by the late 18th century.[34] These powers could be granted to true trustees with custody of the assets, but also to non-custodial third parties who would be treated as if they were trustees in relation to the power.[35] The powers were distinct from the mere power in the paradigm case because they did not authorise the trustees to divest default interests.

A second early type of trustee distributive discretion can be found in the special rules that developed for the maintenance and support of children. For example, in the late 17th century a trustee paid £20 of his own funds to apprentice out a contingent beneficiary, who then died before his interest vested. The Court allowed the reimbursement of the trustee's expense even though the contingent beneficiary had never been entitled to a distribution.[36] Standard trust terms developed that empowered trustees to benefit children with contingent interests at the expense of those entitled in default.[37] Through the 1925 property law reforms these powers became default legislative provisions.[38] These powers are conceptually similar to the mere power in the paradigm case, in that the trustees are authorised to distribute assets to those who are not entitled to them, and to divest the interests of those who would have become entitled to them upon the failure of the contingency. Indeed, in the United Kingdom Parliamentary debates on the default

[34] See *Harding v Glyn* (1739) 1 Atk 469; 26 ER 299; *Gower v Mainwaring* (1750) 2 Ves Sen 87; 28 ER 57; *Supple v Lowson* (1773) Amb 729; 27 ER 471; *Brown v Higgs* (1801) 8 Ves Jr 561; 32 ER 473 , affd (1813) 18 Ves Jr 192; 34 ER 290 ('*Brown*'); *Kemp v Kemp* (1801) 5 Ves Jr 849; 31 ER 891.

[35] See Sugden (n 23) 591; RL Congreve, 'Trust-Powers and Trusts' (1973) 7(4) *Victoria University of Wellington Law Review* 393, 396–7.

[36] *Franklin v Green* (1690) 2 Vern 137; 23 ER 696.

[37] See William Hayes and T Jarman, *Concise Forms of Wills with Practical Notes* (S Sweet, 1835) 13–4.

[38] See *Trustee Act 1925*, 15 & 16 Geo 5, c 19, ss 31, 32. See also *Trustee Act 1925* (ACT) ss 43, 44; *Trustee Act 1925* (NSW) ss 43–44; *Trustee Act* (NT) ss 24, 24A; *Trusts Act 1973* (Qld) ss 61, 62; *Trustee Act 1936* (SA) ss 33, 33A; *Trustee Act 1898* (Tas) s 29; *Public Trustee Act 1930* (Tas) s 34; *Trustee Act 1958* (Vic) ss 37, 38; *Trustees Act 1962* (WA) ss 58, 59; *Trusts Act 2019* (NZ) ss 62–66.

statutory powers one MP protested the Bill, arguing that Parliament would be empowering trustees to give money that belongs to one person to another, in violation of their property rights.[39] However, these types of discretions raise distinct policy considerations[40] and must be considered in light of the ecclesiastical law of legacies, which emphasised male children's natural rights to be maintained and advanced by their fathers.[41]

Trustee mere powers make an unambiguous appearance in the record in the early 19th century with attempts to avoid creditors' claims against beneficiaries.[42] Protective trusts granted the trustees a discretion to apply income or capital to the maintenance and support of an impecunious beneficiary, rather than granting a beneficial interest that could be executed by the beneficiary's creditors. Stuart Anderson relates that it was some decades into the 19th century before the courts accepted the efficacy of these discretionary provisions.[43] Once they were established distributive trustee discretions flourished, especially as estate duties rose in prominence over the late 19th and early 20th centuries.[44]

[39] United Kingdom, *Parliamentary Debates*, House of Commons, 14 June 1922, vol 155, col 452–3 (Sir J Butcher).

[40] The policy behind the statutory powers was to favour the first rank of contingent beneficiaries, who were often only subject to contingencies in order to avoid inheritance tax: ibid col 452 (Sir L Scott).

[41] See, eg, *Billingsley v Critchet* (1783) 1 Bro CC 268; 28 ER 1121; RSD Roper, *A Treatise on the Law of Legacies* (Henry Hopley White, 3rd ed, 1828) vol 2, 234.

[42] Anderson (n 28) 250.

[43] Ibid.

[44] See Yuri FR Grbich, Gregory D Munn and Harry Reicher, *Modern Trusts and Taxation* (Monash University Faculty of Law, 1978); Lindsay GS Trotman, 'The Use of Discretionary Trusts in Tax Planning' (1988) 3(3) *Canterbury Law Review* 291; Michael Littlewood, 'The History of Death Duties and Gift Duty in New Zealand' (2012) 18(Mar) *New Zealand Journal of Taxation Law and Policy* 66.

### B *Default Beneficiaries' Interests*

The first side of the orthodox position is the conceptualisation of the default beneficiaries' interests as essentially the same as other fixed interests. They are traditionally characterised as vested or contingent proprietary interests. However, they are not characterised as contingent by virtue of being subject to the power, but only if subject to additional contingencies.[45] In *Re Brooks' Settlement Trusts; Lloyds Bank Ltd v Tillard*, Farwell J held:

> [I]n the case of a special power the property is vested in the persons who take in default of appointment, subject, of course, to any prior life interest, but liable to be divested at any time by a valid exercise of the power, and the effect of such an exercise of the power is to defeat wholly or pro tanto the interests which up to then were vested in the persons entitled in default of appointment and to create new estates in those persons in whose favour the appointment had been made.[46]

Under the orthodox position, the fact that the default beneficiaries might never receive any trust assets does not prevent them having vested interests in the trust assets.

A more recent explanation of the nature of default interests was given by the New Zealand Court of Appeal when distinguishing between default beneficiaries' vested and contingent interests and discretionary objects' interests:

> The crucial difference between contingent and vested interests on the one hand and discretionary interests on the other is that possession of the former interests, if enjoyed at all, is enjoyed as of right; whereas discretionary interests are never enjoyed as of right; their enjoyment is always subject to the discretion of the trustees.[47]

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[45] See Note, 'Remainders Over in Default of Exercise of Powers of Appointment and Revocation' (1958) 106(3) *University of Pennsylvania Law Review* 420, 420–1.

[46] [1939] 1 Ch 993, 997.

[47] *Johns v Johns* [2004] 3 NZLR 202, 217 [49] ('*Johns*').

This frames the orthodox position as a rule of attribution. Receipt of benefits by default beneficiaries are attributed to the settlor's decision, whereas receipt of benefits by discretionary objects are attributed to the trustees' decision.

The orthodox position's origins can be traced to the 18th century. In *Cunningham v Moody*, the question was whether a default interest subject to an unexercised power of appointment could descend to an heir.[48] Lord Hardwicke held that an interest is not put into abeyance by being subject to a power because the law never puts interests into abeyance except from necessity.[49] In *Doe v Martin*, the defendants accepted the principle that assets must not be left in abeyance. However, they argued that the uncertainty engendered by a power of appointment meant that the default interests were uncertain and, therefore, the assets should be vested in the settlor until the uncertainty was resolved.[50] This argument was rejected by the Court.[51] This rejection fits with the common law theory of powers, which characterises them as contingent events.[52] Understanding a power as a contingent event focuses attention on the effect of exercising the power and draws attention away from the power as a legal relationship that exists before it is exercised. In general, all contingent interests were conceptualised as a series: a presently vested interest, which might upon a future contingent event be divested and the estate vested in another.[53] The alternative conception would have been to recognise

[48] (1748) 1 Ves Sen 174; 27 ER 965 ('*Cunningham*').

[49] Ibid 967.

[50] *Martin* (n 31) 890–2.

[51] Ibid 896–9.

[52] Congreve (n 35) 393–4. See also Francis Williams Sanders, *An Essay on Uses and Trusts* (5th ed, 1844) 160.

[53] These shifting or springing uses could also be converted into legal estates by the *Statute of Uses 1535*, 27 Hen 8, c 10 (n 24).

that uncertain contingent interests can exist in parallel and each has only a chance of being realised.[54] Powers were treated the same; the decision to exercise one was simply a type of contingent event. The exercise of a power of appointment was understood to revoke exiting fixed trusts in favour of the default beneficiaries and declare new fixed trusts in favour of the appointed objects.[55] This conceptualisation produces a vision of the settlor constituting an ordinary fixed trust relationship between trustees and default beneficiaries, with a mere caveat that the relationship may be varied in the future. The power is seen as an external future event rather than itself constituting part of the relationship between trustees and beneficiaries.

A powerful point supporting the orthodox position is that, in general, defeasible interests and contingent interests can be genuine proprietary interests.[56] They are not disqualified from being rights, or proprietary, merely because they may never be enjoyed. At least three types of defeasible interests may be recognised as proprietary. First, contingent interests are accepted as genuine proprietary interests even though they might never be enjoyed.[57]

Second, a closely related area is interests under revocable trusts. A power of revocation has the same effect on all beneficial interests as a power of appointment has

[54] Presently vested defeasible interests only have a probability of realising enjoyment of the interest in the future.

[55] Congreve (n 35) 394. See also Sanders (n 52) 160. Powers of appointment could not usually be used to declare new discretionary trusts as that would be an improper delegation of the power: *Re Joicey; Joicey v Elliot* [1915] 2 Ch 115; *Re May's Settlement; Public Trustee v Meredith* [1926] Ch 136; *Re Mewburn's Settlement; Perks v Wood* [1934] Ch 112.

[56] LexisNexis, *Halsbury's Laws of Australia* (online at 30 December 2019) 355 Real Property, '1 Introduction' [355-135].

[57] See the brief history of the acceptance of contingent interests in Chapter 2 n 138.

on the default beneficial interests. However, the power of revocation does not prevent the trust from arising immediately:

> The fact that the depositor reserved a right to revoke the trust would not prevent an immediate trust arising and if the trust was not revoked by the depositor in his lifetime the beneficiary would be just as much entitled to the money as a beneficiary under an irrevocable trust …[58]

This supports the idea that the trust in default can create an immediate fixed trust relationship between trustee and beneficiary.

Third, beyond trust law, there are multiple interests that are subject to defeat but, while that defeat remains unrealised, are considered genuine interests. For example, the doctrine of rescission grants rights to unwind transactions for reasons like impaired consent. As Birke Häcker argues, rights to rescind should be understood as remedial powers over the recipient's interest.[59] This renders the interest defeasible, as the authors of *Remedies: Commentary and Materials* write:

> A transaction which is voidable at the instance of the plaintiff remains valid unless and until the plaintiff elects to rescind. This means that any contract remains binding and the defendant receives good (albeit defeasible) title to any benefit transferred pursuant to the impugned transaction.[60]

These three examples support the claim that the default beneficiaries' interests cannot be distinguished from fixed beneficial interests simply because they are defeasible.[61]

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[58] *Kauter v Hilton* (1953) 90 CLR 86, 100. See also *Duke of Marlborough v Godolphin* (1750) 2 Ves Sen 61; 28 ER 41, 52 ('*Marlborough*').

[59] Birke Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68(2) *Cambridge Law Journal* 324. See also Elise Bant, 'Trusts, Powers and Liens: An Exercise in Ground-Clearing' (2009) 3(3) *Journal of Equity* 286.

[60] Normann Witzleb et al, *Remedies: Commentary and Materials* (Thomson Reuters, 6th ed, 2015) 62 [2.115].

[61] There is a comparable debate about whether a proprietary interest is affected when it is made subject to a contractual option. The traditional position is that the grant of an option has no impact on the grantor's

The classification of default beneficiaries' interests as a type of proprietary interest of the same order as other equitable proprietary interests has ramifications for how the courts regulate trustee decisions. If the default beneficiaries are entitled to trust assets, then the courts cannot order the exercise of a mere power. This follows from the general constitutional principle that the courts have no jurisdiction to make orders that deprive people of their assets.[62] An order that trustees exercise a power in favour of discretionary objects would violate this principle.[63] An example of this principle being applied to the exercise of powers is found in *Holmes v Coghill*, where the interest in default was subject to a general power of appointment held by a non-trustee. The Court held that the donee, 'though bound to pay his creditors, could not be called upon by law to pay them out of an estate, which is the property of another person',[64] the person entitled in default. However, if the donee of the general power had exercised it, even if he had exercised it improperly, the courts could seize the assets for the creditors, which would be justified because it was the donee, not the court, who had divested the default interest.[65] The same reasoning would suggest that the law cannot demand that trustees distribute assets that are vested in the default beneficiaries.[66]

interest: see *J Sainsbury plc v O'Connor* [1991] 1 WLR 963; Alan Berg, 'Options and Beneficial Ownership' (1992) 108(Jan) *Law Quarterly Review* 20.

[62] *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337, 354 (Gibbs J). See also William Blackstone, *Commentaries on the Laws of England* (13th ed, 1800) vol 1, 138–9.

[63] See Grant T Riethmuller, 'The Interests of Non-Spouses in Discretionary Trusts in Family Property Cases' (2016) 30(3) *Australian Journal of Family Law* 240, 252.

[64] (1806) 12 Ves Jr 206; 33 ER 79, 81.

[65] Ibid.

[66] Cf *Angus's Trustees v Monies* 1939 SC 509, 536 (Lord Moncrieff).

### C *Trustees' Duties*

A second aspect of the orthodox position is that the trustees' duties are owed to the default beneficiaries, not to the discretionary objects. Hence, in the older cases we find the principle that the courts cannot control mere powers.[67] For example, in *Baden* Lord Hodson distinguished trust powers, which must be controllable, from mere powers:

> Where there is a mere power entirely different considerations arise. The objects have no right to complain. Where by the instrument creating the power the discretion is made absolute and uncontrollable the court cannot interfere. The trust in default controls and he to whom the trust results in default of exercise of the power is in practice the only one competent to object to a wrongful exercise of the power by the donee. Counsel did not profess to know of any successful application to the court by a person claiming to be an apparent object of a bare power. I exclude from consideration cases in which bad faith may be alleged.[68]

Lord Hodson was in dissent, but the majority was not clear on this point. Lord Wilberforce initially said that trustees holding mere powers might be controlled on grounds other than the bare minimum of capricious or excessive exercises.[69] However, he later appeared to say that control over mere powers was limited to those two grounds.[70] Overall, Lord Wilberforce applied the orthodox position, because he found a discretionary trust of income for the employees and their relatives even though it was subject to a distributive power to accumulate for the benefit of other parties.[71]

More recently, it has become widely accepted that duties are owed to the discretionary objects as well as to the default beneficiaries.[72] Nevertheless, the orthodox position was

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[67] See, eg, *Broadway Cottages* (n 16) 31; *Gulbenkian* (n 4) 521, 524–5 (Lord Upjohn).

[68] *Baden* (n 1) 441 (citations omitted).

[69] Ibid 449.

[70] Ibid 456.

[71] Ibid 447–9.

[72] See, eg, *Karger v Paul* [1984] VR 161 ('*Karger*').

stated in obiter recently by the New Zealand Court of Appeal, albeit without much reflection.[73] Moreover, a more nuanced version of the orthodox position has emerged, which is that, while duties might be owed to discretionary objects by default, they can be excluded without compromising the true trust relationship. For example, David Hayton argues that a settlor ought to be able to exclude any accountability owed to discretionary objects because accountability to the default beneficiary is sufficient for a trust.[74] This reasoning prioritises the duties to the default beneficiaries as the true trust relationship that must be capable of being controlled and executed by the courts,[75] whereas the relationship with the mere objects need not be.

### D *Lionel Smith's Account*

The key academic work on mere powers with trusts in default is Lionel Smith's article, 'Massively Discretionary Trusts'.[76] The article uses the orthodox position to work through the consequences that arise when the trustees' discretions are drafted very broadly. Smith's account is worth examining closely for three reasons.

First, in defining his terms, Smith provides a more complete account of the orthodox position than found elsewhere. The core of the orthodox position is found in his two definitions of 'trust': the narrow and wide senses. A trust in the wide sense means an entire trust structure including discretionary powers and trusts in default. A trust in the narrow sense means a trust in default only. Smith defines the latter as 'an obligation with

[73] *Crawford v Phillips* [2018] 3 NZLR 247, 254 [18].

[74] David Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47, 51.

[75] As required for a trust relationship: *Morice v The Bishop of Durham* (1805) 10 Ves Jr 522; 32 ER 947; *Broadway Cottages* (n 16) 31.

[76] Smith (n 17).

respect to the benefit of property',[77] which we will refer to as Smith's 'narrow trust obligation'. He continues:

> The overlap between the two senses is that every trust structure — every trust in the wider sense — must include at least one trust in the narrow sense — an obligation with respect to the benefit of the property held in trust. It is because of that obligation that we can say that the property is held in trust; and then we may use the wider sense to refer to the whole structure, discretions and all. Conversely, if there is no trust in the narrow sense, there can be no trust in the wider sense either. This is because if there were no trust in the narrow sense, the 'trustees' would not owe any obligation relating to the benefit of the property; but then, they would not be trustees. And this is why, outside of trusts for charitable purposes, there is no trust unless there is a beneficiary: to say that the trustee owes an obligation with respect to the benefit of the property is to say that someone is owed that obligation. The person who is owed the obligation is a beneficiary. The principle that there must be a beneficiary in order for there to be a trust is usually called the beneficiary principle. A beneficiary is always needed for there to be a trust in the narrow sense; and a trust in the narrow sense is always needed for there to be a trust in the wider sense. …
>
> When there is a trust in the narrow sense, not being a charitable trust, the trustee is obliged to hold the trust property for the benefit of one or more persons. They are called beneficiaries: the persons who are entitled to the trust property, even though their entitlements may be vested or contingent, defeasible or indefeasible. That is the strict or narrow sense of the word 'beneficiary'.[78]

There is some ambiguity in Smith's phrase: the 'obligation with respect to the benefit of property'.[79] However, the overwhelming impression is that he means default beneficiaries have the same distributive entitlements as ordinary fixed beneficiaries.[80]

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[77] Ibid 19.

[78] Ibid 20–1 (citations omitted).

[79] Ibid 19.

[80] An alternative interpretation is that Smith only claims that default beneficiaries have procedural entitlements to have the assets distributed in accordance with the terms of the trust, but not a distribution to them personally. However, this interpretation is inconsistent with other points in Smith's reasoning. First, Smith claims that only the default beneficiaries are owed the narrow trust obligation, but accepts that discretionary objects have the right to ensure the proper exercise of the power: ibid 22. If the narrow trust obligation is a right to a correct distribution then it is owed to the discretionary objects as well as the default beneficiaries. Second, Smith emphasises that the default beneficiaries are entitled to the assets during the life of the trust, even though that entitlement may be defeasible: ibid 21, 28 fn 33. Third, Smith categorises the beneficiaries of trust powers as beneficiaries because they are collectively entitled to the trust assets,

Second, unlike most references to the orthodox position, Smith frames it in terms of the trustees' duties to the default beneficiaries rather than the latter group's rights. Smith argues that narrow trust obligations are unique duties owed to default beneficiaries and not to the discretionary objects:

> Objects of powers do not have any right to any property. Perhaps less obviously, they do not have a right to enforce the trust, certainly when 'trust' is used in the narrow sense. This is just saying the same thing in a different way, because the trust in the narrow sense is the obligation relating to the benefit of the trust property, and by definition, that obligation is owed to the beneficiaries in the strict sense and not to the objects of any discretionary powers. Or in other words, since objects of powers do not have any right to any trust property, they cannot enforce obligations owed by the trustees in relation to the benefit of the trust property.[81]

This mirrors the nuanced argument made by Hayton.[82] While Smith accepts that some duties might be owed to the discretionary objects, he excludes those duties from the definition of 'trust' duties in the narrow sense.

Third, Smith suggests that the default beneficiaries ought to be able to exercise their power under the rule in *Saunders*[83] and thereby override the trustees' mere power.[84] This point is critically important to evaluating the orthodox position.

### E *Ramifications of the Orthodox Position*

The orthodox position as related above is incomplete, because it excludes its necessary ramifications. One ramification is Smith's suggestion that default beneficiaries

even though the discretionary objects of mere powers are not: ibid 25. The idea of collective entitlement here fits better with a distributive entitlement rather than a right to have the power exercised properly.

[81] Smith (n 17) 22.

[82] See above n 74.

[83] *Saunders* (n 12).

[84] Smith (n 17) 39–42.

ought to have the benefit of the rule in *Saunders*[85] to override the trustees' distributive discretions — henceforth the 'Saunders claim'. This coheres with the orthodox account but is unsupported in the case law. The alternative ramification is that, in the absence of the Saunders claim, the orthodox position is deeply incoherent.

### *1 Saunders Claim*

Smith's suggestion that default beneficiaries have a Saunders claim takes the orthodox position to its logical conclusion. Ordinary fixed beneficiaries can terminate a trust by agreement under the rule in *Saunders*[86] and override any conflicting provisions the settlor has included in the trust terms. Therefore, if default beneficiaries are relevantly similar to fixed beneficiaries, then they ought to be able to do the same. They ought to be able to demand the assets and terminate the trustees' mere power. The logic of the orthodox position would require that both the individual and collective versions of the rule in *Saunders* be available to default beneficiaries. That is, an individual default beneficiary must be able to demand their aliquot share of the assets when their interests are vested in interest and quantum.[87] This means the default beneficiaries could be described as having distributive entitlements (although the trustees would not have distributive duties to the default beneficiaries as they would retain the power to distribute to others).

The problem with the Saunders claim is that it is unsupported by the cases. Indeed, Smith only goes so far as claiming the law is open on this point, and that, in principle, the

[85] *Saunders* (n 12).

[86] Ibid.

[87] See Chapter 2 Part II(C) on fixed beneficiaries' distributive entitlements.

uncertainty ought to be decided in favour of the default beneficiaries.[88] However, even this cautious claim is too strong.

The only authority given for the Saunders claim, other than the theoretical demands of the orthodox position, is an obiter statement in *Vandervell v Inland Revenue Commissioners*.[89] Lord Upjohn held that a settlor had transferred assets to a trustee upon trusts to be declared in the future, which left them on resulting trust for the settlor in the present.[90] In response to the question of whether the settlor or the trustees had power to declare those future trusts, Lord Upjohn said, in obiter, that if the settlor had granted the trustees the power then the settlor could revoke it at any time.[91] This could be interpreted to suggest that the source of the right to revoke the power is the settlor's beneficial interest in result. However, the better interpretation is that the source of the right to revoke the power is the ambiguous circumstances in which the settlor granted the power, not the settlor's default interest. There can be no doubt that the settlor could have granted a revocable power; in these circumstances it was ambiguous whether the power had even been granted; therefore, the conclusion that any power granted would have been revocable merely indicates that it was not the settlor's intention to give up the power. The ambiguity in this case means it is not good authority for a general proposition regarding the rights of default beneficiaries.

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[88] Smith (n 17) 40–1.

[89] [1967] 2 AC 291.

[90] Ibid 315–7.

[91] Ibid 317. See also Lord Millett's ambiguous statement in *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 191–2 [98] ('*Twinsectra*'), that the lender-settlor in a Quistclose trust is the sole beneficiary and can revoke the borrower-trustee's discretion to apply the assets for a purpose. It is ambiguous because it is unclear whether Lord Millett meant the settlor could revoke the discretion at any time or only if the purpose failed. The first supports the logical conclusion of the orthodox position.

In opposition to the Saunders claim is the obiter dicta in *Schmidt v Rosewood Trust Ltd* (‘*Schmidt*’) that the consent of discretionary objects must be obtained before the Saunders claim can be exercised.[92] Unlike Lord Upjohn’s dicta, the dicta in *Schmidt* is unambiguous. Moreover, it is consistent with the historical context of trust practice. There is a long history of beneficial interests being subject to powers of appointment granted to trustees and third parties.[93] The question of whether these powers can be destroyed or overridden is covered by the extensive case law on the release of powers.[94] These cases consistently suggest that release by the donee is the only way to extinguish powers. For example, in *Re Courtauld’s Settlement; Courtauld v Farrer*, when Plowman J listed the means by which a power could be extinguished he only included release by the donee and said nothing about extinguishment by default beneficiaries.[95] Moreover, in Lord St Leonards’ commentary on powers collateral, appendant and in gross there is nothing to suggest that they can be extinguished against the wishes of the person holding the power.[96]

If the Saunders claim were adopted, it would destabilise the trust relationship. It would become a relationship of competing powers, rather than correlating rights and duties. Both trustee and default beneficiary would have an incentive to exercise their power as soon as possible, in order to pre-empt the other’s power. This would not be a stable trust relationship.

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[92] [2003] 2 AC 709, 726 [41].

[93] See, eg, Sugden (n 23); Farwell (n 23).

[94] See *Re Combe; Combe v Combe* [1925] Ch 210; *Re Wills’ Trust Deeds; Wills v Godfrey* [1964] Ch 219, 228; *Muir v Inland Revenue Commissioners* [1966] 1 WLR 1269, 1283–4 (Harman LJ); *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1614 (‘*Mettoy*’).

[95] [1965] 1 WLR 1385, 1388.

[96] Sugden (n 23) ch 3. On powers collateral see *Willis v Shorral* (1738) 1 Atk 474; 26 ER 302.

The unlikelihood that the default beneficiaries have any right to demand the trust assets is a serious difficulty for the orthodox position. But without the Saunders claim, the orthodox position devolves into incoherence.

*2 Incoherence*

If the default beneficiaries do not have a Saunders claim, the orthodox position that default beneficiaries are relevantly similar to non-defeasible fixed beneficiaries is incoherent. It is incoherent because trustees cannot owe a distributive duty to the default beneficiaries while also having a discretion to distribute nothing to them. A duty and power relating to the same subject-matter and vested in one person contradicts the ordinary meaning of duty.[97] This section explains the incoherence and why it affects default trust interests but not other defeasible interests.

The orthodox position is incoherent because trustees have power over default beneficiaries, rather than having distributive duties towards them.[98] Trustees cannot owe distributive duties to the default beneficiaries while they have the power, and the liberty, to distribute to others under the mere power. A duty is ordinarily defined as compulsory not optional.[99] Therefore, the trustees' option not to distribute is incompatible with any duty to distribute. As Justice Edelman says of trustees holding general powers of appointment, there can be no duty on a person who is authorised to do something else: 'At best, all that can be said is that the trustee has a "duty" to be loyal to the beneficiaries

[97] See the concept of duty in Christopher Berry Gray (ed), *The Philosophy of Law: An Encyclopedia* (Routledge, 2012) 635 'Obligation and Duty'.

[98] It is acknowledged that where the Saunders claim applies the trustees still do not have distributive duties. However, the beneficiaries have distributive entitlements provided they claim them before the trustees exercise the power.

[99] Gray (n 97) 635 'Obligation and Duty'.

unless the trustee decides not to be. That is no duty at all.'[100] The correlating consequence is that default beneficiaries have no distributive right against the trustees with respect to the benefit of the trust assets.

The incoherence of the orthodox position can be traced through Lionel Smith's article. As discussed above,[101] he claims that the default beneficiaries are owed the narrow trust obligation: 'an obligation with respect to the benefit of property'.[102] However, he recognises that trustees cannot be bound by *fiduciary* duties of loyalty to the default beneficiaries, because the trustees are authorised to exercise the mere power, which will necessarily harm the default beneficiaries' interests.[103] If this reasoning were applied to the narrow trust obligation, it would follow that the trustees can owe no obligation to the default beneficiaries about the benefit of the trust assets while they also hold a power to distribute all benefits elsewhere. For Smith's position to be coherent it needs to apply the same reasoning to both the fiduciary and narrow trust obligations.

The High Court of Australia has indirectly recognised that the orthodox position is incoherent. In *Chief Commissioner of Stamp Duties (NSW) v Buckle* ('*Buckle*'), the Court evaluated interests that were subject to the trustee's power to use assets to reimburse or exonerate his own liabilities:

> To the extent that the assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not 'trust assets' or 'trust property' in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries.[104]

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[100] James Edelman, 'The Importance of the Fiduciary Undertaking' (2013) 7(2) *Journal of Equity* 128, 139.

[101] See above Part II(D).

[102] Smith (n 17) 19.

[103] Ibid 43–4.

[104] (1998) 192 CLR 226, 246 [48].

This surprising statement suggests that no trust, or no true trust, exists while the default interests are defeasible to the trustee's rights.[105] If the same reasoning were applied to a trust in default subject to a mere power in favour of others, then the necessary conclusion would be that the default beneficiaries are not beneficiaries of a discrete 'true trust' because the trustees are not bound solely in their favour. They could only be beneficiaries if they were considered part of a unified trust that included the mere power and its objects.

The incoherence of the orthodox position means that the only duties the trustees can owe to the default beneficiaries are procedural not distributive duties. The trustees can only owe duties about how they exercise their distributive power, not duties to distribute any benefit to the default beneficiaries. Thus, without the Saunders claim, the default beneficiaries have no proprietary interests in the trust assets, in the sense of a positive distributive entitlement.[106]

The argument that the orthodox position is incoherent, in the absence of a Saunders claim, faces the objection that other types of defeasible interests are accepted as proprietary without producing incoherence. The answer to this objection is that default interests can be relevantly distinguished from the three examples of other defeasible interests: contingent trust interests, revocable trust interests, and interests defeasible to remedial powers.[107]

First, an objection can be made that the default beneficiaries, even without the Saunders claim, nevertheless have a fixed right to whatever is left in the trust fund in the

[105] See also *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, 121 [51].

[106] See Chapter 2 Part III(A), where equitable proprietary interests are defined as rights to claim the benefit of assets from the trustees.

[107] See above text to nn 56-61.

future. That is, default interests are simply contingent interests, which we accepted in Chapter 2 as fixed proprietary interests.[108] This argument was accepted in *Johns v Johns* ('*Johns*').[109] Counsel argued that 'there should be no distinction between "a beneficiary who will become entitled to income or capital at a given age" and "a beneficiary who will become entitled to a share of the trust fund on the date of distribution"' despite 'the fact that the trustees might pay out all the income and capital to the discretionary beneficiaries before the date of distribution'.[110] This reasoning is attractive but flawed. It is true that default beneficiaries will become entitled to a share in any trust assets left over at the expiry of the mere power. However, this 'entitlement' is no more significant than saying 'X will become entitled to Blackacre when Y gifts it to her'. A hope of receiving assets is not an entitlement if the person holding those assets has the volitional power to defeat that hope. Therefore, the default beneficiaries' hope that the trustees will leave assets for them is distinct from contingent future interests. The latter are contingent on events other than the trustees' volitional power.[111] For example, a beneficiary whose interest is contingent on professing a certain religion[112] may or may not benefit from that interest in the future, but that possibility is not dependent on hope, but on the beneficiary's own decision. She has a genuine future right against the trustees that the trustees have no volitional power over. Similarly, if default beneficiaries have a Saunders claim, then the

[108] See Chapter 2 n 138.

[109] *Johns* (n 47) 215-20 [42]-[63].

[110] Ibid 215–6 [43].

[111] See the discussion in Chapter 2 Part II(C)(3), which distinguished between interests that were contingent because they were subject to the volitional control of another human agent and interests that were contingent because of an impersonal future event. For example, in *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 270 [29], the contingent interest was determined by an employee's unemployment and inability to engage in future work. The fact that the trustee was given the task of determining whether the event had occurred did not give the trustee a discretion to decide whether or not to pay out the interest.

[112] As in *Hickin v Carroll [No 2]* [2014] NSWSC 1059.

possibility of them benefiting depends on their own choice. In contrast, without the Saunders claim, they have nothing but hope that the trustees will not distribute all the assets to the discretionary objects.

Second, default interests are distinguishable from interests under a revocable trust. The beneficiaries and trustees of a revocable trust have a relationship of genuine rights and duties. Unlike trustees holding a discretion themselves, the trustees of the revocable trust do not have a choice about whether to distribute assets to the default beneficiaries. Their duties may be terminated, but only by an external party's intervening act, not by the trustees' own decision. For emphasis, consider a hypothetical power of revocation granted to a trustee, rather than to the settlor. A 'trustee' with a power to revoke their own trust cannot owe the same duties as a trustee whose duties might be revoked by a third party. Third party powers over trusts do disrupt the beneficiaries' entitlements because they are subject to the volitional control of another, however, they do not produce the same incoherence produced by the idea that trustees owe fixed duties to those whose interests they may volitionally divest. Trusts subject to third party powers produce an intermediate form that is neither a fixed trust, under the model in Chapter 2, nor a trust like that we are considering in this chapter. This intermediate form deserves attention but is outside the scope of this thesis.

Third, default interests are distinguishable from interests subject to divestment by remedial powers, such as rescission, despite both interests being subject to another's volitional control. Until a right to rescind is exercised, the recipient of the asset enjoys rights in the asset that can be exercised immediately. She has all the rights, powers and

liberties of an ordinary owner to use the asset, dispose of it or to destroy it.[113] The recipient also has the power to destroy the transferor's power to rescind by entering into a new transaction with a bona fide purchaser for value.[114] The defeasible recipient is only comparable to a default beneficiary if the Saunders claim is accepted. If it is, then both a defeasible recipient and a default beneficiary have interests with real rights that can immediately affect the relevant assets. They might lose those rights if the transferor, or trustees, exercise their power, but they nevertheless have some exercisable rights. In contrast, if the Saunders claim is not accepted, then the default beneficiaries have no exercisable rights. Without the power to override the trustees' power default beneficiaries enjoy no exercisable rights that can affect the trust assets.

## F *Conclusion*

In conclusion, the orthodox position, although it has a long history in the legal materials, ultimately requires the adoption of one of two difficult claims. Either it must be claimed that the default beneficiaries have rights to demand trust assets that override the trustees' discretion, or it must be claimed that their rights are similar to other fixed beneficiaries' rights, despite being completely subject to the volitional power of the trustees whom the rights are against. These claims are difficult to maintain. The first is not supported in the legal materials. The second is not coherent with the ordinary meaning of 'duty'. Fortunately, there is an alternative position that can be drawn from the materials that does not suffer from these defects.

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[113] *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* (2009) 76 NSWLR 195, 213-4 [79]-[81] (Allsop P and Handley AJA); *Bristol and West Building Society v Mothew* [1998] Ch 1, 22–3 (Millett LJ). See also Bant (n 59) 298.

[114] *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265. See also Bant (n 59) 299.

## III ALTERNATIVE POSITION

After *Baden*[115] there was some speculation that Lord Wilberforce's revolutionary decision might impact the orthodox position on mere powers.[116] However, the wider consensus was that the decision established trust powers as a category of discretionary trusts that was distinct from both fixed trusts and mere powers.[117] Thus, the orthodox position remained the dominant explanation of mere powers with trusts in default. However, the case law has developed to a point where we can argue for an alternative position in which mere powers with trusts in default fit squarely within the discretionary trust model, alongside trust powers. The alternative position provides a coherent interpretation that better fits the cases.

### A *Holistic Analysis*

The basis of the alternative position is simple. Given that a mere power always has a trust in default,[118] both of these distributive elements must be analysed together, holistically.[119] Smith's narrow trust obligation cannot be analysed properly without consideration of mere powers. Under a holistic analysis, there is no significant conceptual difference between default beneficiaries and discretionary objects. Any enjoyment of the

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[115] *Baden* (n 1).

[116] JD Davies, 'Trusts' in HWR Wade and Harold L Cryer (eds), *Annual Survey of Commonwealth Law 1970* (Butterworths, 1971) 187, 190; FR Crane, 'Notes of Recent Cases' (1970) 34(4) *Conveyancer and Property Lawyer* 279.

[117] Yuri Grbich, 'Baden: Awakening the Conceptually Moribund Trust' (1974) 37(6) *Modern Law Review* 643, 654 ('Baden'); Susan Fradley, 'A Bird's Eye View of Baden' (1975) 4(4) *Anglo-American Law Review* 442, 454.

[118] If there is no express trust in default then there will be a resulting trust in default for the settlor: *Sayer* (n 7).

[119] In contrast, a compartmentalised analysis that compares the duties applicable to mere and trust powers, without considering the trust in default as a necessary addition to the mere power, will be insufficient: see, eg, Grbich, 'Baden' (n 117) 644.

trust assets by any of them depends entirely on the trustees' discretion. A discretionary object will receive assets if the trustees decide to exercise the power in her favour. A default beneficiary will receive assets if the trustees decide, at the end of the trust period, not to exercise the power. Both outcomes are equally dependent on the trustees' discretion. Neither beneficiary has an interest similar to a non-defeasible fixed beneficiary.[120]

Moreover, not only do the trustees have the liberty to choose between the two classes of potential beneficiaries, but they have a duty to make that choice. Trustees have a fiduciary duty to consider exercising mere powers, which means that they have a duty to decide whether the assets should be distributed to discretionary objects or to default beneficiaries.[121] Unlike non-fiduciary donees who may release their powers because they owe no duties to the objects,[122] trustees do owe such duties.

A holistic analysis renders it difficult to meaningfully distinguish mere powers from trust powers. During the trust period, trustees of either power may choose to distribute assets. The traditional distinction between the two powers only arises at the end of the trust period, when the trustees must positively exercise a trust power, but can decide not to exercise a mere power.[123] However, a decision not to exercise a mere power is necessarily a positive decision to let the assets pass under the default provision. A holistic analysis recognises that both types of power are subject to the duty to consider. This

[120] *Cock v Smith* (1909) 9 CLR 773, 835 (Higgins J), revd (1911) 12 CLR 30.

[121] *Re Gestetner Settlement; Barnett v Blumka* [1953] Ch 672, 688; *Gulbenkian* (n 4) 518 (Lord Reid); *Re Hay's Settlement Trusts; Greig v McGregor* [1982] 1 WLR 202, 210 ('*Hay*'); *Karger* (n 72).

[122] *Re Greaves; Public Trustee v Ash* [1954] Ch 434, 446–7.

[123] *Brown* (n 34) 476.

renders the distinction 'narrow and in a sense artificial'.[124] An excellent example of the narrowness of the distinction is found in *Bridge Trustees Ltd v Noel Penny (Turbines) Ltd*, where the trust instrument provided:

> Any remaining policy monies shall on the direction of the Principal Employer either be applied to increase the benefits … or be returned to the Participating Employers in proportion to the amounts respectively contributed by them to the Scheme …[125]

This was interpreted as a trust power because the trustees were positively obliged to transfer the assets either to the employees or to the employers in fixed shares.[126] However, the two classes of beneficiaries fit the form of a mere power for the employees with a trust in default for the employers. The only distinction between this power and a typical mere power with trust in default is that here the duty to choose between the two classes is explicit not implicit.

The alternative analysis produces a coherent account in which mere powers are aligned with trust powers under the discretionary administrative model. Both a discretionary object and a default beneficiary have procedural entitlements in regard to the exercise of the power and neither have distributive entitlements to receive anything. The analysis applies even to very simple trusts where there is one discretionary object and one default beneficiary. For example, in *Karger v Paul* the relevant power was to advance capital to one object at the expense of one residual beneficiary.[127] The trustees

[124] *Baden* (n 1) 448 (Lord Wilberforce).

[125] [2008] Pens LR 345, 347 [7].

[126] Ibid 349 [18].

[127] *Karger* (n 72).

were obliged to decide the extent to which they benefited one rather than the other and neither was entitled to the assets.

### B *Fit with the Case Law*

The alternative position is not only coherent but enjoys considerable support in the case law. The leading case is the House of Lords 3:2 decision in *Pearson v Inland Revenue Commissioners* ('*Pearson*').[128]

*Pearson* concerned three sisters' liability for tax. The trustees were obliged to hold the income and capital for the three sisters as children of the settlor. The trustees were also granted discretionary mere powers to distribute income and capital to discretionary objects, and discretionary powers to accumulate income.[129] Thus, the sisters were default beneficiaries whose interests were defeasible to the volitional exercise of power by the trustees. The question posed in the case was whether the sisters' interests in the income were 'vested in possession'. The question arose because an appointment was made to one sister, which would attract capital transfer tax unless she had an 'interest in possession' in the trust fund prior to the appointment.[130] Although some tax cases must be treated with caution,[131] this case was decided on trust principles.[132]

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[128] *Pearson* (n 13).

[129] Ibid 768 (Viscount Dilhorne).

[130] Ibid 769.

[131] See Yuri Grbich, 'Duke of Westminster's Graven Idol on Extending Property Authorities into Tax and Back Again' (1978) 9(2) *Federal Law Review* 185.

[132] The context of a taxation statute was not a significant influence on the decision. Neither Viscount Dilhorne nor Lord Russell (in dissent) emphasised the statute: *Pearson* (n 13) 775, 779–80. Viscount Dilhorne found that 'interest in possession' had its ordinary natural meaning of a present right of present enjoyment: ibid 775. Lord Keith did consider the context in deciding that 'interest in possession' meant an 'absolute' interest: ibid 785–6. However, this is not significant because Lord Russell, for the minority, held that the sisters' interests were absolute: ibid 776.

Lord Russell, for the minority,[133] applied the orthodox position:

> [T]he three daughters were absolutely entitled each to one third of the income of the trust subject only to a power in the trustees to divert all or part by deciding to accumulate (during a period permitted by law) some or all of the income as it accrued.[134]

He decided that the case rested on the traditional distinction between trusts and powers. If there had been a trust to accumulate the income with a power to pay the sisters, then the sisters would not have had an interest in possession. However, because the trust was for the sisters, subject to a mere power to accumulate and divert, the sisters had 'interests in possession' under the general law.[135] This is a direct application of the orthodox position that default beneficiaries are entitled to trust assets until the divesting power is exercised.

Viscount Dilhorne and Lord Keith, for the majority,[136] applied a holistic analysis and rejected the orthodox position. Viscount Dilhorne frankly stated that the sisters' interests depended on the trustees' decision:

> Here the three sisters' entitlement to income was subject to the trustees' power to accumulate. On reaching 21 they had no valid claim to anything. If there was any income from the settled property, they were not entitled to it. Their right to anything depended on what the trustees did or did not do and the receipt of income by them appears to me to have been just as much at the discretion of the trustees as was the receipt of income by the beneficiaries in the *Gartside* case.[137]

Similarly, Lord Keith could see no difference in the quality of an interest simply because it depended on the trustees' decision not to exercise their power rather than to exercise it:

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[133] *Pearson* (n 13) (Lord Salmon agreeing at 775).

[134] Ibid 776.

[135] Ibid 778.

[136] Ibid (Lord Lane agreeing at 787).

[137] Ibid 773. The interests in the *Gartside* case were those of discretionary objects: *Gartside* (n 3) 555–6.

> In the present case Fiona certainly did not have an absolute right to any income of the property as it accrued. At that moment her entitlement was qualified by the existence of the trustees' power of accumulation, to the effect that she had no immediate right to anything, but only a right to later payment of such income as the trustees, either by deliberate decision or by inaction for more than a reasonable time, did not cause to be subjected to accumulation. In my opinion a right of that nature is not a present right of present enjoyment. Further, I do not consider it to be a satisfactory state of affairs that the question whether a person has an interest in possession should turn on the distinction between the position where his interest derives from his being the object of a discretionary power and that where his interest results in a benefit only failing the exercise of such a power. The practical results as regards the person having the interest are unlikely to be materially different in either case, and I can see no good reason why the distinction should lead to a difference of treatment for purposes of capital transfer tax.[138]

This reasoning directly contradicts *Johns*,[139] which attempted to distinguish default beneficiaries and discretionary objects on the basis that the latter would receive a benefit from the positive exercise of a power and the former from the negative decision not to exercise the power.[140]

An attempt is made in *Underhill and Hayton* to reconcile *Pearson* with the orthodox position by arguing that it only applies to income. The authors claim that a default interest in capital is a fixed interest yet accept that an interest in income defeasible as it accrues is not a fixed interest.[141] However, no good reason is given, or appears to exist, for the distinction. While the focus of the case were the sisters' income interests, neither the majority nor Lord Russell's dissent distinguished between trusts of income and capital. Lord Keith stated in obiter that no distinction could be drawn between the power to

[138] *Pearson* (n 13) 786.

[139] *Johns* (n 47).

[140] See above text to n 47.

[141] Hayton, Matthews and Mitchell (n 10) 99 [5.3].

accumulate income, which was the focus of the case, and the other powers to distribute income and capital.[142]

The significant development in *Pearson* is not isolated but finds considerable support in the case law. This support relates to the interests of the default beneficiaries and the duties owed to the discretionary objects.

First, while the cases accept that default beneficiaries have vested interests, the importance of this classification has eroded.[143] The majority in *Pearson* held that the sisters' vested interests were in substance indistinguishable from the non-vested interests of discretionary objects.[144] This follows an earlier trend of cases placing little weight on an interest's classification as vested.[145] In *Buckle*, the High Court of Australia held that interests defeasible on the exercise of the trustee's powers were 'interests of a lesser nature. These were vested interests in a technical sense.'[146] Although 'property', these technical interests had no value for stamp duty purposes.[147] Sir Anthony Mason has summarised this trend: 'A person entitled in default of distribution in a discretionary trust has no more than a contingent remainder, if that.'[148]

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[142] *Pearson* (n 13) 784.

[143] YFR Grbich, 'Vesting: The Classification Charade' (1973) 9(1) *Melbourne University Law Review* 81 ('Vesting').

[144] *Pearson* (n 13) 773 (Viscount Dilhorne), 786 (Lord Keith).

[145] See also *Adamson v A-G* [1933] AC 257, 269 (Lord Blanesburgh) ('*Adamson*'); *Burrell v A-G* [1937] AC 286, 298–9 (Lord Russell); Grbich, 'Vesting' (n 143).

[146] *Buckle* (n 104) 243 [40].

[147] Ibid.

[148] Anthony Mason, 'Discretionary Trusts and Their Infirmities' (2014) 20(10) *Trusts & Trustees* 1039, 1045 (citations omitted).

The diminishing significance of the default beneficiaries' interests is associated with an increasing willingness in the courts to enforce the exercise of mere powers, and thereby deprive the default beneficiaries of their interests. For example, in *Mettoy Pension Trustees Ltd v Evans*, Warner J accepted he had jurisdiction to order the exercise of a fiduciary mere power, which would have divested the default interest.[149] Another example is *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* where the Privy Council ordered the delegation of a power of revocation to a receiver in order that it be exercised to divest the beneficiaries' interests.[150] This is only possible because interests subject to a power do not attract constitutional protection.[151]

Second, the equivalence drawn in *Pearson* between default interests and those of discretionary objects is supported by the increasing recognition of the discretionary objects' rights. This includes rights in relation to trust management. For example, in *Schmidt*,[152] the Privy Council stated that discretionary objects are entitled to have the trustees administer the trust properly.[153] Richard Nolan has uncovered cases in which lower courts have allowed discretionary objects to sue for breach of trust,[154] for example, the Royal Court of Jersey:

> I am in no doubt that I should declare Jersey law to be … that the object of a fiduciary power (whether a trust power or a mere power) has *locus standi* to apply to the Court for relief and that

[149] *Mettoy* (n 94) 1632.

[150] [2012] 1 WLR 1721, 1734-5 [54]-[60].

[151] Cf above text to nn 62-66.

[152] *Schmidt* (n 92).

[153] Ibid 729–30 [52].

[154] Richard Nolan, 'Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2017) 151.

> such relief can include the reconstitution of the trust fund where loss has been caused by a trustee's breach of trust.[155]

Increased recognition of discretionary objects' rights also includes their rights in relation to the exercise of distributive powers. The expansion of these rights enables the courts to control the exercise of mere powers on grounds other than bad faith and excessive execution.[156] Indeed, shortly before *Baden*,[157] Lord Wilberforce stated in obiter that a discretionary object[158] had relatively extensive rights to be protected by equity:

> No doubt in a certain sense a beneficiary under a discretionary trust has an 'interest': the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion 'fairly' or 'reasonably' or 'properly' that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes.[159]

A thorough examination of the expansion in these grounds of review is the topic of Chapter 5. The significance of the alternative position is that differences in the extent of review cannot reasonably be justified according to whether a power is a trust or mere power.

### C *Imperfect Fit with the Case Law*

It must be acknowledged that there are still areas where the alternative position does not fit the case law as the orthodox position remains influential. However, it is argued that this lack of fit is less severe than that which bedevils the orthodox position. The

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[155] *Freeman v Ansbacher Trustees (Jersey) Ltd* [2010] WTLR 569, 584 [42] (emphasis in original).

[156] See above Part II(C).

[157] *Baden* (n 1).

[158] The beneficiary was the object of a mere power: *Gartside* (n 3) 554.

[159] Ibid 617–8.

difficulties can, and should, be resolved to fit with the alternative position without difficulty.

First, the difference between 'vested' default interests and discretionary interests has traditionally been significant for succession. If a default beneficiary dies then her vested default interest passes to her estate.[160] In contrast, if a discretionary object dies her discretionary interest does not pass to her estate. The trustees are not authorised to make an appointment in favour of a deceased beneficiary's personal administrators.[161] Under the alternative position this difference is not justified as both interests should be treated the same. A principled resolution would be that trustees should generally prefer living discretionary objects and default beneficiaries to the deceased estates of either class. This is because settlors can be assumed to want those they nominate as beneficiaries or objects to be benefited, but they cannot necessarily be assumed to want those succeeding to their estates to benefit. This would mean that in a case where the default beneficiaries were all dead, but discretionary objects were living, then reasonable trustees ought to exercise the mere power.

Second, current law might prioritise default interests where the mere power is found invalid. The exercise of a mere power is traditionally treated as a condition subsequent, therefore, an invalid mere power will leave the default interest intact.[162] However, this is likely not significant because the same effect occurs when the invalidity is inverted. Where the default interest clause is invalid, the mere power is left intact.[163]

[160] See Sugden (n 23) 625.

[161] See *Marlborough* (n 58) 53.

[162] *Pearson* (n 13) 778 (Lord Russell).

[163] *Sayer* (n 7).

Third, the consequences of trustees failing to exercise trust and mere powers may need to be reconsidered in light of the alternative position. If trustees neglect to exercise a trust power the courts will ensure that it is exercised.[164] In contrast, if trustees neglect to consider exercising a mere power before it ceases to be exercisable there are two possible answers. Under the orthodox position, the default beneficiaries' entitlements arise as soon as the power has not been exercised in time, for whatever reason.[165] This would mean that the courts could not order trustees to consider exercising a mere power after the default interests have vested in possession. In contrast, the alternative position promotes the principle that a breach of trust should have a remedy. This could require the interests of the default beneficiaries to remain subject to the power until the trustees' duties have been fulfilled. That is, if the trustees breach their duty to consider exercising the power, the courts ought to be able to order that consideration even after the trust's vesting date. Alternatively, the courts would need to be able to order compensation from the trustees.

Finally, the alternative position demands a consistent approach to the doctrine of administrative unworkability. This doctrine suggests that trustees cannot be expected to exercise trust powers that are too broad or incoherent.[166] Mere powers have been exempted from this requirement on the ground that there is no duty to exercise a mere power.[167] However, the substantial similarity between the duty to choose between the beneficiaries of a trust power and the duty to choose between the discretionary objects

[164] *Baden* (n 1) 456–7 (Lord Wilberforce).

[165] See *Pearson* (n 13) 786 (Lord Keith); *Johns* (n 47) 217 [49].

[166] Cf Chapter 3 text to nn 137-40 about whether the concept of administrative workability imposes a limit on the breadth of trust powers.

[167] *Hay* (n 121) 208–12.

and default beneficiaries of a mere power[168] means that the same constraints on defining coherent classes should apply to both.

## IV TRUSTS WITHOUT EQUITABLE PROPRIETARY INTERESTS

The final question circles back to a justification for the orthodox position: the perceived necessity of an equitable proprietary interest for the existence of a trust. For example, Lionel Smith states that an equitable proprietary interest is simply essential for a trust to exist.[169] He questions French CJ's statement that it would be possible to create a trust in which 'there was no equitable interest in its assets held by anyone',[170] and instead asserts that it is not possible to create a trust unless there is a person who has 'a right (albeit possibly defeasible, and possibly only as a member of a group) to some of the trust property'.[171] This claim requires interrogation because, if true, it might provide a reason to support the orthodox position with the Saunders claim.

First, the reason given by Smith for this claim is not persuasive. Smith argues that a right to some of the trust property is necessary to ensure the trustees are obliged to dispose of the assets in a particular way and do not have the power of absolute owners.[172] However, as we found in Chapter 3, equitable proprietary interests are not necessary to fulfil this condition as procedural entitlements will suffice. *Baden*[173] established that it is

[168] See above text to n 121.

[169] Smith (n 17) 20 n 9. See also *Gulbenkian* (n 4) 521 (Lord Upjohn).

[170] *Kennon v Spry* (2008) 238 CLR 366, 386–7 [49].

[171] Smith (n 17) 20 n 9.

[172] Ibid 21 n 9.

[173] *Baden* (n 1).

possible to have a discretionary trust where the class of beneficiaries is broad and no one has an individual or collective right to the trust property.[174]

Second, the idea that there must be an equitable proprietary interest in a trust echoes the principle of abeyance. This is the principle that assets held in trust should always be subject to equitable proprietary claims, because the law must avoid situations in which beneficial title to the assets is held in suspense or abeyance.[175] Judicial aversion to abeyance was the original reason for the development of the orthodox position that beneficial title to the trust assets needed to be vested in the default beneficiaries.[176] The abeyance principle continues to appear in some cases. For example, in *Adamson v A-G*, Lord Wright decided that the beneficial right to assets passed to default beneficiaries because otherwise the 'beneficial right … must remain in suspense'.[177] In *Twinsectra Ltd v Yardley* ('*Twinsectra*'), Lord Millett held that there must be a resulting trust for the lender because the beneficial interest cannot be in suspense but must be located somewhere.[178]

In contrast, there is a long line of cases that has minimised the importance of abeyance in deciding cases on equitable interests. In *Abbiss v Burney*, the Court of Appeal explained that the common law necessity for the abeyance principle — that someone must always hold title in order to perform feudal duties associated with ownership — did not

[174] See Chapter 3 Part III.

[175] Abeyance is the principle that lies behind automatic resulting trusts: see *Twinsectra* (n 91) 187 [79], 189 [90] (Lord Millett).

[176] *Cunningham* (n 48) 967; *Martin* (n 31) 899 (Grose J).

[177] *Adamson* (n 145) 287.

[178] *Twinsectra* (n 91) 187 [79], 189 [90] (Lord Millett).

apply to equitable interests, because the trustees held the legal title.[179] In *Glenn v Federal Commissioner of Land Tax*, the High Court of Australia confirmed equitable interests can be in suspense and did not need to be vested in anyone.[180] The Privy Council, in *Commissioner of Stamp Duties (Qld) v Livingston*, rejected an argument that the beneficial title to assets in a deceased estate must be somewhere, so must be vested in the residual legatee.[181] This reasoning was applied directly to default beneficiaries in *Commissioner of State Revenue v Serana Pty Ltd*, where Buss JA held that, for the purposes of stamp duty, default beneficiaries[182] had no equitable proprietary interests[183] and that there was no need for a trust to include equitable proprietary interests.[184]

This thesis submits that the perceived necessity for equitable proprietary interests is a vestige of the time when the fixed proprietary model was the only one available. Now that we have the alternative administrative model the fiction that default beneficiaries have vested proprietary interests can be discarded.

## V CONCLUSION

In conclusion, there is no persuasive difference between trustees with distributive mere powers and those with distributive trust powers. Any trustee who must decide between the objects of a mere power and the beneficiaries of default trust is in a comparable position to the trustee of a trust power. Neither of the two classes of

[179] (1880) 17 Ch D 211, 229 (Jessel MR).

[180] (1915) 20 CLR 490, 504 (Isaacs J).

[181] [1965] AC 694 (PC), 712. See also Grbich, 'Vesting' (n 143) 86.

[182] (2008) 36 WAR 251, 283 [126] (Buss JA).

[183] Ibid 283 [127].

[184] Ibid 286 [138]-[139].

beneficiaries have an entitlement to be distributed any benefits until the trustees decide whether or not to exercise the discretion. The alternative position provides a strong argument that the case law supports this more coherent position. Thus, the ordinary usage of 'discretionary trusts' to describe all trusts with distributive discretions is not merely descriptive but is a doctrinally sound category.[185] From here on, this thesis will use 'discretionary beneficiaries' to describe default beneficiaries, the objects of trust powers and the objects of mere powers. The latter objects include anyone who can be added to the defined class of eligible objects of a mere power.[186]

Recognising that the alternative position is a better interpretive fit does not require the pretence that it is a perfect fit. It has not yet completely displaced the orthodox position, which continues to be depended on in cases like *Johns*.[187] The alternative position does require some authorities like this to be overturned or reinterpreted. It also requires the resolution of inconsistencies between traditional doctrines and the alternative position where they arise. Moreover, the analysis does not deal with trusts where beneficiaries' interests are defeasible on the exercise of a power held by a third party. These trusts are outside the scope of this thesis.

There are a number of ramifications of the categorisation of mere powers alongside trust powers in the administrative model. First, application of the administrative model

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[185] Contrast *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271, 552; *Buckle* (n 104) 234 [8].

[186] In *Schmidt* (n 92), counsel for the respondent argued that the petitioner was not even the object of a mere power of appointment: at 713. The Privy Council held that as the object of a mere power to be added to the defined class of objects of the distributive power the petitioner had as many, if not more, rights as other discretionary objects: at 723 [33], 735 [68]. There is no substantive distinction between a distribution that can be completed in one step and a distribution that requires the additional step of inclusion in the eligible class.

[187] *Johns* (n 47).

means that mere powers must create a relationship between trustees and individual legal persons as beneficiaries. This means that powers for abstract purposes that have no objects to be gratuitously benefited cannot be characterised as mere powers. This conflicts with Lord Millett's comments in *Twinsectra*.[188]

Second, a significant ramification is that the alternative position frees doctrinal reasoning from the imaginative limit of the orthodox position, in which mere powers could not be controlled by the courts. The alternative position opens the imaginative space to recognise that mere powers do not entail absolute, unaccountable power, but can be constrained and controlled by trustees' duties. The next two chapters will thoroughly analyse these constraints.

[188] *Twinsectra* (n 91) 193 [101]. See also JB Ames, 'The Failure of the "Tilden Trust"' (1892) 5(8) *Harvard Law Review* 389; LA Sheridan, 'Purpose Trusts and Powers' (1957) 4 *University of Western Australia Annual Law Review* 235.

# CHAPTER 5

# INCOHERENCE WITHIN THE ADMINISTRATIVE TRUST MODEL (PART I): DECISION-MAKING DUTIES

## I INTRODUCTION

The distinction between fixed proprietary trusts and discretionary administrative trusts, developed in Chapters 2 and 3, was founded on discretionary beneficiaries[1] being vested with procedural entitlements, rather than distributive entitlements to receive specific benefits from the trust assets.[2] Chapter 3 did not provide an account of the procedural entitlements, but summed them up as the beneficiary's right to due administration.[3] It is now time to further develop the administrative trust model by conducting a thorough analysis of distributive entitlements and the duties that correlate to them. This is necessary to answer the third research question. It asks whether the change in our understanding of trust relationships brought about by the administrative model is coherent.

Understanding discretionary beneficiaries' procedural entitlements is necessary to understand the meaning of a discretionary trustee's 'obligation to hold [assets] for the benefit of others'.[4] The beneficiaries' procedural entitlements in relation to distributive discretions and the trustees' correlating duty of due administration form the core of the

[1] Unless the context suggests otherwise, in this chapter 'beneficiaries' means discretionary beneficiaries as defined in Chapter 4 Part V. This includes the beneficiaries of trust powers, objects of mere powers and default beneficiaries subject to mere powers.

[2] See Chapter 3 Part IV(C).

[3] Ibid.

[4] *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614, 622 (Dixon J).

administrative trust model. That is, the regulation of trustee decision-making is not an auxiliary or supplementary area of trust law but *is* the legal form of the discretionary trust relationship. This original insight is the fundamental starting point that the administrative model provides.

The task of analysing the core of the administrative model will be spread across this chapter and Chapter 6. This is necessary because understanding the administrative model requires the analysis of a large body of poorly organised case law. The quantity of detail in the cases means that even this extended analysis is less than optimal. However, it is sufficient to demonstrate that the heart of the discretionary trust relationship is currently underdeveloped. This chapter and Chapter 6 break down the task of analysing the regulation of trustee discretion into four parts. This chapter contains the first two parts: developing an overarching framework for the analysis of the scope and regulation of trustees' distributive discretions; and analysis of the trustees' decision-making duties that make up the trustees' duty of due administration. Chapter 6 contains the third and fourth parts: ancillary rules that influence the effective enforcement of the trustees' duties, and variables that affect how the decision-making duties and ancillary rules apply to different trusts. Chapter 6 will also present conclusions about the accountability of discretionary trustees.

The fundamental difficulty in the current task is that regulating discretion is very complex. The making of a decision itself is a complex phenomenon that has its own fields of research in psychology, management theory, economics, logistics and philosophy.[5] It is inevitable that the law regulating how trustees make their decisions will

[5] A founding figure in decision making in all these fields is Herbert Simon: see, eg, James G March and Herbert A Simon, *Organizations* (John Wiley & Sons, 1958); Herbert A Simon, *Administrative Behavior:*

be complex. The argument presented over the next two chapters is that the large body of law that is relevant to this topic does not satisfactorily deal with this complexity, but is uncertain and, ultimately, incoherent. The argument for incoherence is developed through the identification of widespread uncertainties and inconsistencies in the law. For example, there is pervasive uncertainty and inconsistency regarding what duties apply to trustees and what those duties mean. This means that, without violating precedent, trustees in similar cases could be subjected to different sets of duties or have the same nominal duties applied to different effect.

Arguments for incoherence are relatively rare in interpretive doctrinal scholarship, where the goal is often to find coherence.[6] Indeed, an argument for incoherence could be seen as a failure or a sign of insufficient effort. However, it will be argued that the case law in this area is too inconsistent for a coherent interpretation that achieves an adequate fit with the legal materials.[7] The law ought to become more coherent, and in Chapter 7 arguments are assessed about how this could be achieved. However, this goal is not yet realised. As Michael Ashdown concludes, what trust law needs 'is a comprehensive analysis of the control of trustees' powers as a system, rather than a series of unconnected rules'.[8]

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*A Study of Decision-Making Processes in Administrative Organizations* (Free Press, 4th ed, 1997); Behrooz Kalantari, 'Herbert A. Simon on Making Decisions: Enduring Insights and Bounded Rationality' (2010) 16(4) *Journal of Management History* 509.

[6] See Steve Hedley, 'The Shock of the Old: Interpretivism in Obligations' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 205, 212–3.

[7] See Chapter 1 Part VI(B) on interpretivist methodology.

[8] Michael Ashdown, *Trustee Decision Making: The Rule in* Re Hastings-Bass (Oxford University Press, 2015) 212 [11.20].

In the typical search for coherence, interpretive scholarship will often present novel conceptual frameworks to explain and comprehend the law.[9] Despite making an argument for incoherence, this chapter will also introduce novel frameworks because part of the reason the law is so uncertain is a dearth of helpful frameworks. While there has been significant analysis of parts of the system by which trustee discretions are regulated — for example, the rule in *Hastings-Bass*[10] and the doctrine of fraud on a power[11] — we are missing a comprehensive structure for understanding.[12] The object of the frameworks is not to impose an explanation that does not fit the cases, but to comprehend the field sufficiently that we can understand where it is incoherent. The original frameworks are introduced in the next section. Then the third section will analyse trustees' decision-making duties.

## II UNDERSTANDING THE REGULATION OF TRUSTEE DISCRETION: A FRAMEWORK

To aid understanding of the regulation of trustee discretion, three original frameworks will be proposed. They are nested, in that each framework presents a structured

[9] See, eg, Richard Nolan's categorisation of controls on fiduciary power according to their remedial effect: 'Controlling Fiduciary Power' (2009) 68(2) *Cambridge Law Journal* 293, 294.

[10] Sir Robert Walker, 'The Limits of the Principle in Re Hastings Bass' [2002] *Private Client Business* 226; JC Campbell, 'Should the "Rule in *Hastings-Bass*" Be Followed in Australia?: Trustees' Duty to Enquire and Trustees' Mistakes' (2011) 34(3) *Australian Bar Review* 259; Simon Kerry, 'Control of Trustee Discretion: The Rule in *Re Hastings-Bass*' (2012) 1(2) *UCL Journal of Law and Jurisprudence* 46; Ashdown (n 8).

[11] Yuri Grbich, 'Fraud on a Power: Judicial Control of Appointments by Discretionary Trustees' (1977) 3(3) *Monash University Law Review* 210; Paul Matthews, 'The Doctrine of Fraud on a Power' (Pt 1) [2007] *Private Client Business* 131; Peter Devonshire, 'Fraud on a Power: A Doctrine in Retreat' [2010] (3) *New Zealand Law Review* 503; Jessica Hudson, 'Propriety, Loyalty and Power' (Workshop Paper, International Fiduciary Law Workshop, December 2018) ('Propriety'); Jessica Hudson, 'One Thicket in Fraud on a Power' (2019) 39(3) *Oxford Journal of Legal Studies* 577 ('Thicket').

[12] See Ashdown (n 8) 212 [11.20].

understanding of one element of the preceding framework, as illustrated in Figure 1. First, constraints on trustees' distributive discretions will be divided into *external* constraints provided by the definition of discretionary beneficiaries and *internal* constraints that regulate how trustees decide which of the discretionary beneficiaries to benefit.[13] Second, the law governing internal constraints is divided into three parts: decision-making duties, ancillary rules that impact the effective enforcement of the duties, and variables that affect how the decision-making duties and ancillary rules apply to different trusts. Analysis of the last two parts is undertaken in Chapter 6. Third, analysis of the decision-making duties is organised around four steps in the decision-making process: addressing the decision, gathering information, deliberation, and resolving on a course of action. This analysis makes up the bulk of this chapter.

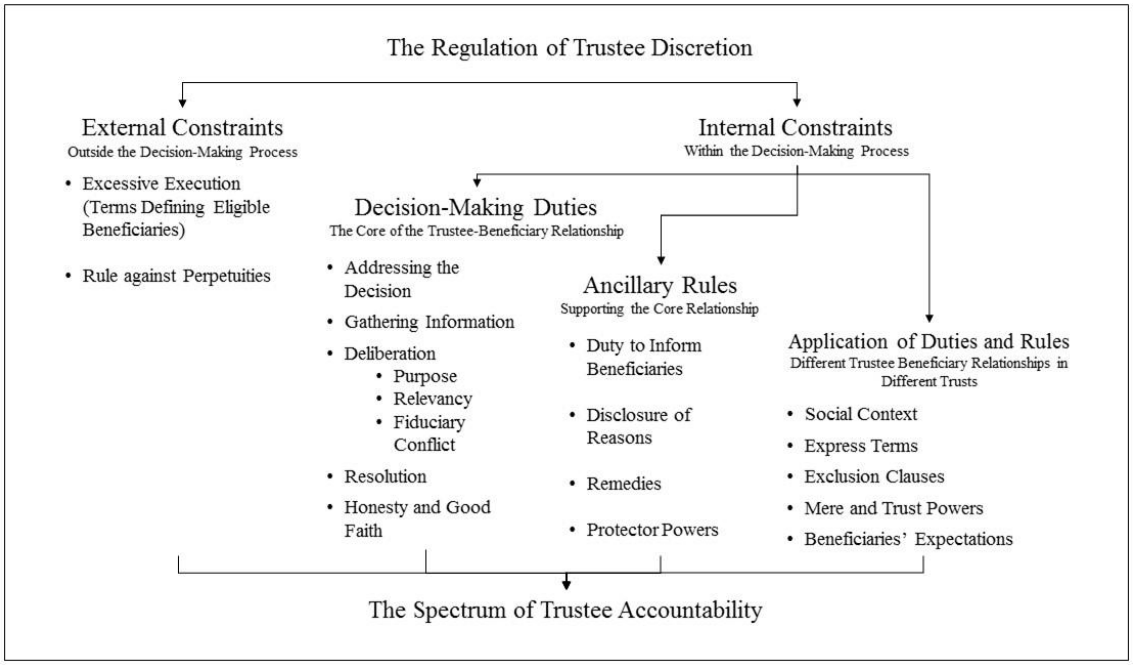

Figure 1: A Framework for Understanding the Regulation of Trustee Discretion

[13] See Chapter 3 Part IV(B).

The immediate task, however, is a brief survey of frameworks that currently exist in the law and the literature to establish that there is a space for improvement.

## A *Existing Frameworks*

The cases present a wide range of internal constraints on how trustees should make decisions about distributive discretions. They include honesty,[14] good faith,[15] fairness,[16] impartiality,[17] reasonableness,[18] irrationality,[19] responsibility,[20] capriciousness,[21] fraud on the power,[22] improper purpose,[23] proper purpose,[24] genuine consideration,[25] relevant considerations,[26] soundness,[27] inadequate deliberation,[28] excessive execution,[29] and mistake.[30] The literature presents several considered attempts to comprehend the full range of duties.[31] The literature also notes that a comprehensive framework for

[14] *Armitage v Nurse* [1998] Ch 241 (CA) ('*Armitage*').

[15] Ibid.

[16] *Gartside v Inland Revenue Commissioners* [1968] AC 553, 618 (Lord Wilberforce) ('*Gartside*').

[17] *Edge v Pensions Ombudsman* [2000] Ch 602 (CA), 627 ('*Edge*').

[18] *Cock v Smith* (1909) 9 CLR 773 (HCA), 811 (O'Connor J) ('*Cock*').

[19] *Re Manisty's Settlement; Manisty v Manisty* [1974] Ch 17, 26 ('*Manisty*').

[20] *Re Baden's Deed Trusts; McPhail v Doulton* [1971] AC 424, 449 (Lord Wilberforce) ('*Baden*'); *Karger v Paul* [1984] VR 161, 165 ('*Karger*').

[21] *Hart v Tribe* (1854) 18 Beav 215; 52 ER 85, 86 ('*Hart*').

[22] *Vatcher v Paull* [1915] AC 372, 378 ('*Vatcher*').

[23] *Curwen v Vanbreck Pty Ltd* (2009) 26 VR 335 ('*Curwen*').

[24] *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] Bus LR 1395, 1403 [14]-[15] (Lord Sumption JSC) ('*Eclairs*').

[25] *Karger* (n 20) 164.

[26] *Elovalis v Elovalis* [2008] WASCA 141 [70] (Buss JA) ('*Elovalis*').

[27] *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 271 [33] ('*Finch*').

[28] *Pitt v Holt* [2013] 2 AC 108, 135 [60] ('*Pitt*').

[29] Ibid.

[30] Ibid 157 [126].

[31] See, eg, Guy Newey, 'Constraints on the Exercise of Trustees' Powers' in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 36; Mark Studer, 'Modern Trustee Decision-Making: Unpacking the Duty of Proper Consideration' (2016) 22(9) *Trusts & Trustees* 991.

understanding the regulation of distributive discretions has not yet been developed.[32] This thesis builds on the existing body of scholarship and attempts to develop the comprehensive framework for which calls have been made. Such a framework is necessary to draw out the uncertainty and incoherence in this area.

At present, the standard framework for understanding the regulation of distributive discretions in Australia is the three grounds of review in *Karger v Paul* ('*Karger*'): a discretion must be exercised in good faith, with real and genuine consideration, and without an ulterior purpose.[33] In the United Kingdom, the framework set out in *Pitt v Holt* ('*Pitt*') includes categories of adequate deliberation, fraud on the power and excessive execution.[34] In New Zealand, the Court of Appeal in *Erceg v Erceg* replicated the standard grounds of review that apply in public administrative law: whether a decision 'erred in law or principle, overlooked a relevant point, factored in an irrelevant point or made a decision that is plainly wrong'.[35] These frameworks summarise important aspects of the review jurisdiction. However, they are not comprehensive and do not explain the relationship between the duties.

Academic work has also not yet developed a comprehensive framework tailored to the issue of the regulation of distributive discretions. Justice Campbell has argued that all grounds of review are instances of the single principle that a discretion must be

[32] See Ashdown (n 8) 212 [11.20]. This was also implicitly acknowledged by Justice Campbell when he wrote that trustees' decision-making duties are difficult to deal with in the abstract and that any analysis is very fact dependent: 'Exercise by Superannuation Trustees of Discretionary Powers' (2009) 83(3) *Australian Law Journal* 159, 159–60.

[33] *Karger* (n 20) 166.

[34] *Pitt* (n 28).

[35] [2016] 2 NZLR 622, 630 [32], affd [2017] 1 NZLR 320. This decision concerned the disclosure of information to beneficiaries, which is related to the exercise of distributive discretions although not directly concerned with them.

exercised faithfully.[36] While this must be correct at a high level of generality, the case law from which one draws this faithfulness principle is inconsistent. A more comprehensive framework is required to understand what faithfulness means. Other important academic articles on trustees' duties provide comprehensive analysis of the duties that have been applied to trustees' distributive discretions; however, they provide limited analysis of how the duties relate to each other.[37] One useful, broader framework is Daniel Clarry's account of the courts' supervisory jurisdiction over trusts.[38] This situates the regulation of trustee decision-making as one part of a broad legal framework governing how and when the courts will intervene in the administration of trusts. However, a central theme of Clarry's account is to explain the supervisory jurisdiction without reference to trustees' wrongful actions.[39] This limits Clarry's account as the distributive function of trusts is intimately concerned with rights and wrongs, as mediated through trustees' duties.[40] The most useful framework that has been developed, which does account for the trustees' duties, is Richard Nolan's remedial framework.[41]

Nolan has proposed a comprehensive taxonomy of constraints on fiduciary powers that divides them according to their remedial consequences.[42] First, constraints that render the fiduciary's decision void ab initio are categorised as part of the scope of the power. Following Lloyd LJ in *Pitt,* the logic is that the defined scope of the power

[36] Campbell (n 32) 164. Cf Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130(Oct) *Law Quarterly Review* 608 ('Loyal').

[37] See Newey (n 31); Studer (n 31).

[38] Daniel Clarry, *The Supervisory Jurisdiction over Trust Administration* (Oxford University Press, 2018).

[39] Ibid 229, 248–50.

[40] Cf ibid ch 9.

[41] Nolan (n 9).

[42] Ibid 294.

determines the fiduciary's authority and any act outside of that authority is necessarily void.[43] The concept of scope distinguishes between *whether a power exists* to be exercised (a question of scope) and *how an existing power is exercised* (a question of decision-making duties).[44] In Nolan's account, constraints that concern whether a power exists include the terms of the power, the duty of good faith, and proper purpose duties.[45] Second, constraints that render the fiduciary's decision voidable are categorised as duties that control the fiduciary's decision-making process. They include the self-dealing rule against fiduciary conflicts and the duty to take into account relevant considerations.[46] Third, constraints that do not unravel the decision, but may impose personal liability on the fiduciary, are categorised as constraints of care and skill. They include the statutory and common law duties requiring fiduciaries to act prudently and with reasonable care.[47]

Nolan's framework provides a useful account of the different types of remedies that may proceed from different types of decision-making errors. However, it does not provide a comprehensive answer to the issue addressed in this thesis: the regulation of distributive discretions. One reason is that the remedial classification does not relate to the type of conduct required of trustees.[48] For example, Nolan categorises a trustee's duty to take into account relevant considerations under his second, decision-making category. However, the same type of trustee conduct would be categorised under the first category of scope, if the relevant consideration was written into the trust instrument.[49] Similarly,

[43] *Pitt v Holt* [2012] Ch 132, [96] (Lloyd LJ) ('*Pitt* (CA)').

[44] Hudson, 'Thicket' (n 11) 582; Hudson, 'Propriety' (n 11) Part 3(B)(i).

[45] Nolan (n 9) 295–304.

[46] Ibid 304–9.

[47] Ibid 309–10.

[48] Cf Grbich (n 11) 213 n 8.

[49] See, eg, *Sinclair v Moss* [2006] VSC 130 [3], [19] ('*Sinclair*').

duties to act for proper purposes are included in the scope category, even though the conduct they require of trustees concerns the process of decision-making.[50]

Another limitation on the remedial framework is that the meaning of scope, which is central to the remedial framework, is highly ambiguous. As Nolan acknowledges, it is possible to construe any constraint, including any decision-making duty, as going to the scope of the power by construing it as an implied term.[51] For example, Justice Edelman has argued that all fiduciary duties are terms implied into voluntary undertakings.[52] This would mean that any breach of a fiduciary decision-making duty would be outside the terms of the power, and thus, according to Nolan, outside the scope. Even if Edelman's position is not accepted, there is no certainty about where the line between implied terms and other constraints should be drawn.[53] The ambiguity in scope can be compared to the concept of jurisdictional error in Australian public law, and, more broadly, the ultra vires concept.[54] Jurisdictional errors concern whether the decision-maker *may* exercise a discretion, whereas non-jurisdictional errors concern whether it *should* be exercised.[55] However, there are no stable criteria to distinguish jurisdictional from non-jurisdictional

[50] The remedy for the breach of a proper purpose duty may also change depending on the type of discretion and whether it is found in a trust or corporation: Hudson, 'Thicket' (n 11) 578–9. See also *Eclairs* (n 24) 1412 [30] (Lord Sumption JSC).

[51] Nolan (n 9) 308, 310. See also AKW Halpin, 'Hohfeld's Conceptions: From Eight to Two' (1985) 44(3) *Cambridge Law Journal* 435, 457.

[52] James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126(Apr) *Law Quarterly Review* 302, 316. See also Ernest Lim, 'Directors' Duties: Improper Purposes or Implied Terms?' (2013) 34(3) *Legal Studies* 395.

[53] Cf Geraint W Thomas, *Thomas on Powers* (Oxford University Press, 2nd ed, 2012) 378–9 [8.02].

[54] Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 101–2.

[55] Mark Elliott and Jason NE Varuhas, *Administrative Law: Text and Materials* (Oxford University Press, 5th ed, 2017) 33–5.

errors, as shown by the expansion of jurisdictional error to most grounds of judicial review.[56]

In summary, the available frameworks provide some insight into the regulation of trustee discretion, but they are not sufficiently comprehensive. Refinement is necessary.

### B *High-Level Framework: External and Internal Constraints*

This thesis proposes an original high-level framework for understanding the regulation of trustee distributive discretions. It simplifies the taxonomy of constraints by understanding that most concern the trustees' decision-making process. These are categorised as internal constraints. The remaining external constraints are those that determine the outer limits of the trustees' decision-making process. The most important external constraint is the definition of those who may benefit from the distributive discretion. Transfers to non-beneficiaries are void in equity.[57] Another external constraint is the rule against perpetuities that limits distributions in the form of a new trust relationship.[58] These external constraints are fixed and objective; enforcing them requires no consideration of the trustees' internal process.[59] The internal-external distinction is illustrated by Sir Robert Megarry V-C's prescription that in exercising their powers trustees have a duty to consider what persons or classes of persons are objects of the

[56] Cane, McDonald and Rundle (n 54) 94–101.

[57] An excessive execution that benefits a person who is not a beneficiary of the power is void: *Kain v Hutton* [2008] 3 NZLR 589 (SC), 606–7 [37], [41] ('*Kain*'). However, if the void appointment is implemented through a transfer at law, then good title may pass to a bona fide purchaser for value.

[58] *Re Pilkington's Will Trusts; Pilkington v Inland Revenue Commissioners* [1964] AC 612 ('*Pilkington*').

[59] The identity of discretionary beneficiaries is objectively fixed by the terms of the trust, which must be sufficiently certain: *Re Gulbenkian's Settlements; Whishaw v Stephens* [1970] AC 508 ('*Gulbenkian*'); *Baden* (n 20).

power.[60] This duty is an internal constraint that operates on the trustees' decision-making process. It is distinct from the external constraint that simply invalidates any distribution to non-objects, even though they both concern the same subject matter: the identity of the beneficiaries.

The distinction between internal and external constraints fits one interpretation of the distinction in *Pitt* between excessive execution and adequate deliberation.[61] The cases traditionally categorised as excessive executions involve distributions to non-beneficiaries,[62] which fits the definition of external constraints. However, excessive execution is now often associated with the scope of the power[63] and is, therefore, encumbered with the uncertainty about what that means.[64] Moreover, this thesis categorises fraud on a power as the same type of constraint on decision-making as Lord Walker's adequate deliberation. There is no need for a separate category based on the remedial differences.[65] This does not deny the difference but denies that it is helpful to work backwards from remedies to attempt to understand the substance of the trustee-beneficiary relationship.

### C *Mid and Low-Level Frameworks: Decision-Making*

In addition to the overarching, high-level framework, this thesis proposes two original frameworks for understanding the internal constraints on how discretions are exercised.

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[60] *Re Hay's Settlement Trusts; Greig v McGregor* [1982] 1 WLR 202, 210 ('*Hay*').

[61] *Pitt* (n 28) 135 [60].

[62] See Thomas (n 53) 382-96 [8.08]-[8.34].

[63] *Pitt* (n 28) 135 [60].

[64] See also Thomas (n 53) 379-82 [8.03]-[8.07].

[65] Contrast *Pitt* (n 28) 136 [62].

The second, mid-level framework divides the law into three parts according to how they relate to the trustee-beneficiary relationship that concerns trustee decision-making. First, there are legal incidents that directly make up the core of the trustee-beneficiary relationship. These are the duties that control trustees' decision-making, and the beneficiaries' correlative rights. Second, there are ancillary rules that support the core legal relationship and influence how effectively the beneficiaries can hold the trustees' accountable for their decision-making. These rules, for example, include access to information and remedies. Third, there are variables that change how the core legal relationship and the ancillary rules are applied to different trusts. The latter two parts will be interrogated in Chapter 6. The focus of this chapter is the first part: decision-making duties.

The third, low-level framework categorises the decision-making duties according to a process of decision-making. An example of a decision-making process can be found in *Re Hay's Settlement Trusts*: '[T]he trustee must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments.'[66] This thesis proposes that it is useful to divide the decision-making process into four stages of decision-making: addressing the decision, gathering information, deliberation, and coming to a resolution. As will be shown below, comparing the decision-making duties to these four stages reveals important inconsistencies, overlaps and uncertainties in what the duties mean.

A final task in presenting these two frameworks is to explain three alternative ways to conceptualise the trustees' constraints and why they are not a focus of the frameworks

[66] *Hay* (n 60) 210.

that this thesis presents. The two frameworks set out in this section equate the internal constraints on trustees' discretions with decision-making duties, which are collectively summarised as the trustees' duty of due administration. Alternative ways to conceptualise these constraints include fiduciary duties, judicial review, and a distinction between duties and standards.

First, the constraints that apply to fiduciary discretions are sometimes categorised as fiduciary duties. For example, Paul Finn has argued that there are two groups of fiduciary duties: the proscriptive rules against profit and conflict that are associated with the fiduciary duty of loyalty; and the prescriptive rules that control the exercise of fiduciary discretions.[67] However, there is a broad-ranging debate about the categorisation of duties as fiduciary or otherwise, which is too nuanced to be satisfactorily grappled with in this thesis.[68] Fortunately, it is not essential for the purposes of this thesis to decide whether

[67] Paul D Finn, *Fiduciary Obligations* (Law Book, 1977) chs 9-13; PD Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Law Book, 1989) 1, 28 nn 163–4. See also *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 344–5 [174]; JD Heydon, 'Modern Fiduciary Liability: The Sick Man of Equity?' (2014) 20(10) *Trusts & Trustees* 1006, 1015–8; Lionel Smith, 'Prescriptive Fiduciary Duties' (2018) 37(2) *University of Queensland Law Journal* 261 ('Prescriptive').

[68] See, eg, RP Austin, 'Moulding the Content of Fiduciary Duties' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 153; Sarah Worthington, 'Fiduciaries: When Is Self-Denial Obligatory?' (1999) 58(3) *Cambridge Law Journal* 500; RP Meagher and Adrian Maroya, 'Crypto-Fiduciary Duties' (2003) 26(2) *UNSW Law Journal* 348; Antony Goldfinch, 'Trustee's Duty to Exercise Reasonable Care: Fiduciary Duty?' (2004) 78(10) *Australian Law Journal* 678; Gillian Dempsey and Andrew Greinke, 'Proscriptive Fiduciary Duties in Australia' (2004) 25(1) *Australian Bar Review* 1; Matthew Conaglen, 'Nature and Function of Fiduciary Loyalty' (2005) 121(Jul) *Law Quarterly Review* 452; JD Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 185; Robert Flannigan, 'Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122(Jul) *Law Quarterly Review* 449; William M Heath, 'The Director's Fiduciary Duty of Care and Skill: A Misnomer' (2007) 25(6) *Company and Securities Law Journal* 370; Geraint W Thomas, 'The Duty of Trustees to Act in the "Best Interests" of Their Beneficiaries' (2008) 2(3) *Journal of Equity* 177; Rebecca Lee, 'Rethinking the Content of the Fiduciary Obligation' (2009) 73(3) *Conveyancer and Property Lawyer* 236; Nolan (n 9); R Nolan and M Conaglen, 'Good Faith: What Does It Mean for Fiduciaries, and What Does It Tell Us About Them?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 319; Rosemary Teele Langford, 'Solving the Fiduciary Puzzle: The Bona Fide and Proper Purposes Duties of Company Directors' (2013) 41(3) *Australian Business Law Review* 127; KM Hayne, 'Directors' Duties and

the internal constraints set out below are properly categorised as fiduciary or not. Categorisation of a constraint as fiduciary may have important effects for remedies,[69] however, it is not essential in determining what constraints exist.[70]

Second, the primary procedure for regulating trustees' decision-making is judicial review under the courts' inherent jurisdiction to oversee the administration of trusts.[71] However, a judicial review lens may obscure the relationship of rights and duties between the beneficiaries and trustees. Judicial review of trustees is not like public law judicial review. In the latter, duties are owed to the public at large,[72] whereas trustees owe the duty of due administration directly and exclusively to the beneficiaries.[73] For this reason, the language of a direct legal relationship will be preferred to that of judicial review.

Third, there is a question whether the constraints on trustee decision-making are duties or standards. Jessica Hudson argues that the fraud on a power doctrine is not a duty against acting for improper purposes but a condition that must be satisfied before the power can validly be exercised.[74] Hudson expresses two concerns underlying this

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a Company's Creditors' (2014) 38(2) *Melbourne University Law Review* 795; Smith, 'Prescriptive' (n 67); John Goldberg, 'The Fiduciary Duty of Care' in Evan J Criddle, Paul B Miller and Robert H Sitkoff (eds), *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2018).

[69] See *Westpac Banking Corporation v Bell Group Ltd (in liq) [No 3]* (2012) 44 WAR 1, 524 [2733] (Carr AJA). On remedies see Chapter 6 Part II(C).

[70] The debate is not about what duties are owed by a fiduciary, but about which established duties are properly described as fiduciary: Smith, 'Prescriptive' (n 67) 263.

[71] See, eg, *Public Trustee v Cooper* [2001] WTLR 901; Richard C Nolan, '"The Execution of a Trust Shall Be under the Control of the Court": A Maxim in Modern Times' (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 469.

[72] Cf Stephen Gageler, 'The Equitable Duty of Loyalty in Public Office' in Tim Bonyhady (ed), *Finn's Law: An Australian Justice* (Federation Press, 2016) 126, 130–1.

[73] Contrast JW Harris, 'Trust, Power and Duty' (1971) 87(Jan) *Law Quarterly Review* 31, 50–1. Harris argues that trustees may be subject to a distinct type of duty that does not correlate to any right held by the beneficiaries. This is not supported by the case law analysed in this chapter.

[74] Hudson, 'Thicket' (n 11) 580.

argument: a duty imposes personal liability for loss if it is breached,[75] and a standard for exercise implicates the scope of the power.[76] Lionel Smith also distinguishes between duties and standards.[77] He argues that duties of fiduciary loyalty are not strictly duties but modes required for the valid exercise of powers.[78] However, it appears that Smith's concern is not about the scope of the power,[79] but about preventing a right-duty relationship in the strict sense from overbearing the trustees' discretion.[80] Smith has more recently suggested a more relaxed approach on this point.[81] These concerns are reasonable, however, this chapter will follow language used in the case law, which largely speaks of the constraints as duties on the trustees. As explained above, remedial differences and the scope of the power provide a poor framework for understanding the regulation of trustee discretion. Moreover, while a Hohfeldian analysis may well properly characterise some constraints as disabilities rather than duties, they must be understood within the trustee-beneficiary relationship of a duty and right to due administration of the trust.[82]

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[75] Ibid.

[76] Ibid 586–8. Hudson distinguishes between the equitable power to overreach a subsequent equitable interest and the trustees' legal power to transfer title to a beneficiary. The former is the power to make an effective decision to distribute that divests all other beneficiaries' equitable claims. The latter is the power required to implement the decision by transferring title to trust assets.

[77] Lionel D Smith, 'Can We Be Obliged to Be Selfless?' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 141, 152–8 ('Selfless'); Smith, 'Loyal' (n 36) 620–1.

[78] Smith, 'Selfless' (n 77) 152–4.

[79] Smith refers to a partial disability rather than Hudson's complete disability. He also accepts that the consequence for breach of a fiduciary duty is usually voidability rather than the complete disability that can follow the fraud on a power doctrine: ibid 152–8.

[80] Ibid 154.

[81] Smith, 'Prescriptive' (n 67) 275, 279–80.

[82] See Chapter 3 Part IV(C).

In conclusion, our understanding of the regulation of trustee distributive discretion can be enhanced by an analytical framework that distinguishes between external and internal constraints, and considers the decision-making process to which the internal constraints apply. The remainder of this chapter will focus on the decision-making duties. Chapter 6 will consider two further areas of uncertainty — ancillary rules and variables affecting application — that render the regulation of trustee discretion even more uncertain.

## III UNCERTAINTY IN DECISION-MAKING DUTIES

As set out above the internal constraints on how trustees go about making distributions are helpfully analysed through the framework provided by the decision-making process: addressing the decision, gathering information, deliberation, and a resolution. Most decision-making duties fit into this framework. The exceptions are honesty and good faith. It is argued that this is not because the framework is lacking, but because these duties are too vague and lack necessary content.

### A *Addressing the Decision*

The first stage in decision-making is to face the decision. This requires subjective awareness of one's authority to make the decision and willingness to address it. The relevant duty is to consider exercising discretions. The duties to act personally and to not delegate[83] are also relevant as the trustees must personally address decisions about

[83] See *Speight v Gaunt* (1883) LR 9 App Cas 1, 29 (Lord FitzGerald) ('*Speight*').

distribution. The duty to consider can be breached by lack of care and does not require deliberate or knowing conduct.[84]

The duty to consider is uncertain because it can be conceptualised narrowly or broadly. The narrow conception is simply a duty to make a decision, but without any judgement on the decision or how it is made. An example is *Turner v Turner*, where the trustees signed trust documents without reading them or knowing they had a discretion to exercise.[85] Trustees would also fail to address their discretion if they were aware they were required to consider the discretion and chose to avoid doing so.[86] In contrast, the broad conceptualisation of the duty includes more than simply making a decision; it expands into a duty to consider the decision genuinely or properly,[87] which demands some evaluation of the thought put into the decision. An example is *Klug v Klug*, where a trustee decided not to exercise her discretion in favour of her daughter because she did not approve of her daughter's marriage; Neville J held that 'she has not exercised her discretion at all.'[88] However, Neville J's objection was not that she had made no decision, but that she had made the decision for an irrelevant reason or improper purpose. Thus, a broad conception of the duty to consider could include the deliberation duties addressed below.

Broad and narrow meanings are not inherently problematic, however, rhetoric invoking the narrow meaning can be used to obscure the broad meaning, which is

[84] *Turner v Turner* [1984] Ch 100, 106.

[85] Ibid 110.

[86] *Re Gestetner Settlement; Barnett v Blumka* [1953] Ch 672, 688; *Gulbenkian* (n 59) 518 (Lord Reid). This, however, would usually overlap with an improper purpose duty as trustees would necessarily be ignoring the discretion for some improper reason.

[87] *Karger* (n 20) 164.

[88] [1918] 2 Ch 67, 71. See also *Re Abrahams' Will Trusts; Caplan v Abrahams* [1969] 1 Ch 463, 485.

problematic. This is prominent in the influential Victorian case of *Karger*.[89] McGarvie J claimed that 'the Court examines whether the discretion was exercised but does not examine how it was exercised',[90] and in his final statement of principle held 'an absolute and unfettered discretion is examinable only as to good faith, real and genuine consideration and absence of ulterior purpose, and not as to the method and manner of its exercise'.[91] These statements are self-contradictory. Reviewing whether the consideration of the discretion was real and genuine, or for a proper purpose, necessarily demands evaluation of the method and manner of exercise and not simply whether a decision was made. Thus, *Karger* is authority that trustees do not have duties beyond the narrow version of the duty to consider and, contradictorily, for expanding their duties to include genuine deliberation. The fact that this internally incoherent decision is cited as the leading statement of principle in Australia[92] indicates the incoherent state of the law.

A final note on the duty to consider is that it does not correlate with an individual right to be considered. Trustees must address their discretions, but do not need to address every possible beneficiary.[93] At most they may be obliged to consider distributing to a beneficiary who requests a distribution.[94]

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[89] An example of this influence is the High Court of Australia's reference to '*Karger v Paul* principles': *Finch* (n 27) 269 [28].

[90] *Karger* (n 20) 164.

[91] Ibid 166.

[92] See *Finch* (n 27) 269 [28]; *Curwen* (n 23) 348 [24].

[93] *Baden* (n 20) 449 (Lord Wilberforce).

[94] *Manisty* (n 19) 25.

## B *Gathering Information*

The second stage in decision-making is to gather relevant information. The duty that fits here is to make inquiries, or to survey the beneficiaries.[95] Although McGarvie J in *Karger* stated that 'the insufficiency of inquiries by the trustees' was not a ground of review,[96] more recently, in *Finch v Telstra Super Pty Ltd* ('*Finch*'), the High Court of Australia held that generally trustees do have a duty to inquire.[97] Although this was a superannuation case, the Court noted that this only affected the intensity of the duty not its existence.[98] Recognition of this duty can be traced back to Lord Wilberforce's statement in *Re Baden's Deed Trusts; McPhail v Doulton* ('*Baden*'), that a responsible trustee 'might indeed make diligent and careful inquiries, depending on how much money he had to give away and the means at his disposal, as to the composition and needs of particular categories and of individuals within them'.[99]

In addition to any remaining doubt that the duty exists, there is uncertainty about its extent. Lightman J in *Abacus Trust Co (Isle of Man) v Barr* ('*Barr*') held that a trustee was in breach for failing to take 'adequate measures' to find out relevant information,[100] which strongly suggests a standard of reasonableness. However, Lightman J did not discuss what adequate steps a reasonable trustee might have taken in that case. Moreover, there is inconsistency on whether the duty extends to asking the beneficiaries for

[95] See Harris (n 73) 59–61; *Hay* (n 60) 210.

[96] *Karger* (n 20) 166. See also *Tonkin v Western Mining Corporation* (1998) 10 ANZ Cas 61–397.

[97] *Finch* (n 27).

[98] Ibid 280–1 [66]. See also *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618, 629-32 [47]-[57] (Nettle JA).

[99] *Baden* (n 20) 449.

[100] [2003] Ch 409, 419 [27].

information. Several cases hold that there is no duty to give discretionary beneficiaries a fair hearing,[101] while other judges have entertained the possibility.[102] Yet more cases have recognised that circumstances may oblige trustees to consult the beneficiaries in order to obtain relevant information.[103]

The duty to inquire is not a duty to obtain the correct information.[104] However, the doctrine of rescission for mistake may produce similar practical outcomes. In *Pitt*, the United Kingdom Supreme Court held that a distribution can be unilaterally rescinded if a trustee had an incorrect belief or assumption about a past or present state of affairs, provided that it is of sufficient gravity and the judge thinks it just in all the circumstances, including consideration of the conscience of the recipient.[105] The extent and meaning of these elements remain uncertain.[106] While rescission for mistake is not a duty to avoid mistakes, the trustees' overall duty of due administration suggests that where trustees have made a mistake, then they may well owe a duty to the discretionary beneficiaries to pursue rescission. In short, there is uncertainty built into the doctrine set out by Lord Walker and uncertainty about its future development.

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[101] *Karger* (n 20) 166; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 431 (Mahoney JA) ('*Hartigan*'); *Stuart v Armourguard Security Ltd* [1996] 1 NZLR 484, 506; *X v A* [2000] 1 All ER 490, 496.

[102] *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 718 (Robert Walker J) ('*Scott*'); *Maciejewski v Telstra Super Pty Ltd* (1998) 44 NSWLR 601, 605 (Young J).

[103] *Mercanti v Mercanti* (2016) 50 WAR 495, 543 [238] (Buss P). See also *Telstra Super Pty Ltd v Flegeltaub* (2000) 2 VR 276, 284–5 [30] (Batt JA) ('*Flegeltaub*'); *Edington v Board of Trustees of State Public Sector Superannuation Scheme* [2015] QSC 245 [50], [57], affd [2016] QCA 247; Lisa Butler, 'The Legitimate Bounds of a Trustee's Discretion' (1999) 11(1) *Bond Law Review* 14.

[104] *Pitt* (n 28) 143–4 [88].

[105] Ibid 157-8 [126]-[128].

[106] See Birke Häcker, 'Mistaken Gifts after *Pitt v Holt*' (2014) 67(1) *Current Legal Problems* 333.

The uncertainty found in the duties related to gathering information can only be resolved in coordination with the duties relating to deliberation. The quality of deliberation required of trustees will necessarily determine the quality of information they should obtain.

### C *Deliberation*

Most decision-making duties control the trustees' deliberation: how they weigh in the mind the reasons for and against different courses of action. Duties that will be considered here include purpose, relevant considerations, and fiduciary rules against conflicts. Other duties that also fit are 'adequate deliberation' from *Pitt*,[107] 'genuine consideration' from *Karger*,[108] and the duty to ask the right questions.[109] Also relevant are duties to make decisions in a fair or reasonable manner, as illustrated by Lord Wilberforce in *Gartside v Inland Revenue Commissioners*:

> [W]hen it is said that he [the beneficiary] has a right to have the trustees exercise their discretion 'fairly' or 'reasonably' or 'properly' that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes.[110]

These other formulations are vaguer than the purpose and relevancy grounds and are difficult to distinguish from them. Therefore, this section will focus on purpose,

[107] *Pitt* (n 28).

[108] *Karger* (n 20).

[109] *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, 905 (Lord Reid) ('*Dundee*'); *Harris v Lord Shuttleworth* [1994] ICR 991, 999 (Glidewell LJ) ('*Harris*').

[110] *Gartside* (n 16) 617–8. See also *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] 1 WLR 160, 167 [13] (Lewison LJ).

relevancy and fiduciary conflicts. To the extent that the others do mean something different, this only indicates that the law is even more uncertain than this analysis reveals.

Access to the trustees' deliberations, after the event, is most directly available through the trustees' reasons for their decisions. The trustees' reasons provide the common thread between all the deliberative duties. As Jessica Hudson identifies for the purpose duties, deliberation is assessed in two steps: first, objectively, what is the purpose of the discretion or matters relevant to its exercise; and second, subjectively, did the trustees' reasons for their decision align with that purpose or those matters?[111] The difficult issue about whether and how beneficiaries can adduce evidence of the trustees' reasons will be addressed in the next chapter.[112]

### *1 Purpose*

The first deliberation duty concerns the purpose of discretions. Purpose here is linked to the settlor's intention:[113] 'a power is to be exercised in the manner best calculated to

[111] Hudson, 'Propriety' (n 11) Part 4(A)(i).

[112] See Chapter 6 Part II(B).

[113] It is possible to draw a distinction between intention and purpose. In some contexts, a person is taken to have intended X as a result of their actions if she or he subjectively knew X was a likely result and went ahead with the action, even though X was not a goal that she or he subjectively desired to achieve. That is, to intend a consequence is to knowingly cause it: see *Walker v Stones* [2001] QB 902, 943 (Sir Christopher Slade) ('*Walker*'); *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433, 457 [54] (Blanchard and Wilson JJ). In contrast, a purpose is sometimes distinguished as a desired, rather than incidental, outcome of the person's actions. As Grbich says, the purpose is instrumental in moving a person to act how she or he did: Grbich (n 11) 218. See also John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law* (5th ed, revised and edited by Robert Campbell, 1885) vol 1, 424. Contrast John W Salmond, *Jurisprudence* (Stevens & Haynes, 2nd ed, 1907) 341. However, there is no consistency to how these terms are used. For example, James Edelman has used 'intention' to the same effect as Grbich used 'purpose': 'Four Fiduciary Puzzles' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 298, 316. In any event, with exercises of distributive discretions this distinction is likely irrelevant. Wherever a trustee knowingly causes a benefit to pass to a beneficiary she or he can be assumed to have desired that outcome.

give effect to the settlor's or testator's intentions'.[114] The principle is of venerable heritage and dates back at least to *Aleyn v Belchier*: 'No point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void.'[115] In determining whether this duty has been breached two determinations must be made: what the proper purpose of the discretion was, and whether the trustees' reasons for exercising the discretion aligned with that purpose. Assessing the trustees' reasons is necessarily a subjective test of the trustees' state of mind.[116] However, assessing the proper purpose of the discretion must be an objective determination based on the settlor's intention manifested in its context.[117]

The central uncertainty with this duty arises, I argue, through the considerable latitude in interpreting 'the end designed'. The purpose of a discretion can be interpreted very differently, so that it gives the trustees greater or lesser freedom in deciding the distribution of assets. This concern is not limited to trust law. Dale Smith has shown recently that, while scholarship on purposive statutory interpretation is impressive, there is relatively little work on how statutory purpose should be understood. For example, statutory purpose can be understood as the intention of the legislature, as the intention a reasonable legislature would have, or as a statute's objective function in the context of

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[114] *Australian Incentive Plan Pty Ltd v A-G (Vic)* (2012) 44 VR 661, 668 [36] (Nettle JA) ('*Australian Incentive*'). See also *Re Steed's Will Trusts* [1960] Ch 407, 415 (Lord Evershed MR).

[115] (1758) 1 Eden 132; 28 ER 634, 637 (emphasis in original). See also *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505.

[116] Cf *Eclairs* (n 24) 1403 [15]. Trustees acting pursuant to the right objective subjectively but making a decision that was not a reasonable means of achieving that objective, might find that their discretion is reviewable under the relevancy or reasonableness grounds discussed below.

[117] Interpretation of a discretion's purpose cannot rely on the settlor's subjective purpose, because it must be capable of being understood by the trustees charged with implementing that purpose. Therefore, it must be objectively ascertainable in the same way as a statutory purpose. For a widely-cited summary of the principles of purposive statutory interpretation see *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 421–4 (McHugh JA).

the overall legal system.[118] Further exploration of statutory purpose may shed welcome light on purpose in trust law.

The prime example of a purpose duty is the fraud on a power doctrine.[119] The core case of the doctrine applies where trustees exercise a special[120] power of appointment in favour of an eligible beneficiary, but with an arrangement or intention that the beneficiary will pass the benefit on to a non-beneficiary.[121] For example, if the trustees have a discretion to distribute to A or B, it is improper to distribute to B with the ulterior design that B will pass on the assets to C. The doctrine's function is to prevent the circumvention of the doctrine of excessive execution through compliance in form but not substance.[122] A variation on the doctrine is where an appointment is made to a beneficiary on condition that she or he provides a discrete benefit to another, for example, out of her or his own funds.[123] In the core case of fraud on a power, the only relevant purposes relate to the identity of those intended to benefit. This means the purpose of benefiting a non-beneficiary is improper, but the purpose of benefiting a beneficiary is always proper, regardless of the reason why the benefit is granted. For example, in *Topham v Duke of Portland* Lord Hatherley LC stated that the non-trustee donee of a power could validly

[118] Dale Smith, 'What Is Statutory Purpose?' in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law Under a Democratic Constitution* (Hart Publishing, 2019) 13, 14.

[119] See generally Grbich (n 11); Matthews (n 11) 136; Devonshire (n 11); Thomas (n 53) ch 9; Hudson, 'Thicket' (n 11).

[120] See Chapter 3 text to n 36 for a definition of special powers. The fraud on a power doctrine does not apply to general powers: Thomas (n 53) 468–9 [9.115].

[121] *Vatcher* (n 22) 378; *Re Merton; Public Trustee v Wilson* [1953] 1 WLR 1096, 1100; *Re Greaves; Public Trustee v Ash* [1954] Ch 434, 445; *Wong v Burt* [2005] 1 NZLR 91, 95-6 [29]-[30].

[122] For this reason Grbich argued that fraud on a power should be considered part of the ultra vires principle: Grbich (n 11) 215. See also *Kain* (n 57) 598 [17] (Blanchard J), 608 [47] (Tipping J).

[123] *Re Perkins; Perkins v Bagot* [1893] 1 Ch 283 ('*Perkins*'); *Re Cohen; Brookes v Cohen* [1911] 1 Ch 37 ('*Cohen*'); *Vatcher* (n 22) 378–9.

make an appointment in favour of his sister 'for any other reason, however capricious',[124] however, he could not make an appointment that was nominally in favour of his sister but intended to redirect money into an account subject to the donee's control.[125]

The interpretation of purpose in the core case of fraud on a power allows great freedom to the trustees. It is focused almost entirely on purposes related to *who* benefits. It does not focus on purposes related to *why* an authorised beneficiary may be benefited.[126] This means that the core of the doctrine says nothing about the different purposes that trustees may have in deciding between authorised beneficiaries. Provided the trustees' genuine purpose is to benefit a beneficiary there is no 'real vice' in the trustees being motivated by any variety of additional purposes.[127] To find more comprehensive purpose duties we must go beyond the core case of fraud on a power.[128] An influence in this area is directors' duties, where the fraud on a power doctrine has transformed into a positive duty to act for proper purposes, rather than a duty to not divert benefits to non-

[124] (1869) LR 5 Ch App 40, 57.

[125] Ibid 57–9.

[126] The distinction between purposes related to who and purposes related to why may be the basis for the rather murky distinction drawn by Turner LJ between purpose and motive: *Topham v The Duke of Portland* (1863) 1 De G J & Sm 517; 46 ER 205, 227. On this distinction in the criminal law see Walter Wheeler Cook, 'Act, Intention, and Motive in the Criminal Law' (1917) 26(8) *Yale Law Journal* 645, 660.

[127] *Vatcher* (n 22) 379.

[128] Cf Thomas (n 53) 416–7 [9.28]. Thomas claims that fraud on a power embraces more than an intention to benefit a non-object and provides one case in support: *D'Abbadie v Bizoin* (1871) 5 IR Eq 205. This case held that an appointment that had been exercised with a condition that coerced the beneficiary to live in France was invalid. The purpose of controlling the beneficiary's domicile was foreign to the purpose of the power. However, other cases cited by Thomas do not support his claim. Three cases involved an intention to benefit a non-object: *Re Marsden's Trust* (1859) 4 Drew 594; 62 ER 228; *Perkins* (n 123); *Cohen* (n 123). The final two cases cited involved purposes to benefit objects, but because of this they were found to be proper: *Hodgson v Halford* (1879) 11 Ch D 959; *Vatcher* (n 22) 379.

beneficiaries.[129] Powers of advancement also provide more a more rigorous purpose duty. They must be exercised for the purpose of benefiting the person advanced.[130]

In several trust cases, judges have imposed more demanding proper purpose duties that do provide guidance to trustees in deciding how to distribute benefits between authorised beneficiaries. In these cases, relevant purposes go beyond the identity of who is intended to benefit and include why. In *Blair v Vallely* ('*Blair*'), Wild J found that the settlor's purpose for a power was to ensure a substantively equal division of farming assets among six children.[131] Over the lifetime of the trust the children had received different benefits such as interest-free loans and generous rental agreements, and Wild J found that the trustees' discretion was intended to equalise the total material benefits over time. Thus, it was an improper purpose to distribute more to some children simply because they had a greater need.[132] In *Australian Incentive Plan Pty Ltd v Attorney-General (Vic)* the Victorian Court of Appeal found that an employer's primary purpose for the trust was to incentivise employees by granting them interests that would vest after a period of employment.[133] The settlor went into liquidation, which meant this purpose could not be carried out and a final discretion was left to distribute the assets among employees and charity. The Court found that, where employees could no longer be incentivised, the settlor's primary purpose was to benefit charity. Thus, the Court approved an order that the discretion be exercised in favour of charity alone.[134] In direct

[129] See, eg, *Corporations Act 2001* (Cth) ss 180(2)(a), 181(1)(b); Langford (n 68); David Pollard, 'Exercising Powers: Proper Purposes Rather than Best Interests' (2016) 30(2) *Trust Law International* 71.

[130] *Re Pauling's Settlement Trusts; Younghusband v Coutts & Co* [1964] Ch 303, 333 ('*Pauling*').

[131] [2000] WTLR 615.

[132] Ibid.

[133] *Australian Incentive* (n 114).

[134] Ibid 668-70 [36]-[42] (Nettle JA), 691-2 [129]-[132] (Davies AJA).

contrast, in *Clayton v Clayton* the New Zealand Supreme Court rejected an argument by counsel that the trustee was limited by a duty to exercise discretions in accordance with certain business purposes. The Court reasoned that the settlor could have expressed such a purpose in the instrument but did not.[135]

These examples show that there can be great variation in how the courts interpret the purpose of a discretion. While the cases can be formally reconciled by saying that the settlors in the different cases had different purposes, there is little guidance as to how the courts should determine the purpose. In all these cases, the courts go beyond the text of the instrument to impose or imply additional restrictive duties. The uncertainty lies in the extent of the courts' willingness to go beyond the text.

In addition, further uncertainty arises from the relationship between purpose duties and other duties, for example, the duty against delegation. A settlor who makes the purpose of a discretion clearly known, for example, through a letter of wishes, will create a predicament for the trustees. If they adhere to the settlor's purpose too closely they may be accused of improperly delegating their discretion to the settlor.[136] However, if they do not adhere to the settlor's purpose then they may be in breach of the duty to act for a proper purpose.[137] There is also uncertainty in how the purpose duties overlap with the relevancy duties discussed next. Many cases hold that the settlor's purpose is a relevant consideration;[138] however, this would seem to reduce the importance of the settlor's purpose to the same level as other relevant considerations. A solution to this uncertainty

[135] [2016] 1 NZLR 551, 572 [66] ('*Clayton*').

[136] *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1973) 129 CLR 177, 191 (Gibbs J).

[137] Cf *Natalie W Chen v Wong Siu Ling* [2000] HKCFI 481.

[138] *Baden* (n 20) 457 (Lord Wilberforce); *Manisty* (n 19) 26; *Breadner v Granville-Grossman* [2001] Ch 523, 544–5 [66]; *Breakspear v Ackland* [2009] Ch 32, 37 [8] ('*Breakspear*'); *Pitt* (n 28) 137 [66].

proposed by Michael Ashdown is to recognise that the purpose of a discretion has primacy and it determines what other considerations are relevant.[139]

Finally, some judgments state that trustees must exercise discretions for the purpose of benefiting the beneficiaries as a whole.[140] This formula works for management discretions, which are exercised to protect and grow the trust fund for the benefit of the beneficiaries as a whole.[141] When applied to distributive discretions the formula would oblige the trustees to make only those distributions that maximise the utility for the beneficiaries as a whole. While this may apply to some discretions, it would be unusual. Discretionary beneficiaries usually have competing interests where a distribution to one is not in the best interests of the rest.[142] This formulation of the proper purpose duties may be influenced by the courts' duty when appointing new trustees, which is to appoint those who will act in the interests of the beneficiaries as a whole.[143] In relation to discretionary trusts, this principle should be interpreted to mean trustees who will exercise their discretions in accordance with the decision-making duties, not trustees who will only make distributions that benefit all the beneficiaries.[144]

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[139] Ashdown (n 8) 84 [5.07].

[140] See *Andco Nominees Pty Ltd v Lestato Pty Ltd* (1995) 126 FLR 404, 431–2 ('*Andco*'); *Re Cooper Street Property Trust* [2016] VSC 756 [70] ('*Cooper*').

[141] See *Armitage* (n 14).

[142] *Gartside* (n 16) 605–6 (Lord Reid).

[143] *Re Tempest* (1866) LR 1 Ch App 485, 487–8 (Sir G J Turner LJ).

[144] Contrast *Re Cooper Street Property Trust [No 2]* [2017] VSC 291 [36].

### *2 Relevancy*

The second major area in the deliberation stage is the duty to consider relevant, but not irrelevant, matters when making the decision. There are five identifiable areas of uncertainty about this duty or set of duties.

First, the existence of relevancy duties has been more contentious than purpose duties. For example, in *Cock v Smith* the prevailing judgments in the High Court of Australia invalidated the trustees' decision on the basis that they had not considered all the relevant circumstances of the case, including fairness between the beneficiaries and their individual circumstances.[145] The Privy Council overturned this decision on the basis that the only ground of review was bad faith, which was an implicit rejection of the relevancy grounds.[146] Nevertheless, the language of relevant considerations continued[147] and was put into effect in the *Re Hastings-Bass (dec'd); Hastings-Bass v Inland Revenue Commissioners* line of cases.[148] However, yet other cases have held that trustees do not have an enforceable duty to consider particular matters.[149] Some have given reasons, such as that '[s]uch grounds smack very much of administrative law'[150] and that trustees'

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[145] *Cock* (n 18) 798, 800 (Griffith CJ), 806 (O'Connor J).

[146] *Smith v Cock* (1911) 12 CLR 30, 38.

[147] *Dundee* (n 109) 905 (Lord Reid); *Lutheran Church of Australia South Australia District Inc v Farmers' Co-operative Executors & Trustees Ltd* (1970) 121 CLR 628, 639 (Barwick CJ).

[148] [1975] Ch 25. See also *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1621; *Elovalis* (n 26) [51] (Martin CJ), [63]-[70] (Buss JA).

[149] See *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918, 928 (Harman LJ), 936 (Salmon LJ); *Karger* (n 20) 175. In *Manisty* (n 19), Templeman J contradicted himself on this point. First, he said that the 'court cannot judge the adequacy of the consideration given by the trustees': ibid 25. However, on the following page Templeman J accepted that a decision made for reasons that are irrational or irrelevant to the purpose of the discretion might render it capricious, which is judging the adequacy of the consideration: ibid 26.

[150] *Flegeltaub* (n 103) 285–6 [33] (Batt JA).

deliberations are essentially confidential.[151] This uncertainty should be reduced following the United Kingdom Supreme Court's decision in *Pitt*, which decisively found a duty to take relevant considerations into account under the duty of adequate deliberation.[152]

Second, applying these duties presents a similar challenge to the purpose duties, which is that there is no established method for determining what matters are relevant or irrelevant.[153] For example, relevant matters may be explicitly set out in the terms of the discretion,[154] but silence in the terms will not stop the courts finding other matters are relevant. There is consensus that the settlor's wishes are relevant,[155] although there is a question over wishes arising after the commencement of the trust.[156] In general, relevancy will depend upon the circumstances of the discretion.[157] Examples of matters that have been found relevant include designation of a beneficiary as 'primary',[158] the interests of a whole family,[159] fairness between beneficiaries,[160] the beneficiaries' individual deserts,[161] the beneficiaries' expectations,[162] the interests of a non-beneficiary

[151] *Breakspear* (n 138) 51-2 [54]-[58].

[152] *Pitt* (n 28) 120 [2], 135 [60].

[153] See Ashdown (n 8) 81-6 [5.03]-[5.10].

[154] See *Sinclair* (n 49) [19].

[155] See *Baden* (n 20) 457 (Lord Wilberforce); *Kain v Hutton* (2004) 1 NZTR 14 [301]; *Australian Incentive* (n 114) 668 [36] (Nettle JA); *Pitt* (n 28) 137 [66].

[156] See *Hartigan* (n 101) 431 (Mahoney JA); *Barr* (n 100).

[157] *Pitt* (CA) (n 43) 176 [118] (Lloyd LJ).

[158] *Foley v Gleeson* [2013] QSC 234 [38].

[159] *Re Munro's Settlement Trusts* [1963] 1 WLR 145, 149.

[160] *Cock* (n 18) 800 (Griffiths CJ).

[161] *Hay* (n 60) 209–10.

[162] *Smithson v Hamilton* [2008] 1 WLR 1453, 1484 [99] ('*Smithson*').

superannuation trust employer,[163] and the tax consequences of distributions.[164] The courts have occasionally stated that the interests or claims of *all* beneficiaries must be considered;[165] however, this is in conflict with *Baden*, where Lord Wilberforce held that trustees need not identify and consider every beneficiary.[166] More generally, the list above shows that 'matters' or 'considerations' mean more than mere information. It includes the questions that trustees ought to turn their minds to,[167] and ultimately, any sensible reason for or against a distribution.[168]

Third, there is a question about the standard by which a breach is judged. Guy Newey has recognised, extra-judicially, that *Pitt* is authority that a lack of reasonable care is sufficient to breach the duty and that deliberate or reckless failure to consider is not necessary.[169] This issue has yet to be considered in detail by the courts, but it conflicts with the view that reasonableness and fairness do not govern trustees.[170]

Fourth, there is uncertainty about whether the relevancy duties allow review of the weight placed on different matters. In *Edge v Pensions Ombudsman* the Court of Appeal said that the weight placed on different considerations is for the trustees and the courts

[163] *Edge* (n 17) 633. But see *Smithson* (n 162) 1485 [101]-[102].

[164] *Pitt* (n 28) 146 [95].

[165] *Andco* (n 140) 431–2; *Cooper* (n 140) [70].

[166] *Baden* (n 20) 449. Instead, the trustees should make a general survey of the 'field, class and category' of beneficiaries, which should be of greater or lesser intensity depending on the context.

[167] See, eg, *Barr* (n 100) 415 [16].

[168] See, eg, *Manisty* (n 19) 26; *Esso Australia Ltd v Australian Petroleum Agents' and Distributors' Association* [1999] 3 VR 642, 651–2 [39].

[169] Newey (n 31) 53–5. See also *Barr* (n 100) 419 [27]; *Masters v Stewart* [2018] NZAR 233, 242 [33]-[34] ('*Masters*').

[170] See *Manisty* (n 19) 26; *A-G (Cth) v Breckler* (1999) 197 CLR 83, 99-100 [7] ('*Breckler*'); *Gailey v Gordon* [2003] 2 NZLR 192, 202 [83] ('*Gailey*').

should not intervene.[171] In contrast, in *Finch*, the High Court held that the trustee breached its duty by placing undue weight on certain information.[172] Indeed, because trustees cannot be required to forget or 'unlearn' irrelevant information, categorising a matter as irrelevant means requiring trustees to not place any weight on that matter. In *Scott v National Trust for Places of Historic Interest or Natural Beauty* ('*Scott*'), Robert Walker J held that '[i]n reaching decisions as to the exercise of their fiduciary powers, trustees have to try to weigh up competing factors, ones which are often incommensurable in character. In that sense they have to be fair.'[173] This suggests the duty to take relevant matters into account includes a duty to weigh them fairly when deliberating. The superannuation and charity contexts of these last examples must be kept in mind, because different duties may apply to other trusts,[174] however, the High Court in *Finch* stated it was applying the same grounds of review available in ordinary trust cases.[175]

### *3 Fiduciary Conflict*

Little needs to be said about the fiduciary conflict rule because it is relatively narrow and easily excluded.[176] Indeed, in many cases the conflict rule is not even mentioned despite clear conflicts.[177] However, it has the same function as the duties above: to

[171] *Edge* (n 17) 627.

[172] *Finch* (n 27) 276 [48], 277-8 [53]-[55].

[173] *Scott* (n 102) 718. See also *Parkes Management Ltd v Perpetual Trustee Co Ltd* (1977) 3 ACLR 303, 311 (Hope JA).

[174] See Chapter 6 Part III(B).

[175] *Finch* (n 27) 278-80 [57]-[65].

[176] See also Chapter 6 Part III(D).

[177] In *Karger* (n 20), the entire trust fund was appointed to one of two trustees. In *Re Cottee* [2013] NSWSC 47, trust assets were paid to trustees to build an extension on their home, which also benefited their children, the beneficiaries, to the extent that they continued to live with their parents.

prevent decisions being made for improper reasons.[178] It differs in that its reach is narrower but its standard of proof is easier to satisfy. Fiduciary conflicts only occur where trustees have an 'interest' or another duty that could conflict with their duty to the beneficiaries. What counts as an 'interest' in fiduciary law is limited to pecuniary interests; close relationships do not count.[179] Therefore, the rule only applies to distributive discretions where the trustee is a discretionary beneficiary, has a pecuniary interest in a beneficiary (such as a spouse), or has a separate duty to act in the interests of one beneficiary.[180] Where these circumstances are known to the settlor it can be readily inferred that the settlor intended to exclude the conflict rule.[181] Where it does apply, the advantage of the conflict rule is that it is easier to prove than the deliberation duties. It need not be proved that trustees made a decision influenced by improper reasons but only that the circumstances created a risk of the trustees basing their decision on improper reasons.[182]

### D *Resolution*

The final[183] stage in the decision-making process is to resolve to make a distribution or not make one. The duty that fits here is to make only those decisions that a reasonable

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[178] See Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7(2) *Journal of Equity* 87, 97–8; JE Penner, 'Is Loyalty a Virtue, and Even If It Is, Does It Really Help Explain Fiduciary Liability?' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 159, 168–9.

[179] See Chapter 7 text to nn 75-92.

[180] For example, a solicitor-trustee who has a discretionary beneficiary as a client.

[181] A settlor who deliberately places someone in a position of conflict is inferred to have authorised the conflict: *Tempest v Lord Camoys* (1888) 58 LT NS 221, 223; *Hordern v Hordern* [1910] AC 465, 475; *Jones v Firkin-Flood* [2008] EWHC 2417 [266]-[267]. But see *Pauling* (n 130) 339.

[182] The conflict rule may be properly construed as a standard rather than a duty: see above text to nn 74-82.

[183] We will not consider questions surrounding the implementation of the trustees' decision, although the doctrine of rectification would be relevant there: see Lionel Smith, 'Can I Change My Mind? Undoing Trustee Decisions' (2008) 27(3) *Estates, Trusts & Pensions Journal* 284, 286–291.

body of trustees could make. This is a 'threshold-reasonableness' duty in that decisions only need to be reasonable enough to cross the threshold of decisions that reasonable trustees could make.[184] The duty is associated with the second limb of '*Wednesbury* unreasonableness' from the public law case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[185] (The first limb is the duty to consider relevant, but not irrelevant, matters.[186]) However, the public law reference must be treated with caution as the public law concept of *Wednesbury* unreasonableness has expanded over the intervening decades and presents a lower standard.[187] The major advantage of the threshold-reasonableness duty is that it allows the courts to review a resolved decision in circumstances where the decision-making process is inaccessible.

Acceptance of a threshold-reasonableness duty in trust law is uncertain. In 1952 the House of Lords doubted that it applied.[188] In 1999 the High Court of Australia referred, with apparent approval, to the proposition that trustees' decision could not be impugned on grounds of unreasonableness or unfairness.[189] On the other hand, lower level courts have accepted that some degree of reasonableness is required.[190] Moreover, it is difficult

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[184] Cf *Trusts Act 2019* (NZ) s 126.

[185] [1948] 1 KB 223.

[186] As Baroness Hale DPSC explained in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, 1671 [24]:

> The first limb focuses on the decision-making process — whether the right matters have been taken into account in reaching the decision. The second focuses on its outcome — whether, even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the *Wednesbury* principle, but without necessarily excluding the former …

[187] See *DNZ Property Fund Management Ltd v Argosy Property Management Ltd* (2011) 3 NZTR 21 [55] ('*DNZ*'); Cane, McDonald and Rundle (n 54) 196–201.

[188] *Dundee* (n 109) 901–2 (Lord Normand), 904–5 (Lord Reid), 907 (Lord Tucker).

[189] *Breckler* (n 170) 99-100 [7].

[190] *Harris* (n 109) 999; *Edge* (n 17) 628; *Wendt v Orr* [2004] WASC 28 [53], revd [2005] WASCA 199; *Kowalski v MMAL Staff Superannuation Fund Pty Ltd [No 2]* [2008] FCA 691 [25]; *DNZ* (n 187) [56];

to distinguish threshold-reasonableness from the widely accepted duty against capriciousness.[191] While capriciousness is poorly defined, Asher J has suggested that it is the same as the 'narrow original notion of *Wednesbury* unreasonableness', although not the expanded principle as it developed in public law.[192]

To the extent that the threshold-reasonableness duty does exist, its significance is also uncertain. It does allow direct review of the merits of a decision.[193] However, it is not a duty to make a decision that everyone would agree is fair and reasonable in the circumstances.[194] The logic of the duty is that a breach can only be proved by proving that no hypothetical reasonable process of decision-making exists that could have produced that decision. A decision that was in fact produced by an unreasonable process will not breach this duty if, hypothetically, it could have been produced by a reasonable process. Therefore, if this logic is strictly followed the duty will only be breached in exceptional circumstances.

Finally, uncertainty can arise when the threshold-reasonableness duty is conflated with every instance of a reasonableness standard applying to the trustees' decision-making. For example, trustees have a duty of reasonable care in exercising management discretions, which is not the threshold-reasonableness duty.[195] They also have a duty of

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*Chapman v United Super Pty Ltd* (2013) 9 ASTLR 155, 164 [53]; *Re Honoris Trust* [2018] 3 NZLR 160, 177 [62].

[191] See *Hart* (n 21); *Pilkington* (n 58) 641.

[192] *DNZ* (n 187) [56].

[193] Cf Cane, McDonald and Rundle (n 54) 196.

[194] See *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233 [8] (Meagher JA) ('*Hannover*').

[195] A general reasonableness duty, the prudent person of business rule, applies to management discretions: *Speight* (n 83). Although the case law is not clear on the point, it is widely accepted that the prudent person rule does not apply to distributive discretions: see *Elder's Trustee & Executor Co Ltd v Higgins* (1963) 113 CLR 426, 448 (Dixon CJ, Tiernan and Windeyer JJ) ('*Elder's*'); Ashdown (n 8) 69 [4.10].

impartiality in exercising management discretions, which requires a high degree of fairness and reasonableness.[196] And, as we have seen, the inquiry and relevancy duties can be breached by lack of reasonable care.[197] As Meagher JA has noted in another context there is a distinction between judging that the resolution is itself unreasonable and judging that a decision-maker 'acted unreasonably in the opinion-forming process.'[198] An example of the conflation of these two concepts is the treatment of *Blair* in New Zealand.[199] In that case Wild J made broad statements about *Wednesbury* unreasonableness,[200] which were later criticised as going beyond established principle.[201] The focus on *Wednesbury* unreasonableness is unfortunate because it was unnecessary for Wild J's decision. The better interpretation of the judgment is that it is an application of the proper purpose and relevancy grounds, which is consistent with the majority of the case law.[202]

### E *Honesty and Good Faith*

The duties of honesty and good faith[203] do not fit neatly into the decision-making framework set out above. This is not a failure of the framework, but a result of

[196] The duty of impartiality is widely considered not to apply to distributive discretions because these discretions authorise trustees to treat beneficiaries unequally: *Edge v Pensions Ombudsman* [1998] Ch 512 (Ch), 533–4.

[197] See above text to nn 100, 169–170.

[198] *Hannover* (n 194) [8].

[199] *Blair* (n 131).

[200] Ibid 632–3.

[201] See *Gailey* (n 170) 203 [88]-[89]; Jonathan Orpin, 'Reviewing "Unreasonable" Discretionary Decisions Made by Trustees' (2015) 21(2) *New Zealand Business Law Quarterly* 131.

[202] See *Masters* (n 169) 241-3 [30]-[38].

[203] These duties are often treated as synonyms: see *Karger* (n 20) 164. They can also be distinguished, but need not be for our purposes. See further James Penner, 'Trustees and Agents Behaving Badly: When and How Is "Bad Faith" Relevant?' in Paul B Miller and Matthew Harding (eds), *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge University Press, forthcoming) ('Bad Faith').

considerable uncertainty and inconsistency with these duties. There is uncertainty about how honesty and good faith fit with the duties discussed above, and uncertainty about what honesty and good faith mean. One reason for this uncertainty is that the primary case law on honesty and good faith is difficult to apply to exercises of distributive discretion. Another reason is that honesty and good faith usually only become salient in relation to exclusion clauses.[204] This results in difficulty in interpreting the effect these duties have on the regulation of distributive discretions.

The leading case for honesty and good faith in trustee decision-making is *Armitage*,[205] which is frequently cited for the proposition that honesty and good faith are the core duties of the trust.[206] Millett LJ's conception of these duties is that honest trustees must act in what they genuinely believe is the best interests of the beneficiaries.[207] This is controversial because he suggested such a belief would render trustees honest even if they deliberately breached their duty to comply with the trust terms.[208] Regardless of this controversy, Millett LJ's conception of honesty is not useful for our purposes because it only satisfactorily applies to management discretions,[209] not distributive discretions. Management discretions can sensibly be exercised in the interests of all beneficiaries, because all beneficiaries have a shared interest in preserving and increasing the trust

[204] See Chapter 6 Part III(D).

[205] *Armitage* (n 14).

[206] See, eg, *Crossman v Sheahan* (2016) 115 ACSR 130, 192 [307]-[308] (Ward JA) ('*Crossman*'); *Clayton* (n 135) 583 [124].

[207] *Armitage* (n 14) 251.

[208] Charles Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' (2018) 32(2) *Trust Law International* 92, 100. See also *Crossman* (n 206) 192 [308] (Ward JA). Cf *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 498 [32].

[209] *Armitage* (n 14) 249.

fund.[210] In contrast, most distributive discretions cannot be exercised to benefit all beneficiaries, because a distribution to one is detrimental to the rest.[211] Therefore, in this context, Millett LJ's conception of honesty means, at most, that honest trustees must not distribute assets to anyone other than a beneficiary. It says nothing about how trustees should honestly make decisions distributing assets between different beneficiaries. Therefore, *Armitage* leaves us with the proposition that settlors may excuse trustees' liability for anything other than dishonesty, but without a way to explain what dishonesty means in relation to distribution.

The second key source on dishonesty is the accessory cases.[212] In the United Kingdom the dishonesty of an accessory to a breach of trust is determined directly,[213] while in Australia the accessory's dishonesty is determined by her or his knowledge of the fiduciary's dishonesty.[214] The most recent United Kingdom Supreme Court decision establishes a single test for dishonesty across civil and criminal law,[215] consisting of two steps: 1) assessing the person's actual state of knowledge or belief; and 2) assessing whether the person's conduct, given their state of mind, was dishonest by applying the objective standards of ordinary decent people.[216] For accessories, it has been established

[210] The primary purpose of management discretions is to financially benefit all beneficiaries: *Cowan v Scargill* [1985] 1 Ch 270, 286–7. An exceptional case is *Purcell v Deputy Federal Commissioner of Taxation*, where the purpose of management discretions was not to preserve or increase the trust fund but to give personal control to the settlor-trustee: (1920) 28 CLR 77, 81 (Knox CJ and Gavan Duffy J), 91–4 (Isaacs J).

[211] See *Gartside* (n 16) 605–6 (Lord Reid).

[212] The accessory cases have been cited as the primary source on dishonesty in the civil context: *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] AC 391, 411 [62] ('*Ivey*').

[213] *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 WLR 1476 ('*Barlow*').

[214] *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 360 ALR 1, 20–1 [71] (Gageler J) ('*Foresters*').

[215] *Ivey* (n 212) 411 [63].

[216] Ibid 416–7 [74].

that ordinary decent people would not wittingly assist dishonest fiduciaries.[217] However, like *Armitage*, this principle is not very helpful for determining what dishonesty means for trustees, especially when exercising distributive discretions. The critical difference between accessories and trustees is that the latter are already subject to objective standards provided by law. This raises the difficult question about how the legal standards provided by trustees' duties relate to the honesty standards derived from ordinary decent people. As the High Court of Australia has said, breaches of trust may be more or less serious.[218] However, the default position must be that ordinary decent people would expect trustees, as trusted fiduciaries, to comply with their core duties.

Observing dishonesty more broadly, we find two common conceptualisations. First, honesty can be considered a discrete duty with distinct content. This makes most sense in relation to the common conception of dishonesty as fraud, which means lying or deceitfulness.[219] A related view is that honesty has no unique content in trust law but is part of the law's general policy against fraud.[220] This conception has little application to distributive discretions, outside the rare case of trustees lying to beneficiaries.[221]

Second, dishonesty can be conceptualised as a standard of fault for breaching a duty. Penner argues that honesty cannot be a core trust duty because it is merely a standard of

[217] *Foresters* (n 214) 20–1 [71] (Gageler J).

[218] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 165 [184] ('*Farah*'). In this paragraph, the High Court contrasted dishonest breaches with well-intentioned breaches.

[219] See *Sgro v Australian Associated Motor Insurers Ltd* (2015) 91 NSWLR 325, 337 [57] (Beazley P); Penner, 'Bad Faith' (n 203).

[220] See *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712 (Denning LJ). See, generally, Elise Bant, 'Unravelling Fraud in the Wake of *Hayward v Zurich Insurance*' [2019] (1) *Lloyd's Maritime & Commercial List Quarterly* 91.

[221] See Penner, 'Bad Faith' (n 203).

fault rather than a duty with its own distinct performative content.[222] For example, a trustee might breach her duty to not distribute to non-beneficiaries either carelessly or knowingly.[223] Thus, determining whether there has been a breach depends on the standard of fault applied, but the performative content remains the same. This conception means that dishonesty can be understood as overlapping with and altering all other decision-making duties. If a duty can be breached by carelessness, applying dishonesty creates a second level to the duty. This may occur when exclusion clauses attempt to exclude liability for any conduct other than dishonesty.[224] For example, a duty to consider a relevant matter could be breached by the trustees' lack of reasonable care when deliberating.[225] A clause limiting liability to dishonesty might restrict this duty. However, when we apply this conception of honesty to decision-making duties a complication arises.

The complication is that both dishonesty and decision-making duties require consideration of mental states. Therefore, an assessment of dishonesty requires discerning different mental states that may exist in a conscious mental process. A way into this problem is to consider what beliefs may make a difference to a trustee's degree of fault. One set of relevant beliefs are beliefs about facts.[226] For example, trustees might exercise a discretion under a false belief about taxation consequences. This could trigger a breach of the relevancy duty if the trustees were careless in verifying the belief, for

[222] JE Penner, 'Exemptions' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 241, 250.

[223] This duty has a third, strict standard. It would apply if she took all reasonable care and still distributed incorrectly.

[224] *Armitage* (n 14).

[225] See above text to nn 169–170.

[226] *Barlow* (n 213) 1481 [15]-[16]; *Ivey* (n 212) 416 [74].

example, by not taking advice when it was reasonable to do so.[227] One application of the dishonesty standard would hold that these trustees cannot be dishonest, provided their beliefs about the tax consequences were genuine — unreasonableness of belief is only relevant as evidence of genuineness.[228] However, another application would ask whether the failure to take reasonable steps breached the standards of ordinary decent people.[229] To judge this we would need to consider the trustees' beliefs about their duty to obtain advice. Beliefs about the duties that one owes and beliefs about one's own honesty, are distinguishable from beliefs about other facts.[230] The accessory cases have rejected the notion that a person can be honest simply because they incorrectly believe they are honest.[231] In contrast, McGarvie J has suggested that a trustee will be honest unless they are conscious of their own dishonesty.[232] Yet other courts have held that trustees with misguided and unreasonable beliefs about their own duties are not honest.[233] It is more certain that trustees' incorrect beliefs about their duties will be accepted as honest if they are reasonable.[234] Indeed, the uncertainty about trustees' duties described in this chapter suggests that honest trustees may hold a wide range of reasonable beliefs about them. In short, the complications arising from applying honesty as a standard to distributive discretions has yet to be resolved.

[227] Cf *Pitt* (n 28) 141 [80].

[228] *Ivey* (n 212) 416–7 [74].

[229] Cf *Barr* (n 100) 419 [27].

[230] Cf *Barlow* (n 213) 1481 [15]-[16].

[231] Ibid; *Farah* (n 218) 162 [173]; *Ivey* (n 212) 417 [74].

[232] *Karger* (n 20) 178.

[233] See *Walker* (n 113) 939 (Sir Christopher Slade); *Spencer v Spencer* [2014] 2 NZLR 190, 216-8 [124]-[131].

[234] Cf *Barlow* (n 213) 1481 [17].

The final issue affecting the duties of honesty and good faith is that they can be subject to different procedural rules and standards of proof. Claims of fraud and dishonesty are treated as serious charges. They are required to be clearly pleaded and proven, due to the presumption of innocence.[235] The high bar set for dishonesty claims reinforces the difficulty of adducing evidence of mental states, which applies to all claims related to trustee discretions.[236] For example, in *Mandie v Memart Nominees Pty Ltd*, the trustees chose not to share any information about their own mental states, which meant that no dishonesty claim could be pleaded with sufficient particularity to meet the seriousness of the charge.[237]

In conclusion, the difficulties addressed above mean that it is difficult to determine what the honesty and good faith duties mean for the regulation of trustee discretion. One possibility is that dishonesty provides a distinct regulatory regime, which is quite limited compared to the default regime. The dishonesty regime would only allow the courts to control the trust relationship when trustees engaged in morally outrageous behaviour. Provided trustees meant well,[238] they could not be held to account, which means exclusion clauses would have significant effects.[239] A contrasting possibility is that dishonesty does not seriously alter the regime of decision-making duties set out above. This path is suggested when decision-making duties that contain a reasonableness component[240] are

[235] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362–3 (Dixon J); *Elder's* (n 195) 448 (Dixon CJ, McTiernan and Windeyer JJ); *Farah* (n 218) 162 [170].

[236] See Chapter 6 Part II(B) on the disclosure of trustees' reasons.

[237] [2018] VSC 719 [155].

[238] Cf *Farah* (n 218) 165 [184].

[239] See Chapter 6 Part III(D).

[240] These include failure to make adequate inquiries, to act for a proper purpose, to take into account relevant matters, or act reasonably: see, eg, Newey (n 31) 55.

categorised as instances of dishonesty or mala fides.[241] It is also suggested when decision-making duties are categorised as fiduciary duties,[242] breach of which can be said to necessarily implicate the trustees' honesty.[243]

## IV CONCLUSION

In summary, while the development of the decision-making framework helps us comprehend the trustees' decision-making duties, it also allows us to identify considerable areas of uncertainty. There is widespread inconsistency in the cases about whether particular duties exist and what they mean. Three deep areas of uncertainty are how the purpose of a discretion is determined, how the trustees' consideration of relevant matters is assessed, and what is expected of honest trustees. Each area of uncertainty, by itself, is not necessarily incoherent. However, when the cumulative effect of these uncertainties is considered, incoherence can be seen to emerge. The sheer quantity of different sources of uncertainty means that two judges could demand very different behaviour and accountability from the same trustee. Without some higher-level principles to resolve the various uncertainties in a systematic way, the result is incoherence. In the next chapter we will find that this incoherence is compounded by uncertainties that arise from ancillary rules of trustee regulation and factors affecting application of the decision-making duties and ancillary rules.

[241] See *Gailey* (n 170) 203 [89]; *Cohen v Amberley Corp Australia Pty Ltd* [2016] VSC 140 [25].

[242] *Pitt* (n 28) 139 [73].

[243] *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194, 224–5 [61] (Lord Clarke).

# CHAPTER 6

# INCOHERENCE WITHIN THE ADMINISTRATIVE TRUST MODEL (PART II): THE SPECTRUM OF TRUSTEE ACCOUNTABILITY

## I INTRODUCTION

Chapter 5 set out a framework to help us understand how the distributive discretions, that make up the administrative core of the discretionary trust relationship, are regulated. The highest level of the framework distinguishes internal constraints on the trustees' decision-making process from external constraints that define the outer limits of that process. The mid-level framework divides analysis of the internal constraints into three parts. The first part was completed in Chapter 5: the decision-making duties that directly make up the trustee-beneficiary relationship. This chapter completes the framework by analysing the final two parts: 1) the ancillary rules that support the core legal relationship and influence how effectively the beneficiaries can hold the trustees' accountable for their decision-making, and 2) the variables that change how the core decision-making duties and the ancillary rules are applied to different trusts. The extended, descriptive analysis facilitated by these frameworks is necessary to understand the nature of discretionary trusts and the administrative trust model. The final part of this chapter presents the conclusion of the two chapters, which is that the regulation of distributive discretions produces a spectrum of discretionary trusts from low-accountability trusts to high-accountability trusts.

The overall argument made across these two chapters is that, while the distinction between the proprietary and administrative models is coherent, the internal structure of the administrative model — the regulation of the trustees' discretion — has yet to develop coherently. The sheer range of different uncertainties and inconsistencies means that it is impossible to determine, with any precision, what a particular beneficiary's procedural entitlements are. Different judges considering identical trusts might, with proper respect for precedent, determine that: different duties regulate the trustees, the trustees' duties mean different things, the trustees' duties may or may not be effectively enforceable, and different weight should be placed on variables that are relevant to resolving these questions. This depth of uncertainty reduces the authority of precedent: older cases are seldom explicitly overturned and current cases are open to being distinguished because they do not consider the sources of uncertainty comprehensively. Moreover, while there are broad historical trends in how trustees' decision-making has been regulated,[1] there has been little acknowledgement in the courts of how regulation has changed,[2] which means that older authorities cannot be disregarded. For example, authorities from the 17th and 18th centuries[3] were used in *Re Baden's Deed Trusts; McPhail v Doulton* ('*Baden*') to justify increased intervention in trustee decision-making,[4] while authority from the 19th century continues to be cited in favour of decreased intervention.[5]

[1] See below text to nn 134-161.

[2] Cf *Re Reidy* [2015] FCA 432 [45], where Wigney J acknowledged that the law regulating decision-making by trustees in bankruptcy had changed.

[3] *Mosely v Moseley* (1673) Fin 53; 23 ER 28; *Clarke v Turner* (1694) 2 Freeman 198; 22 ER 1158; *Warburton v Warburton* (1702) 4 Bro Parl Cas 1; 2 ER 1; *Richardson v Chapman* (1760) 7 Bro Parl Cas 318; 3 ER 206.

[4] [1971] AC 424, 451 (Lord Wilberforce).

[5] See, eg, *Secretary, Department of Family and Community Services v Geeves* (2004) 136 FCR 134, 143 [34] (Weinberg J), citing *Gisborne v Gisborne* (1877) 2 App Cas 300 ('*Gisborne*').

The cumulative effect of the uncertainty in regulation is that the legal form of discretionary trusts is highly variable. While there is consistency in the legal form of a discretion — a power constrained by duties — there is inconsistency in the authority and accountability of trustees. The consequence is that the legal form of discretionary trusts presents as a spectrum of accountability. Here accountability means a relationship between the actors (trustees) and a forum (the beneficiaries), where the actors are required to justify their conduct and where that conduct can be judged.[6] Unlike in fixed trusts, where the beneficiaries' entitlements are all the same type of right — the right to a distributive benefit[7] — the discretionary beneficiaries' procedural entitlements may be very different types of rights. They may be bare rights to have the trustees act honestly through to rights to have the trustees make reasoned and justifiable decisions according to clear criteria. This chapter maps the range of procedural entitlements that beneficiaries may have onto a spectrum of high-accountability to low-accountability trusts.[8] This framework is introduced to help us comprehend the cumulative effect of the different choices that may be made about numerous uncertainties. A particular trust's place on the spectrum will be determined by which decision-making duties and ancillary rules are

[6] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 450. See also Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24(3) *Australian Journal of Administrative Law* 189. The concept of accountability may also suggest implicit values, such as good quality decision-making: see Bovens 448–50. The ideas of accountability as a forum requiring justification and accountability as high quality decision-making are reconciled through the proposition that requiring trustees to justify their decisions is likely to improve their standard of decision-making. However, the degree to which this assumption is true is contested and requires empirical research: see Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 356.

[7] See Chapter 2 Part II(C).

[8] The idea of a spectrum of discretionary trust types is not new. For example, Pearce and Barr set out a spectrum consisting of trust powers, fiduciary mere powers and non-fiduciary mere powers: Robert Pearce and Warren Barr, *Pearce & Stevens' Trusts and Equitable Obligations* (Oxford University Press, 6th ed, 2015) 46–51. This creates a spectrum founded in different ways powers are drafted rather than the full range of factors affecting accountability proposed in this thesis.

applied to it and whether, assessed holistically, they enable or hinder the beneficiaries in holding the trustees to account.

It is recognised that, while this spectrum of trustee accountability is at present produced partly by incoherence, a spectrum of accountability could be coherent. There is a strong pluralist theme in the law. Coherence does not require that a single regulatory regime apply to all discretionary trusts but can accept different standards of decision-making in different contexts.[9] However, a coherent, pluralist system of trustee regulation would need a clear system of higher-level organising principles that determine which modes of regulation apply to which trusts. For example, one possible organising principle is that interpretation of the trust instrument should determine the regulatory regime. While some cases reflect this principle, others are inconsistent with it, as will be shown below.[10] The result is that, at present, trustees and beneficiaries cannot easily predict the standard of accountability to which particular trustees will be held. The future development of these organising principles will be explored further in Chapter 7.

The argument presented over Chapters 5 and 6 responds to the third research question addressed in this thesis.[11] It asks whether any conceptual incoherence is produced by the distinction between proprietary and administrative trust models, which attribute different meanings to the trustees' duty to hold assets for the benefit of beneficiaries. The answer

[9] For example, there is an idea that superannuation trustees are to be held to a higher standard of decision-making because of their social context: *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 271 [33] ('*Finch*').

[10] See below Part III(C)–(D).

[11] See Chapter 1 Part II.

is that while the distinction between the two types of trust is coherent, incoherence remains within the administrative model.

## II UNCERTAINTY IN ANCILLARY RULES

The procedural nature of the decision-making duties set out in Chapter 5 means that their effective enforcement depends on the surrounding matrix of regulatory rules. These ancillary rules include rules concerning whether beneficiaries must be notified of their procedural entitlements, whether trustees must disclose reasons for their decisions, the remedies available to cure impaired decisions, and the effect of granting powers over the trustee-beneficiary relationship to parties outside that relationship. These rules can significantly impair the beneficiaries' ability to hold the trustees accountable for their decisions, even if there was certainty about the trustees' duties. As with the duties themselves, there is not only uncertainty about what these ancillary rules are, but uncertainty about whether the rules apply differently to different types of trusts. However, the latter uncertainty will be considered in Part III below.

### A *Duty to Notify Beneficiaries of their Status*

There is uncertainty whether, and to what extent, trustees have a duty to notify discretionary beneficiaries of their position and rights under the trust. This duty is not a decision-making duty but is a necessary prerequisite for beneficiaries to be able to enforce their procedural rights. While fixed trustees likely do have a duty to notify presently entitled beneficiaries,[12] there is limited and inconsistent authority on discretionary

[12] *Hawkesley v May* [1956] 1 QB 304, 322; *Hawkins v Clayton* (1988) 164 CLR 539, 553–4 (Brennan J). However, correct distribution under the terms of the trust may be enough without separate notification: *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431, 457 [136], 459 [148] (Gleeson JA).

beneficiaries. Mahoney JA has doubted there could be such a duty.[13] In contrast, Palmer J has ordered a deceased trustee's estate to pay an unsuccessful plaintiff's costs who need not have brought the claim but for the deceased trustee's failure to make the discretionary beneficiaries aware of their rights.[14] This is an area in which case law is likely to remain sparse because breach of the duty usually prevents claims being brought.

### B *Disclosure of Reasons*

Access to the reasons why trustees make particular distributions is essential for effective review of the trustees' duties at the deliberation stage.[15] Access to other information, such as the trust accounts, may raise suspicion of a breach, but is unlikely to establish it. There are at least two distinct potential pathways for beneficiaries' to access trustees' reasons: the trustees' duty to disclose information and ordinary civil procedure rules. (In the United Kingdom, an independent route to access reasons may arise through data protection and privacy laws.[16])

The most efficient way for beneficiaries to access trustees' reasons for their distributive decisions would be an independent duty on the trustees to disclose their reasons upon request. However, it is, almost,[17] universally accepted in the cases that the

[13] *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 432 (Mahoney JA) ('*Hartigan*').

[14] *Chang v Tjiong* [2009] NSWSC 122, [44]-[47]. See also *Murphy v Murphy* [1999] 1 WLR 282 ('*Murphy*'); *SAS Trustee Corp v Cox* (2011) 285 ALR 623, 653–4 [148] (Campbell JA); David Fox, 'Non-Excludable Trustee Duties' (2010) 17(1) *Trusts & Trustees* 17, 20–1.

[15] *Esso Australia Ltd v Australian Petroleum Agents' and Distributors' Association* [1999] 3 VR 642, 651–2 [39] ('*Esso*'); *Mandie v Memart Nominees Pty Ltd* [2018] VSC 719 [154] ('*Mandie* (2018)'). When trustees voluntarily ask the courts to assess proposed distributions to ensure they are not breaching any decision-making duties the courts require full disclosure of all relevant information: see *Re Honoris Trust* [2018] 3 NZLR 160, 175–6 [55], [59]-[60].

[16] See *Dawson-Damer v Taylor Wessing LLP* [2017] 1 WLR 3255, 3265-6 [46]-[54] (Arden LJ).

[17] The exception is Kirby J's dissent in *Hartigan* (n 13) 413.

beneficiaries' independent right to information about the state of the trust fund does not include access to the trustees' reasons.[18]

The alternative pathway to access trustees' reasons lies in the civil procedure rules that govern the disclosure of evidence during proceedings. This pathway would be less efficient as beneficiaries must commence costly proceedings. Moreover, the cases present two conflicting lines of authority on whether civil procedure rules require the disclosure of trustees' reasons.

The traditional position is that trustees have a broad immunity against the courts examining their reasons.[19] The archetypal case is *Re Londonderry's Settlement; Peat v Walsh*, which was a request for information.[20] While the Court of Appeal's decision was without prejudice to any right of discovery in proceedings against the trustees,[21] the judges made general statements that the trustees could not be expected to account to the beneficiaries or the courts for their reasons or motives for making a decision.[22] In a later case, Macaulay J summarised the justifications for this immunity:

> A trustee's immunity from giving reasons for the exercise of a discretion is founded upon (1) the irrelevance of those reasons because, absent a breach of trust, a court will simply not interfere; (2) the essentially confidential nature of the trustee's task, serving the interests of the beneficiaries as a whole; and (3) the avoidance of making the task of a discretionary trustee intolerable.[23]

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[18] *Erceg v Erceg* [2017] 1 NZLR 320 (SC), 338–9 [56] ('*Erceg*').

[19] See *Hartigan* (n 13) 436 (Mahoney JA), 442 (Shelley JA); *Foreman v Kingstone* [2004] 1 NZLR 841, 859 [89] ('*Foreman*'); *Breakspear v Ackland* [2009] Ch 32, 51-2 [54]-[58] ('*Breakspear*').

[20] [1965] Ch 918 ('*Londonderry*').

[21] Ibid 939.

[22] Ibid 928 (Harman LJ), 936 (Danckwerts LJ), 936–7 (Salmon LJ).

[23] *Mandie v Memart Nominees Pty Ltd* (2014) 42 VLR 325, 342 [94] ('*Mandie* (2014)').

Some cases have applied this broad immunity in proceedings alleging a breach of decision-making duties. Macaulay J interpreted the authorities as meaning that 'even in a proceeding which features a specific allegation of breach of trust, a trustee is not obliged to state its reasons'.[24] In *Hartigan Nominees Pty Ltd v Rydge*, Mahoney JA said that a settlor's letter of wishes would only be discoverable if the claimant already knew that it contained information relevant to a breach of duty but would not be discoverable in order to see whether it did contain information that was relevant or not.[25] This was because a 'beneficiary may support a case by discovery but may not use the process to ascertain whether a case exists'.[26] In *Flegeltaub v Telstra Super Pty Ltd* ('*Flegeltaub*'), Beach J held that trustees did not have to answer interrogatories about their reasons.[27]

In contrast, another set of cases have held that beneficiaries must be able to access the trustees' reasons during proceedings about any potential breach of the trustees' decision-making duties. In some cases, judges have suggested that trustees would need to give reasons to prevent an adverse inference being drawn from silence in the face of a prima facie case.[28] In *Wendt v Orr*, which was reversed on a different point, an executor-trustee was not protected from cross-examination and *Flegeltaub* was doubted.[29] In *Curwen v Vanbreck Pty Ltd*, the Victorian Court of Appeal held that no adverse inference could be

[24] Ibid 347 [118]. The same plaintiffs later brought an application for discovery pursuant to an improper purpose claim, but it was refused for unjustified delay: *Mandie v Memart Nominees Pty Ltd (No 4)* [2018] VSC 49.

[25] *Hartigan* (n 13) 437.

[26] Ibid.

[27] [1998] VSC 144 [15]-[22].

[28] *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 AllER 705, 718–9; *Maciejewski v Telstra Super Pty Ltd* (1998) 44 NSWLR 601, 604; *Edge v Pensions Ombudsman* [2000] Ch 602 (CA), 633 ('*Edge*'); *Knudsen v Kara Kar* [2000] NSWSC 715 [112], revd *Kara Kar Holdings Pty Ltd v Knudsen* [2001] NSWCA 276 ('*Knudsen*'); *McNulty v McNulty* (2011) 14 ITELR 361, 390 [114]; *Sharp v Maritime Super Pty Ltd* (2012) 9 ASTLR 85, 124 [176].

[29] [2004] WASC 28 [47], revd [2005] WASCA 199.

drawn simply from failure to volunteer reasons.[30] However, contrary to Macaulay J's interpretation that a trustee has a right to 'stand mute',[31] the Court clearly indicated that a trustee could be asked to give reasons in cross-examination.[32] The Court did not say that trustees would be protected if they stayed silent when asked to explain their decisions. In *Guest v Guest*, Mukhtar AsJ accepted a claim for pre-litigation discovery of trust documents, but where the claimants had not asked for discovery of reasons.[33] He noted that if a claim for judicial review of the trustees' decision was lodged then there would be an automatic right to discovery of the trustees' reasons as they would be directly relevant to resolving the claim.[34]

There are good reasons to prefer the latter line of cases. First, one justification for the trustees' immunity is that reasons are simply not relevant to any breach of trust;[35] however, this justification best fits earlier cases where the purpose and relevancy duties were less developed.[36] It does not fit with the growing acceptance that the purpose and relevancy duties concern the trustees' reasons for their decisions.[37] Second, the latter line of cases is consistent with modern rules of civil procedure. Mahoney JA's reasoning about discovery, quoted above,[38] is out of date. Many jurisdictions provide for pre-litigation discovery that can be used to see if a case exists. For example, in Victoria potential plaintiffs can seek access to documents in order to decide whether they have

[30] (2009) 26 VR 335, 348–9 [25] ('*Curwen*').

[31] *Mandie* (2014) (n 23) 347 [118].

[32] *Curwen* (n 30) 350 [30]-[31].

[33] (2015) 16 ASTLR 90.

[34] Ibid 112 [73], 114 [80].

[35] See quotation above n 23.

[36] *Londonderry* (n 20) 936 (Salmon LJ).

[37] See *Esso* (n 15) 651–2 [39]; *Mandie* (2018) (n 15) [154].

[38] See above n 26.

sufficient evidence to bring a claim.[39] This expressly allows 'fishing expeditions', provided they are not purely speculative.[40] Third, several earlier cases state that it is judicial policy to protect trustees from accountability.[41] Such a principle does not fit with any trust model that takes beneficiaries' rights seriously.

In New Zealand, statutory reforms have removed the trustees' immunity. The *Trusts Act 2019* provides beneficiaries a right to ask the court to review any trustee decision, provided they produce 'evidence that raises a genuine and substantial dispute'.[42] If this evidentiary onus is met, then the onus switches to the trustees to establish that their decision was reasonably open to them in the circumstances. While the barrier presented by the evidentiary onus has yet to be interpreted by the courts, the Law Commission did propose this provision in order to end the stultifying effect that the trustees' immunity has on trustee accountability;[43] therefore, it may well be interpreted favourably to beneficiaries.

In summary, while the most efficient pathway to effective enforcement of decision-making duties is closed by the exclusion of trustees' reasons from the duty to disclose information, there is an alternative pathway through the ordinary evidence gathering procedures. However, there remains significant conflict within the cases about the extent

[39] See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ord 32.

[40] *Schmidt v Won* (1998) 3 VR 435 (CA), 445 (Ormiston JA). In England, the more focused the request for disclosure the more likely it is to be approved even if it may arguably be a fishing expedition: *Black v Sumitomo Corporation* [2002] 1 WLR 1562, 1590 [95] (Rix LJ). See also Neil Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* (Mohr Siebeck, 2008) 107.

[41] *Hartigan* (n 13) 436 (Mahoney JA). See also *Foreman* (n 19) 859 [89]; *Breakspear* (n 19) 51-2 [54]-[58].

[42] *Trusts Act 2019* (NZ) s 127.

[43] New Zealand Law Commission Te Aka Matua o te Ture, *Review of the Law of Trusts: A Trusts Act for New Zealand* (Report No 130, August 2013) 176 [11.13]-[11.15].

to which trustees' reasons can be disclosed through these procedures. There are good reasons to resolve this uncertainty in favour of disclosure, however, the older line of cases remains influential. Until this inconsistency is resolved, there is no certainty that a judge will, or will not, require disclosure of reasons.

### C *Remedies*

Decision-making duties can only be effectively enforced if effective remedies are available; however, this is another area of uncertainty. The primary remedial tool for beneficiaries is the comprehensive action for account that embraces compensation for loss, proprietary recovery of misapplied assets, and recovery of unauthorised profits.[44] There is uncertainty in how this remedy applies to decision-making duties and whether additional remedies are available.

First, there is uncertainty about the availability of compensation for loss. Jessica Hudson has noted that the question whether decision-making constraints are duties or only standards may affect the availability of compensatory remedies. There is an argument that trustees should only be liable to restore the trust fund if they have breached a duty rather than merely fallen foul of a standard.[45] An alternative argument may be that non-compliance with a standard gives rise to personal liability under the trustees' general duty of due administration.

Second, there is uncertainty about the voidability of distributive decisions. If a decision about distribution and any consequential transactions are voidable then the

[44] Thomson Reuters, *Ford and Lee: The Law of Trusts* (online at 23 January 2020) [17.1510].

[45] Jessica Hudson, 'One Thicket in Fraud on a Power' (2019) 39(3) *Oxford Journal of Legal Studies* 577, 585–6 fn 51.

beneficiaries will be able to trace and recover the trust fund.[46] However, it is not clear that every breach of a decision-making duty renders a decision voidable. The tension can be illustrated by David Fox's account of overreaching, which is the trustees' ability to overreach or extinguish the beneficiaries' equitable rights through an authorised disposition of trust assets.[47] This raises a question about the relationship between the authorisation of dispositions and breaches of decision-making duties: do all breaches invalidate authorisation? The issue is further complicated by the association between voidability and rescission.[48] Rescission is available for breach of a fiduciary duty,[49] but, Nolan suggests, not for breach of a duty of care.[50] Thus, if the voidability of a trustee decision is properly understood as rescission, it raises the debate about what decision-making duties are properly categorised as fiduciary[51] or whether lack of care in decision-making is sufficient to vitiate the decision. For example, in *Abacus Trust Co (Isle of Man) v Barr*, a lack of reasonable care in obtaining the relevant information was defined as a breach of fiduciary duty.[52] In *Pitt v Holt* ('*Pitt*'), the Supreme Court held that a lack of adequate deliberation, which is a lack of care,[53] was breach of a fiduciary duty.[54] Further complications include the longstanding debate about when decisions are void or only voidable;[55] and a more recent debate about whether rescission should only be granted if

[46] There is, however, a lack of authority on the point: see Chapter 3 n 85.

[47] David Fox, 'Overreaching' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 95.

[48] *Pitt v Holt* [2012] Ch 132, 203-5 [231]-[232], [237]-[238] (Mummery LJ) ('*Pitt* (CA)').

[49] *Maguire v Makaronis* (1997) 188 CLR 449; *Pitt v Holt* [2013] 2 AC 108, 138 [70] ('*Pitt*').

[50] See RC Nolan, 'Controlling Fiduciary Power' (2009) 68(2) *Cambridge Law Journal* 293, 294.

[51] See Chapter 5 text to nn 67–70.

[52] [2003] Ch 409, 419 [27].

[53] See Guy Newey, 'Constraints on the Exercise of Trustees' Powers' in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 36, 53–5.

[54] *Pitt* (n 49) 139 [73].

[55] Ibid 136 [62].

the trustees would, or might, have made a different decision than their initial flawed decision.[56]

Third, a relatively unexplored question is whether remedies are available to order the proper exercise of a discretion as well as reversing improper exercises. This question could arise after an impaired distribution has been rescinded, or if the trustees' decision not to make a distribution is impaired by breach of a decision-making duty. In relation to trust powers, it appears broadly accepted that courts can order a discretion to be exercised, because courts can execute trustees' duties to exercise discretions.[57] In *Baden*, Lord Wilberforce suggested three remedies: appointing new trustees, directing beneficiaries or their representatives to prepare a scheme of distribution for consideration by a court, and directly ordering distribution.[58] However, this is one area where the distinction between trust and mere powers continues to be influential.[59]

In contrast with trust powers, trustees have no absolute duty to exercise a mere power. Traditionally, this meant that the courts were not necessarily required to find a remedy if the discretion was not exercised. The orthodox position extrapolates from this difference to conclude that the courts have no jurisdiction, in any circumstances, to order the exercise

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[56] See *Re Hastings-Bass (dec'd); Hastings-Bass v Inland Revenue Commissioners* [1975] Ch 25 (CA), 41 ('*Hastings-Bass*'). See also Michael Ashdown, *Trustee Decision Making: The Rule in* Re Hastings-Bass (Oxford University Press, 2015) 86-97 [5.11]-[5.31]. Note that the appropriateness of but/for causation tests in questions of decision-making is generally controversial. An alternative test is the 'a factor' test, which only requires that the impugned factor played some role in the decision and contributed to the result: see Elise Bant and Jeannie Marie Paterson, 'Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law' (2017) 24(1) *Torts Law Journal* 1, 15–7.

[57] See, eg, *Australian Incentive Plan Pty Ltd v A-G (Vic)* (2012) 44 VR 661, which upheld the Victorian Supreme Court's direction for the exercise of a trust power.

[58] *Baden* (n 4) 457.

[59] See, eg, *Bridge Trustees Ltd v Noel Penny (Turbines) Ltd* [2008] Pens LR 345, where a judge justified directing the exercise of a discretion by interpreting it as a trust power. See below Part III(E).

of a mere power.[60] Thus, the only remedies are ordering the trustees to consider the decision again or appointing new trustees.[61] (Another contributing reason, as discussed in Chapter 4, is the characterisation of the exercise of a mere power as a divestment of the property rights of the default beneficiary.[62]) However, this conclusion is not logically necessary. The fact that trustees do not have a duty to exercise mere powers in all circumstances does not mean that they cannot have a duty to exercise them sometimes, for example, if refusing to distribute were something no reasonable trustee could do. On this reasoning, the courts could order the trustees to exercise a mere power, if that is what the trustees' duties require them to do. This reasoning is supported by a number of cases. In *Cock v Smith*, which concerned mere powers, O'Connor J stated that the courts can step in and administer the trusts (in the wide sense).[63] In *Klug v Klug*[64] and *Mettoy Pension Trustees Ltd v Evans* ('*Mettoy*'),[65] the judges were willing to order the exercise of a mere power.[66] In the superannuation context it is an open question whether judges can substitute their own decisions or whether they should refer the decision back to the trustee.[67]

[60] See John Chipman Gray, 'Powers in Trust and Gifts Implied in Default of Appointment' (1911) 25(1) *Harvard Law Review* 1, 3–4.

[61] *Re Manisty's Settlement; Manisty v Manisty* [1974] Ch 17, 25; *Knudsen* (n 28) [51]-[54]; *Hannover Life Re of Australasia Ltd v Sayseng* (2005) 13 ANZ Cas 90-123 [33].

[62] See Chapter 4 Part II(B).

[63] *Cock v Smith* (1909) 9 CLR 773 (HCA), 811, revd (1911) 12 CLR 30 ('*Cock*').

[64] [1918] 2 Ch 67, 71 ('*Klug*').

[65] [1990] 1 WLR 1587, 1632 ('*Mettoy*').

[66] See also *Blair v Vallely* [2000] WTLR 615, where the judge directed how the discretion was to be exercised in some detail.

[67] *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* (2015) 89 NSWLR 412, 417-8 [18]-[25] (Basten JA).

In conclusion, there are remedies available that could be used to enforce decision-making duties effectively. However, the availability of these remedies to cure improper decision-making is subject to considerable uncertainty.

### D *Protector Powers*

In many discretionary trusts, the office of trustee is subordinated to powers that are retained by the settlor or granted to someone else, for example, a beneficiary or trusted professional.[68] We will refer to these powers as 'protector powers' although other terms like appointer, enforcer or settlor reserved powers are equally appropriate. Typical protector powers include powers to remove and replace the trustees, to vary the trust terms, to vary the class of beneficiaries, to change the vesting date, or to veto distributions by the trustees.[69] The effect of these powers is to give protectors influence over the trustees and distributive decision-making. They are intended to act as a check on the trustees and oversee their administration of the trust.[70] Where the trustees are not otherwise constrained by their decision-making duties, then the protector, to appropriate

[68] See, eg, Donovan Waters, 'Protectors and Enforcers: Drafting the Trust Instrument' (2000) 8(4) *Journal of International Trust and Corporate Planning* 237; Donovan Waters, 'Trusts: Settlor Reserved Powers' (2006) 25 *Estates, Trusts & Pensions Journal* 234; Donovan Waters, 'Settlor Control: What Kind of a Problem Is It?' (2009) 15(1) *Trusts & Trustees* 12 ('Settlor Control'); Tsun Hang Tey, 'Settlor's Reserved Powers' (2009) 23(4) *Trust Law International* 183; Matthew Conaglen and Elizabeth Weaver, 'Protectors as Fiduciaries: Theory and Practice' (2012) 18(1) *Trusts & Trustees* 17.

[69] A power to veto decisions may be expressed explicitly or through a term that requires the protector's consent as a condition for the valid exercise of a power: see Conaglen and Weaver (n 68) 30.

[70] See, eg, *Blenkinsop v Herbert* (2017) 51 WAR 264, 292 [123] (citations omitted) ('*Blenkinsop*').:

> Prima facie, these features of the Trust Deeds tend to indicate that the object of the provisions is to give the Guardian the opportunity, without the obligation, to exercise a measure of control over the otherwise very broad, and largely unchallengeable, discretions of the Trustee.

See also Tsun Hang Tey, 'Trust Enforcer' (2009) 23(3) *Trust Law International* 151, 151.

Vinelott J's words, is likely to be 'in a position to exercise a decisive influence on the exercise by the trustees'.[71]

The inclusion of these types of powers causes several complications for the beneficiaries' entitlements. This is because dividing influence over distributions between two offices diffuses the distributive control that would otherwise reside in the trustees. Divided control also means divided responsibility.

There is considerable uncertainty about whether protectors are accountable to beneficiaries. This issue manifests as a question of the protector's fiduciary status. The cases tend to answer this question in one of three ways. First, there are cases that investigate the settlor's purpose for granting each power and conclude that the purpose was to benefit the beneficiaries, in which case the power will be regulated by fiduciary duties.[72] Second, there are cases that investigate the same purpose, but come to the opposite conclusion. They conclude that the settlor's purpose was to give control to the protector (often the settlor) for her or his personal benefit, in which case the protector's powers will not be fiduciary.[73] Third, there are cases that do not investigate the settlor's purpose at all, but start with an assumption that protector powers are fiduciary. For

[71] *Inland Revenue Commissioners v Schroder* [1983] STC 480, 502 ('*Schroder*').

[72] *Mercanti v Mercanti* (2016) 50 WAR 495, 575-6 [397]-[398] (Newnes and Murphy JJA); *Berger v Lysteron Pty Ltd* [2012] VSC 95 [83]-[85] ('*Berger*').

[73] *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566, 595 [98]; *Harris v Rothery* (2013) 10 ASTLR 108, 134–5 [168] ('*Harris*'); *Blenkinsop* (n 70) 286-95 [97]-[144]; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) [181]-[278] ('*Pugachev*'). Cf *Kain v Hutton* [2008] 3 NZLR 589 (SC), 596 [10], 600–1 [22] (Elias CJ, Blanchard, McGrath and Anderson JJ).

example, some hold that all powers to remove or appoint trustees must be fiduciary.[74] Others hold that any power exercised over a fiduciary office must itself be fiduciary.[75]

Even when protectors are accountable to beneficiaries through fiduciary duties, they may not be held to the same level of accountability as trustees. The cases that find protectors to be fiduciary suggest only one duty associated with that status: a duty to exercise protector powers in the best interests of the beneficiaries.[76] The formulation of fiduciary duty found in these cases is less stringent than the archetypal idea of a fiduciary as someone who must deny all self-interest.[77] In some of these cases the protector is also a discretionary beneficiary and so may exercise powers in a way that benefits her. One solution would have been for the courts to find that a protector-beneficiary cannot have been intended to be a fiduciary.[78] However, the solution adopted in the cases is to understand a fiduciary as someone who may take into account their own interests alongside the interests of all the other beneficiaries.[79] While it is possible that in the future protectors could be subject to the same system of discretion regulation as trustees, there are no signs of this occurring yet.

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[74] *Schroder* (n 71) 500; *Harris* (n 73) 134 [166]. Cf *El Sayed v El Hawach* (2015) 88 NSWLR 214, 227 [69].

[75] *Carmine v Ritchie* [2012] NZHC 1514 [66] (‘*Carmine*’); *New Zealand Maori Council v Foulkes* [2016] 2 NZLR 337, 344 [22].

[76] *Rayner v NJ Sheaffe Pty Ltd* [2010] NSWSC 810, [152] (‘*Rayner*’); *Berger* (n 72) [84]; *Carmine* (n 75) [70].

[77] See Tobias Barkley, ‘Conceptions of the Fiduciary in Trust Law’ (2019) 13(1) *Journal of Equity* 23, 27–30.

[78] For example, in one case Jenkins J held that where a power of appointment could be exercised to benefit the donee, then the donee was not a fiduciary: *Re Edward’s Will Trusts; Dalgleish v Leighton* [1947] 2 All ER 521, 524 revd [1948] Ch 440. Jenkins J’s decision was reversed without consideration of this point.

[79] *Rayner* (n 76) [152]; *Berger* (n 72) [82]-[85].

Overall, protectors' powers will reduce the accountability of trustees. Reasonable trustees cannot be expected to reject requests or suggestions about distribution from the protector when the very purpose of the protector is to have this influence.[80] For example, a protector could threaten to remove trustees to induce a distribution. It would be unreasonable to hold the trustees accountable for making the distribution, unless a reasonable trustee would have understood that the protector's threat to remove them was in breach of the protector's own duties. This essentially reduces the trustees' duties to a duty to consider whether the protector's purpose in suggesting distributions is proper.

The overall effect of protectors' powers is an accountability gap. The existence of a protector is likely to reduce the trustees' accountability without fully substituting that loss with the protector's accountability. These powers add considerably to the complexity of the trustee-beneficiary relationship and the beneficiaries' ability to hold anyone to account for the distribution of assets. Thus, where they exist, they increase the overall incoherence in regulation.

## III Uncertainty in the Application of Decision-Making Duties and Ancillary Rules

Thus far, the analysis of the regulation of distributive discretions has identified many areas of uncertainty; however, so far, no account has been taken of the fact that regulation varies with different contexts. This raises the possibility that the apparent incoherence identified above could disappear when it is recognised that there are different types of regulation for different types of trusts. For example, could the incoherence be explained

[80] See, eg, *Pugachev* (n 73) [243]-[244].

by the distinction between superannuation trusts and other trusts? Or could it be due to the interpretation of specific trust instruments? This section will argue that, while it would be doctrinally satisfying to find such coherence, imposing a coherent interpretation on this area does not sufficiently fit the cases. While there are certain variables that influence how trustees are regulated, they are not treated consistently and there is uncertainty in how they interact.

An example of the type of uncertainty considered here is the possibility that trustees are subject to enhanced duties when they voluntarily disclose their reasons to the courts. Several cases have stated that a distinct ground to review the soundness of reasons exists, but only when the trustees voluntarily disclose their reasons.[81] Other cases have held that there is no change to the trustees' duties and volunteering reasons only makes it easier to prove a breach.[82] We need not investigate this particular question. Even if this distinct ground exists it does not enhance the beneficiaries' rights because the enhanced oversight only occurs with the trustees' consent.[83]

Several further significant variables affect the application of decision-making duties. These include the social context of the trust, express terms, exclusion clauses, the presence of a mere or trust power, and the beneficiaries' expectations. The purpose of this section is to demonstrate that these variables are not treated consistently and may be associated with very different levels of trustee accountability. While variables such as

[81] See *Londonderry* (n 20) 929 (Harman LJ); *Karger v Paul* [1984] VR 161, 166 ('*Karger*'); *A-G (Cth) v Breckler* (1999) 197 CLR 83, 99-100 [7].

[82] See *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, 900 (Lord Normand); *Manglicmot v Commonwealth Bank Officers Superannuation Corporation* (2010) 239 FLR 159, 168-71 [26]-[35].

[83] See Chapter 4 text to nn 99-100 on the self-contradicting idea of a duty where its performance is optional.

these could be incorporated into a system of principles that produced coherent and consistent answers, this has not yet been achieved.

### A *Jurisdiction*

There are differences in how distributive discretions are regulated between jurisdictions; however, substantial differences are surprisingly infrequent. Judges in the United Kingdom, Australia, New Zealand and Canada frequently refer to, and follow, decisions outside of their home jurisdictions. This contributes to a broadly consistent approach to trust law by the courts, practitioners and academics in these jurisdictions, as one judge has observed.[84] Often differences will appear and then disappear as developments spread from one jurisdiction to another. For example, in the United Kingdom, the *Hastings-Bass* line of cases developed a unique doctrine,[85] which was treated with scepticism in Australia.[86] However, this difference between the jurisdictions has disappeared because the *Hastings-Bass* doctrine was curtailed in the United Kingdom by *Pitt*,[87] and the relevancy grounds have developed in Australia, as seen in *Finch v Telstra Super Pty Ltd* ('*Finch*').[88]

Even legislative differences have not created consistently different outcomes. Queensland has a statutory provision for review of trustee decisions that empowers the

[84] See, eg, *Breakspear* (n 19) 44 [32].

[85] *Hastings-Bass* (n 56); *Mettoy* (n 65).

[86] See *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd* [1999] 1 VR 144, 157 [40]-[41]; JC Campbell, 'Should the "Rule in *Hastings-Bass*" Be Followed in Australia?: Trustees' Duty to Enquire and Trustees' Mistakes' (2011) 34(3) *Australian Bar Review* 259; M Scott Donald, 'Characterising Australia's Super Fund Participants' in M Scott Donald and Lisa Butler Beatty (eds), *The Evolving Role of Trust in Superannuation* (Federation Press, 2017) 33, 50.

[87] *Pitt* (n 49).

[88] *Finch* (n 9).

courts to require trustees 'to substantiate and uphold the grounds of the act, omission or decision that is being reviewed'.[89] However, the Queensland courts have held that a 'heavy onus lies upon a person seeking a review' similar to the inherent jurisdiction.[90] The power to require trustees to substantiate their decisions has not led to a visible difference between Australian states regarding access to trustees' reasons.[91]

A possible exception is New Zealand, which may develop very differently from other jurisdictions due to a comprehensive statutory restatement of trust law.[92] For example, the reforms have removed the trustees' immunity from disclosing reasons.[93]

### B *Social Context*

The social context of a trust can influence the rules that apply to it. For example, a commercial rather than a traditional family context may be relevant.[94] The most important social context is superannuation. Several scholars have argued that superannuation has produced a unique species of trust form.[95] This is supported, for example, by the High Court's reasoning that the superannuation context means that

[89] *Trusts Act 1973* (Qld) s 8. New Zealand and Western Australia have similar provisions but they only apply to statutory powers and not to distributive discretions granted in the trust instrument: *Trustees Act 1962* (WA) s 94; *Trustee Act 1956* (NZ) s 68.

[90] *Re Whitehouse* [1982] Qd R 196, 204.

[91] Searches of LexisNexis and Westlaw AU reveal no cases where the court required the trustees to substantiate their decision.

[92] *Trusts Act 2019* (NZ).

[93] See above text to nn 42–43.

[94] See *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503, 1528–9 [70] (Lord Toulson JSC).

[95] Graham Moffat, 'Pension Funds: A Fragmentation of Trust Law' (1993) 56(4) *Modern Law Review* 471; Marina Milner, 'Pension Trusts: A New Trust Form' [1997] (Mar-Apr) *Conveyancer and Property Lawyer* 89; Scott Chareneka, 'Legal Darwinism: The Evolution of a New Trust Species' (2000) 11(2) *Insurance Law Journal* 120 (author's name given as Chareneka, not Charaneka, in original); David Hayton, 'Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts' [2005] (May-Jun) *Conveyancer and Property Lawyer* 229.

beneficiaries have high and legitimate expectations that the trustees' decisions will be soundly taken.[96] However, while it is true that superannuation trusts are somewhat unique, there is much uncertainty about when and how this will affect regulation of the trustees.[97]

First, it must be noted that superannuation trusts are dominated by fixed interests not discretionary interests.[98] For example, the common discretion to determine whether an employee is totally and permanently disabled is not a distributive discretion;[99] it is a duty to determine the facts necessary to decide the employee's claim to a fixed entitlement.[100] This creates uncertainty because it is difficult to determine how cases on these types of discretion are relevant to true distributive discretions. For example, *Finch* concerned a fixed interest, but was decided by applying the distributive discretion principles from *Karger v Paul* ('*Karger*').[101]

There is less ambiguity in cases concerning the two areas where superannuation trustees do exercise distributive discretions. First, a distributive discretion can arise when surpluses are accumulated in the trust fund, beyond what is needed to satisfy the beneficiaries' entitlements. For example, variable economic conditions can produce large

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[96] *Finch* (n 9) 271 [33].

[97] See, generally, M Scott Donald, 'The Pension Trust: Fit For Purpose?' (2019) 82(5) *The Modern Law Review* 800, 802–5.

[98] In Australia the beneficial entitlements of superannuation beneficiaries are money sums. The sums are usually defined either by set criteria, such as a certain percentage of pre-retirement income, or by the value of contributions made to the fund and invested in mutual investments: see Australian Securities and Investments Commission, 'Types of Super Funds', *Moneysmart* (Web Page, 12 February 2019) <https://www.moneysmart.gov.au/superannuation-and-retirement/how-super-works/choosing-a-super-fund/types-of-super-funds>.

[99] See JC Campbell, 'Exercise by Superannuation Trustees of Discretionary Powers' (2009) 83(3) *Australian Law Journal* 159, 160–1.

[100] *Finch* (n 9) 270 [29].

[101] Ibid 272–3 [38], 280 [65].

surpluses, and consequent disputes between companies and employees over their distribution.[102] In some such cases judges have intervened to a greater degree than is typical in domestic trusts. For example, in *Mettoy*, Warner J directed the exercise of a fiduciary mere power[103] and in *Edge v Pensions Ombudsman* the Court of Appeal of England and Wales stated that trust law principles of review were very similar to public law principles.[104] Second, in Australia, a distributive discretion arises upon an employee's death. Superannuation entitlements are limited to death and do not pass under the employee's estate, but instead are paid out at the discretion of the trustee.[105] The discretion is limited to the deceased's personal representatives, spouse, children and dependants, unless none can be found, in which case there is an open discretion.[106] In at least one case, the Superannuation Complaints Tribunal[107] exercised an intensive control over this discretion, which was approved as correct in the Federal Court.[108] In *D14-15\227*, the Tribunal decided that a trustee's decision to pay all of a deceased beneficiary's entitlements to the deceased's mother as legal personal representative was unfair and

[102] See Clare Dobie, 'The Ownership of a Pension Fund Surplus', *The Independent* (London, 5 February 1990) 23; Eric Short, 'A Moral Dilemma within the Pensions Industry', *Financial Times* (London, 13 February 1990) 15; Christopher Arnheim and Anne Taylor, 'No Easy Answer to the Question of Who Owns a Pension Fund Surplus', *Lloyd's List International* (London, 11 October 1991) 4. Surpluses also arise in Australia: see *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593.

[103] *Mettoy* (n 65) 1632.

[104] *Edge* (n 28) 628.

[105] See *Stock v NM Superannuation Pty Ltd* [2015] FCA 612 [16].

[106] *Superannuation Industry (Supervision) Regulations 1994* (Cth) r 6.22. For example, cl 46 of the UniSuper fund trust deed grants the trustee an absolute discretion: *Consolidated Trust Deed*, UniSuper (at 25 November 2017) <www.unisuper.com.au>. Superannuation beneficiaries can avoid the operation of this discretion by making a binding notification that benefits are to be paid to a person or persons nominated: *Superannuation Industry (Supervision) Act 1993* (Cth) s 59.

[107] The Superannuation Complaints Tribunal's jurisdiction has been replaced by the Australian Financial Complaints Authority: *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) ('*AFCA Act*').

[108] *Ievers v Superannuation Complaints Tribunal* (2016) 160 ALD 96, 97 [3], 121 [71] ('*Ievers*').

unreasonable.[109] Instead, all of the benefit was to be paid to the deceased's de facto partner who 'would have had a legitimate expectation' that the trustee's discretion be exercised in his favour,[110] because he was the only person with a right to ongoing financial support from the deceased.[111] Shockingly, the Tribunal also decided that extensive evidence of psychological and financial abuse by the de facto partner — which the coroner said was a contributing factor in the beneficiary's suicide[112] — was not relevant to the trustees' decision.[113] This is a significantly more intrusive intervention than typical in trust cases, including other superannuation cases, but was upheld in the Federal Court.[114]

Second, as the above case also highlights, differences between superannuation and other trusts are impacted by legislative differences and regulatory dispute resolution bodies that override the common law.[115] A key legislative intervention is the Tribunal's jurisdiction to set aside unfair or unreasonable decisions.[116] The Tribunal may also require the trustees to give reasons,[117] although there has not yet been statutory intervention to create an independent right to access reasons.[118] However, the jurisdictional limits on complaints to the Tribunal mean that many disputes continue to

[109] [2015] SCTA 82.

[110] Ibid [30].

[111] Ibid [32].

[112] Ibid [41].

[113] Ibid [30], [48]-[49].

[114] *Ievers* (n 108) 120-1 [66]-[67].

[115] Legislation may also demand that common law rules change to be coherent with legislative principles: see Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *UNSW Law Journal* 367.

[116] *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 14(2).

[117] See *D14-15\184* [2015] SCTA 39 [57].

[118] Cf Dimity Kingsford Smith, 'Who Knows Best? Review of Discretionary Powers in Superannuation Funds' (2000) 28(6) *Australian Business Law Review* 428, 440–1.

the courts.[119] The High Court in *Finch* acknowledged that there was a question about whether disputes that go to court rather than the Tribunal should be determined by the same principles as the Tribunal legislation; however, the Court declined to answer that question and simply applied the equitable principles of review.[120]

Third, the distinctiveness of superannuation trusts may be overridden or minimised by other variables. For example, *Finch* indicates that superannuation trustees might escape judicial control through exclusion clauses.[121] For this to be successful the exclusion clause would have to be consistent with the mandatory statutory covenants that are incorporated into all superannuation trust instruments. They impose duties to act honestly, in the best interests of the beneficiaries, prudently, and with fairness between beneficiaries and different classes of beneficiaries.[122] However, under the *Superannuation Industry (Supervision) Act* 'beneficiary' is defined as those with a beneficial interest,[123] which arguably does not include discretionary beneficiaries under the death provisions.[124]

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[119] Before the Tribunal was replaced, complaints had a twelve month time limit: *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 22(3)(a). In 2018, 35% of complaints to the Tribunal were outside of its jurisdiction: Superannuation Complaints Tribunal, *Annual Report 2017-2018* (21 September 2018) 34. It can safely be assumed that more complaints were not lodged with the Tribunal because they were out of time. Now, under the Australian Financial Complaints Authority rules, complaints about superannuation death benefits must be made within 28 days of notification of a decision: *AFCA Act* (n 107) B.4.1.3.

[120] *Finch* (n 9) 279-81 [62]-[66].

[121] Ibid 272 [36].

[122] *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2).

[123] *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

[124] See Chapter 3 text to nn 44-48 on the distinction between fixed beneficial interests and the interests of discretionary beneficiaries.

Fourth, contextual distinctions may not persist over time. For example, the duty to consider relevant matters, accepted in *Pitt*,[125] has been progressively developed in both domestic and superannuation trust cases.[126] The development of more intensive review in superannuation cases may yet be extended to other contexts. The impetus of common law incremental change through analogical reasoning suggests that such change may occur unless there are good reasons for less accountability in those contexts.

In summary, social context is important, but not decisive or certain. While the superannuation context is associated with a higher degree of trustee accountability, there is considerable uncertainty about how much more accountability is required and whether the superannuation context's relevance may be subject to other variables considered below. Thus, Megarry V-C's statement that he could 'see no reason for holding that different principles apply to pension fund trusts from those which apply to other trusts' may remain applicable in many cases.[127]

### C *Express Terms*

Decision-making duties can be expressly imposed on the trustees by the settlor, rather than being implied or imposed on general principles. For example, in *Sinclair v Moss* a term of a trust expressly obliged the trustees to take into account a beneficiary's other income and need for support before distributing trust income to her.[128] This duty is identical in nature to the general duty to take relevant matters into account.[129] However,

[125] *Pitt* (n 49).

[126] *Hastings-Bass* (n 56); *Mettoy* (n 65); *Edge* (n 28).

[127] *Cowan v Scargill* [1985] 1 Ch 270, 290.

[128] [2006] VSC 130, [3], [78].

[129] Ibid [17].

the courts are likely to be comfortable demanding a higher standard of accountability when relevant considerations are written down. Byrne J held the trustees accountable in the following ways: they had to disclose all material that had informed their decisions; they had to disclose what inquiries they did or did not pursue; and Byrne J noted that the amount of effort required of the trustees in considering the relevant matter depended on the context.[130] The settlor's imposition of the decision-making duty removes any tension between the principles of settlor autonomy and trustee accountability.[131]

### D *Exclusion Clauses*

Exclusion clauses are used to limit the application or effect of decision-making duties. There are two basic types of clause: those that directly exclude the primary duty, whether all or in part, and those that exclude liability for breaching the duty.[132] Liability exclusion clauses mean that there is no personal remedy against the trustee for a breach, but do not prevent other remedies such as rescission or proprietary remedies.[133] Although the purpose of exclusion clauses is to limit trustee accountability, their effectiveness has varied considerably over their history.

Exclusion clauses have played such a significant role in the history of regulating discretionary trustees that it is useful to summarise the historical trends here. Four periods can be identified.[134] First, into the 19th century there was a widespread view that trustee

[130] Ibid.

[131] The tension between these principles is considered in Chapter 7 Part I.

[132] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848-850 (Lord Diplock).

[133] See JE Penner, 'Exemptions' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 241, 251–3.

[134] These four periods can be usefully compared to the four periods of development of trust powers: see Chapter 3 Part III(A).

discretions should be exercised fairly and reasonably.[135] The core of this view was the doctrine of illusory appointments. In *Bax v Whitbread*, Lord Eldon affirmed this longstanding rule that each beneficiary of a trust power must receive a share that was not illusory but 'reasonable, fair, a substantial share, a provision; that the power is to be exercised consistently with justice'.[136]

Second, from the start of the 19th century the courts began to move away from the interventionist stance[137] and encouraged the drafting of trust terms that excluded the courts' jurisdiction.[138] This led to the widespread adoption of exclusionary terms, such as 'absolute' or 'uncontrolled' discretions, which culminated in *Gisborne v Gisborne* ('*Gisborne*').[139] The House of Lords held that the grant of 'uncontrollable' discretions by settlors excluded any jurisdiction of the court to intervene, unless there had been 'mala fides'.[140] An illustrative case is *Tabor v Brooks*, where two trustees paid all the income to one beneficiary, 'a drunkard of the worst description',[141] and none to the other beneficiary, his wife. Their reason for doing so was to force the wife to return to live with the husband.[142] Malins VC held that, while discretions usually had to be exercised

[135] See *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440; 42 ER 330, 333 ('*Beloved*'); *Tabor v Brooks* (1878) 10 Ch D 273, 277 ('*Tabor*'); *Hampden v Earl of Buckinghamshire* [1893] 2 Ch 531, 544.

[136] (1809) 16 Ves Jr 15; 33 ER 889, 890.

[137] Sir William Grant, in *Butcher v Butcher* (1804) 9 Ves 382; 32 ER 650, 654–6, expressed strong disapproval of courts interfering in the exercise of trustee discretions. Lord Eldon on appeal also expressed reservations but affirmed the doctrine of illusory appointments because it was well established: (1812) 1 Ves & B 79; 35 ER 31, 36.

[138] See *Kemp v Kemp* (1801) 5 Ves Jr 849; 31 ER 891.

[139] *Gisborne* (n 5).

[140] Ibid 305 (Lord Cairns).

[141] *Tabor* (n 135) 276.

[142] Ibid 277.

fairly and reasonably,[143] in this case the terms provided 'uncontrolled and irresponsible' discretion, which prevented interference by the Court.[144]

Third, bolstered by exclusion clauses and the statutory revocation of the illusory appointments doctrine,[145] the courts' reluctance to intervene in the exercise of discretions eventually transformed into a general principle. Later courts could describe the effect of these developments as the courts' traditional reluctance to intervene.[146] However, as non-intervention became a general principle, the courts began to grant less respect to the terms of the discretion. A telling example is *Cock v Smith*, which concerned two trusts each with a mere power that could be exercised in favour of a beneficiary who was, respectively, the daughter and sister of the two settlors.[147] Initially, in a split decision, the High Court took an interventionist approach, despite citing *Gisborne*.[148] The prevailing judgments held that the trustees had a duty to consider what was fair and reasonable in light of all the circumstances.[149] The Privy Council took the opposite view and held that the only relevant ground of review was dishonesty.[150] What is true of both decisions is that neither of them paid attention to the significant difference in the terms of the two discretions. The father's trust granted the trustees power to 'apply the same or such part [of £800 a year] as they shall think fit', while the sister's trust granted a power to pay or apply the residuary estate as the trustees 'from time to time in their absolute and

[143] Ibid.

[144] Ibid 278.

[145] *Illusory Appointments Act 1830*, 1 Will 4, c 46; *Powers of Appointment Act 1874*, 37 & 38 Vic, c 37.

[146] *Re Whitehouse* (n 90) 203.

[147] *Cock* (n 63).

[148] *Gisborne* (n 5).

[149] *Cock* (n 63) 800 (Griffith CJ), 806–7, 811 (O'Connor J).

[150] *Smith v Cock* (1911) 12 CLR 30, 38.

uncontrolled discretion think fit'.[151] That is, the sister's trust included 'absolute and uncontrolled' and the father's did not. The High Court did not consider whether the exclusionary terms in the sister's trust prevented its interventionist approach. The Privy Council did not consider whether the lack of exclusionary terms in the Father's trust allowed for other grounds of review than dishonesty.

Fourth, while the courts' willingness to intervene in the exercise of trustees' discretions increased in the late 20th century,[152] the respect afforded to exclusion clauses relating to the trustees' discretion has been very inconsistent. Many cases grant little weight to exclusionary terms. In Australia the *Karger* grounds of review were held by McGarvie J to apply to 'absolute and unfettered' powers,[153] but he was silent about whether more extensive grounds of review would have applied if those terms were not present.[154] The Privy Council in *Hayim v Citibank NA*[155] considered a clause that relieved the trustees of any duty to the beneficiaries in relation to a house in Hong Kong. The Council, despite claiming to respect the clause, found that the trustees remained bound by a stringent purpose duty to only use their discretion to benefit the beneficiaries, including two named relatives of the settlor.[156] Significantly, in *Pitt*, the Supreme Court held that a duty of adequate deliberation applied to two discretions, but never considered, or even reported, their terms.[157] In contrast, other cases have given weight to exclusion

[151] *Cock* (n 63) 776.

[152] See Chapter 5 Part III. Many of the decision-making duties have been developed over the last fifty years.

[153] *Karger* (n 81) 166.

[154] Ibid 165–6.

[155] [1987] 1 AC 730.

[156] Ibid 746.

[157] *Pitt* (n 49). This case involved two appeals. The *Pitt v Holt* appeal is unlikely to have been an absolute discretion, because the donee was a receiver appointed by a court. However, the discretions in the *Futter*

clauses. Exclusion of the fiduciary conflict rule is accepted as a matter of course,[158] including by implication if the settlor intentionally places a trustee into a position of conflict.[159] In *Clayton v Clayton*, a trust deed included an extensive clause for the unfettered exercise of powers.[160] The New Zealand Supreme Court accepted that this clause, when read alongside others, meant that the trustee was 'not constrained by any fiduciary duty when exercising the VRPT powers in his own favour to the detriment of the Final Beneficiaries'.[161]

The courts have yet to consider systematically what decision-making duties may be excluded from distributive discretions and what may not. The case usually offered as the

*v Futter* appeal appeared to be a power of advancement in an ordinary discretionary trust, which likely would include exclusionary terms. Neither the first instance nor Court of Appeal decisions reported the terms: *Futter v Futter* [2010] EWHC 449 (Ch); *Pitt* (CA) (n 48) 148 [16] (Lloyd LJ).

[158] The possibility of exclusion is so widely accepted that it is included in trust definitions. For example, Ben McFarlane provides the following definition of the core trust duty: 'a duty to B not to use A's right for A's own benefit (unless and to the extent that A is also a beneficiary of the trust)': 'The Centrality of Constructive and Resulting Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 183, 194.

[159] *Tempest v Lord Camoys* (1888) 58 LT NS 221, 223; *Hordern v Hordern* [1910] AC 465, 475; *Jones v Firkin-Flood* [2008] EWHC 2417 [266]-[267]. But see *Re Pauling's Settlement Trusts; Younghusband v Coutts & Co* [1964] Ch 303, 339 ('*Pauling*').

[160] [2016] 1 NZLR 551, 587:

> 11. TRUSTEES' DISCRETION UNFETTERED
>
> 11.1 For the avoidance of doubt and notwithstanding anything in this deed or any rule of law which imposes upon the Trustees the duty to act impartially towards Beneficiaries, the Trustees shall have unfettered discretion as to the exercise of the powers and discretions conferred upon them by this deed even though:
>
> (a) the interests of all Beneficiaries are not considered by the Trustees;
>
> (b) the exercise would or might be contrary to the interests of any present or future Beneficiary;
>
> (c) the exercise results, at any time whether before or on the Vesting Day, in the whole or in any part of the capital or income of the Trust being distributed to any one Beneficiary or to any two or more Beneficiaries in equal or unequal proportions, in either case to the exclusion of the other Beneficiaries.

[161] Ibid 571 [58].

leading authority on exclusion clauses is *Armitage v Nurse* ('*Armitage*').[162] However, as discussed in Chapter 5, *Armitage* concerned management discretions and does not easily translate to distributive discretions.[163] In *Spread Trustee Co Ltd v Hutcheson*, Lord Clarke stated that *Armitage* only concerned exclusion of the duty of care and not exclusion of fiduciary duties,[164] which could include all decision-making duties.[165] Even if *Armitage* were treated as authority relevant to distributive discretions, work needs to be done to understand what honesty means in this context. Honesty might be associated with all decision-making duties, or dishonesty might be restricted to uniquely morally repugnant behaviour.[166]

In summary, while exclusion clauses are a direct method by which settlors may attempt to settle the trustees' accountability, or lack of it, the courts have not consistently given effect to them.

### E *Mere and Trust Powers*

In Chapter 4 we discussed two different accounts of mere and trust powers. The traditional account holds that trust powers can be directly enforced by the courts but mere powers cannot, while the alternative account holds that there is no significant distinction between trust and mere powers: both are distributive discretions and their proper exercise

[162] [1998] Ch 241.

[163] Chapter 5 text to nn 205-11.

[164] [2012] 2 AC 194, 224–5 [61].

[165] See *Pitt* (n 49) 139 [73].

[166] See Chapter 5 Part III (E).

can be enforced by the courts.[167] Because support for both of these accounts is found in the law there is inconsistency in how mere powers are regulated.

Some cases find that categorisation as a mere or trust power is important. For example, we saw above with remedies that sometimes, but not always, the categorisation limits the remedies available to mere powers.[168] Another common theme is that mere powers are constrained by fewer duties than trust powers. For example, in *Re Gulbenkian's Settlements; Whishaw v Stephens*, Lord Reid strongly implied that the only duty applicable to mere powers is a duty to consider whether or not to exercise it.[169]

However, other cases simply do not advert to this categorisation. As we saw above some judges have ordered the execution of mere powers.[170] Even more cases have applied broader grounds of review to mere powers without considering the question of whether categorisation matters. For example, *Karger* concerned a mere power exercisable in favour of one of the trustees, but this was not reported as relevant to the duties owed.[171] Indeed, one of the broader statements on trustees' duties is *Gartside v Inland Revenue Commissioners*, which concerned a mere power.[172]

In summary, a court today could draw on authority that would justify requiring less accountability from a trustee with a mere power than a trust power. However, the court could also draw on authority to impose an equal degree of accountability. If the

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[167] See Chapter 4 Part V.

[168] See above text to nn 57-67.

[169] [1970] AC 508, 518. See also *Inland Revenue Commissioners v Broadway Cottages Trust* [1955] Ch 20; *Baden* (n 4) 441 (Lord Hodson in dissent, Lord Wilberforce did not clearly contradict this point).

[170] *Klug* (n 64) 71; *Mettoy* (n 65) 1632.

[171] *Karger* (n 81).

[172] [1968] AC 553, 617–8 (Lord Wilberforce), quoted in Chapter 5 text to n 110.

alternative account argued for in Chapter 4 prevails then the latter is the most likely and appropriate course, however, this remains another area of unresolved uncertainty.

### F *Beneficiaries' Expectations*

The final question is whether the beneficiaries' expectations, objectively ascertained, can affect the application of regulatory duties and the beneficiaries' procedural entitlements. It might appear that, in principle, different rights cannot be afforded to different people who are members of the same formal class defined in the trust instrument. However, there is a quite natural tendency to associate some beneficiaries with a stronger expectation of a benefit,[173] which must alter how we understand their procedural rights. For example, if two children of a deceased settlor were the only beneficiaries, then the default expectation would be that each would have relatively strong rights concerning the exercise of the discretion.[174]

Several cases have acknowledged that beneficiaries' expectations may be a factor in applying decision-making duties. They indicate that individual rights may depend on the personal circumstances of the beneficiary making the claim, and particularly their expectations of receiving a distribution. One directly relevant case is *Foley v Gleeson*.[175]

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[173] See, for example, Hoffmann J's statement that trustees are 'entitled to take into account … the fact that the tenant for life was a person known to the settlor and a primary object of the trust whereas the remainderman is a remoter relative or a stranger': *Nestle v National Westminster Bank Plc* (1996) 10 Trust Law International 112, 115–6, affd [1993] 1 WLR 1260.

[174] Here it might be argued that they do have stronger rights because it is easier for them to agree to exercise their right under *Saunders v Vautier* (1841) Cr & Ph 240; 41 ER 482. However, as discussed in Chapter 3 Part III(B), this right is only relevant with absolute consensus and it is vulnerable to exploitation as each beneficiary has an incentive to persuade the trustee to benefit them instead of cooperating with their fellow beneficiaries. These incentives suggest that beneficiaries should have relatively strong rights to ensure that the decision is properly made even when the class of beneficiaries is small.

[175] [2013] QSC 234.

Henry J held that 'the identification of the applicant as a "primary" beneficiary bespeaks an intention that she should, albeit not must, benefit', although that designation granted her no greater formal rights under the trust deed.[176] Cases in the related area of beneficiaries' rights to information are also relevant, albeit indirectly. In *Schmidt v Rosewood Trust Ltd*, a claim for access to information was brought by the son of a deceased settlor, who was a discretionary beneficiary — alongside everyone else in the world other than the trustees and Isle of Man residents. Even though the trust terms gave the son no greater claim than the rest of humanity, the Privy Council accepted that his relationship to the settlor meant he had a 'particularly strong claim on the trustees' discretion'.[177] In *Erceg v Erceg*, the New Zealand Supreme Court stated that disclosure of information should routinely be offered to a 'close beneficiary'.[178]

In summary, judges are aware of the reality of trust practice where only some beneficiaries are ever intended to receive a real benefit.[179] For some judges, this reality will have an impact on how they hold trustees accountable; however, there is insufficient case law for a consistent doctrine to have developed.

## IV CONCLUSION: THE SPECTRUM OF TRUSTEE ACCOUNTABILITY

The argument presented in this chapter and Chapter 5 is that there is an overwhelming range of uncertainties in how discretionary trustees' decision-making is regulated. These uncertainties result in the law being incoherent because there is no settled reasoning process by which anyone could determine how accountable a particular trustee will be for

[176] Ibid [38].

[177] [2003] 2 AC 709, 723 [33], 735 [68] ('*Schmidt*').

[178] *Erceg* (n 18) 340 [60]-[62]. See also *Murphy* (n 14) 292.

[179] See *Schmidt* (n 177) 723-4 [34]-[36].

her or his decisions. There is uncertainty about: the duties to which a trustee could be subject, what the duties mean, whether ancillary rules help or hinder enforcement of those duties, and whether their application to particular trustees is affected by variables external or internal to the trust instrument. The number of uncertainties that need to be resolved means that this area of law is quite simply chaotic.

Of course, precedent means that in particular jurisdictions lower courts will be bound on some points of law. However, inconsistent authorities in other jurisdictions, or inconsistent principles within the same jurisdiction, mean that the persuasiveness of precedents is limited beyond directly inferior courts on narrowly defined issues.

### A *High and Low Trustee Accountability*

Now that we have considered the broad range of uncertainties, we can present a clearer picture of the spectrum of trustee accountability. The spectrum of trustee accountability maps onto JH Grey's continuum of strong and weak discretion:[180] a stronger discretion means less accountability in how it is exercised.

At one end of the spectrum is the high-accountability discretionary trust where the beneficiaries have strong and effective rights against the trustees. The trustees' duties at this end of the spectrum can be summarised as a duty to make a sound decision. Such a duty entails duties to consider, and give reasonable weight to, specific identifiable criteria in order to give effect to the specific and identifiable purpose of the discretion. In addition, a duty to make a sound decision entails that beneficiaries have access to the trustees' reasons, have adequate remedies, and be able to hold any protector accountable

[180] JH Grey, 'Discretion in Administrative Law' (1979) 17(1) *Osgoode Hall Law Journal* 107, 109.

to the same degree as they would a trustee. The highest accountability trust regulation would impose a positive duty to disclose the reasons for their decisions, but this has not yet been imposed on any trustees, even superannuation trustees.[181] Certain variables make high-accountability regulation more likely: a superannuation context, written relevant considerations, no exclusion clauses, no protector, a trust power, and beneficiaries with identifiable, legitimate expectations of receiving benefits. However, even in the absence of these features it is open to the courts to impose high-accountability regulation, for example, by determining that the discretion has a narrow purpose or that specific relevant matters must be considered.

At the other end of the spectrum lies the low-accountability trust where the beneficiaries have weak, ineffective rights against the trustees. Certain features make this type of regulation more likely: a private family context, broad classes of beneficiaries, exclusion clauses, mere powers, and protectors with personal interests in the trust. Again, even if all of these features are absent, the uncertain state of trustee regulation means that a court might apply a low-accountability regulation regime to almost any trust. Moreover, even where there appear to be high-accountability duties, low-accountability regulation may be achieved by a lack of access to the trustees' reasons, or other features that hinder the effectiveness of the duties imposed.

A settlor faced with this spectrum of possible models of regulation has some ability to determine how accountable the trustees will be. If a settlor wants the trustees to be accountable, then she or he can clearly specify the purposes and relevant considerations of discretions and oblige the trustees to disclose their reasons. An extreme example of

[181] See above text to nn 117-8.

this is *Natalie W Chen v Wong Siu Ling*, where the settlor's letter of wishes was so prescriptive that Woolley DJ found that it was incorporated into the trust terms to create a fixed, not discretionary, trust.[182] However, settlors are less able to ensure that their trustees are protected from accountability. The best they can do is draft clear exclusion clauses that exclude decision-making duties and specify that the trustees need not give reasons. However, such clauses may or may not be respected by the courts.

Where settlors attempt to create low-accountability trusts with exclusion clauses, their success will ultimately depend on the attitude of the courts. There is a deep conflict within the cases about how willing the courts are to intervene in exercises of discretion. On one side, there is the courts' 'traditional reluctance' to intervene in the decisions of trustees,[183] because the discretion has been entrusted to the trustees not the court.[184] On the other side, there is the courts' concern for the beneficiaries and the courts' inherent supervisory jurisdiction over trusts.[185] Thus, there is a tension in the law between the principle of respect for the trust instrument and the principle that beneficiaries need to be protected by holding trustees accountable.

### B *Ramifications of Low-Accountability Trusts*

A novel ramification of the analysis in these two chapters is that it fully reveals how radical discretionary trusts are in the law of trusts. They are radical because they include

[182] [2000] HKCFI 481.

[183] *Re Whitehouse* (n 90) 203. See also *Tierney v King* [1983] 2 Qd R 580, 583; *Stuart v Armourguard Security Ltd* [1996] 1 NZLR 484, 506; *Gailey v Gordon* [2003] 2 NZLR 192, 203 [89]; *Burns v Burns* [2008] QSC 173 [32].

[184] *Costabadie v Costabadie* (1847) 6 Hare 410; 67 ER 1225, 414; *Beloved* (n 135) 333; *Re Steed's Will Trusts* [1960] Ch 407, 418; *Edge v Pensions Ombudsman* [1998] Ch 512 (Ch), 534.

[185] *Re Hodges; Davey v Ward* (1878) 7 Ch D 754, 761; *Schmidt* (n 177) 724 [36].

low-accountability trusts where the trustee-beneficiary relationship is so weak that it barely exists. This is a radical departure from the traditional fixed trust where there is always a relationship of a certain minimum strength mediated through a claim to assets. It is also a radical departure from high-accountability discretionary trusts like that presaged in *Baden*.[186] It is only by thoroughly analysing the regulation of distributive discretions as the core of the discretionary trust form that this type of trust can be exposed as a feature of contemporary trust law.

Low-accountability discretionary trusts have two important social effects. First, while they reduce the beneficiaries' power in relation to the trust fund, they do not necessarily transfer that power to the trustees. The lack of accountability to beneficiaries means that trustees are more open to influence by outsiders, especially those who hold structural power over them (such as protectors who can remove them), or those with whom they have strong personal or professional relationships. Thus, low-accountability trusts often have the effect of giving power over the trust fund to those outside of the trustee-beneficiary relationship. They are the doctrinal foundation of what is known as the settlor control problem.[187] In contrast, high-accountability trustees are less likely to allow themselves to be influenced by protectors or third parties because that would expose them to liability to the beneficiaries.[188]

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[186] *Baden* (n 4).

[187] See, eg, Waters, 'Settlor Control' (n 68); Mark Bennett, 'Competing Views on Illusory Trusts: The *Clayton v Clayton* Litigation in Its Wider Context' (2017) 11(1) *Journal of Equity* 48.

[188] This may be optimistic as a matter of practice given recent Royal Commission findings about superannuation trustees. They were found to routinely not understand their core duties, rarely sought to avoid conflicts and failed to prioritise beneficiaries' interests over conflicting interests: Kenneth M Hayne, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 225-8.

Second, low-accountability regulation brings discretionary trusts into sharper conflict with the patrimonial assumption underlying other areas of law. As discussed in Chapter 3, discretionary trusts exclude fixed proprietary claims to the trust, which renders the trust assets beneficially unowned. This presents a problem for a legal system in which many areas are underlaid by the patrimonial assumption that assets are subject to claims of beneficial entitlement by individuals.[189] High-accountability trusts are less problematic because the beneficiaries' procedural entitlements will be more predictable and, thus, economically valuable. They could act as a substitute for distributive entitlements if they are accepted as a type of asset.[190] In contrast, in low-accountability trusts the beneficiaries' procedural entitlements are unpredictable and economically worthless.[191] These trusts confirm that discretionary trusts are in conflict with all parts of the legal system that incorporate the patrimonial assumption.

The next chapter will consider different arguments for how the incoherence in the regulation of discretionary trustees could be resolved. Resolution of the incoherence requires a resolution to the tension between settlor autonomy and trustee accountability.

[189] See Chapter 3 Part V(C).

[190] See *Kennon v Spry* (2008) 238 CLR 366, 393-4 [74]-[78] (French CJ), 408 [126]; *Brine v Carter* [2015] SASC 205 [136]; Tobias Barkley, 'Discretionary Interests and Rights to Replace Trustees: Can They Be Property?' (LLM Thesis, University of Otago, 2012). This argument is often rejected: *Hunt v Muollo* [2003] 2 NZLR 322, 325 [11]; *Public Trustee v Smith* (2008) 1 ASTLR 488, 523 [138]; *Re Cooper Street Property Trust* [2016] VSC 756 [73]-[76]; *Swishette Pty Ltd v Australian Competition and Consumer Commission* (2017) 249 FCR 483, 493 [26]-[28]; *SA v Metro Vancouver Housing Corp* [2019] SCC 4 [35]-[48].

[191] They may retain economic value if discretionary beneficiaries have other means to hold trustees accountable, for example, through powers to remove trustees: see Barkley (n 190).

# CHAPTER 7

# IMAGINING A FULLY REALISED ADMINISTRATIVE TRUST MODEL

## I INTRODUCTION: SOME OPTIONS OUTLINED

If the law governing discretionary trusts is to become coherent, the courts must develop a system of organising principles that provide certainty about what type of trustee regulation applies in which circumstances. As we saw in Chapters 5 and 6, it is currently difficult to predict with any degree of certainty whether particular beneficiaries will be able to hold their trustees accountable effectively for how they exercise their discretions. Thus, what it means for a discretionary trustee to hold assets for the benefit of others can vary immensely between different trusts. There is a lack of organising principles to resolve uncertainties and determine what rights and duties obtain between discretionary trustees and beneficiaries. The fourth research question of this thesis asks whether higher-level theories of the trust can be helpful in developing a coherent administrative trust model. The answer presented in this chapter is that they can.

The sources of higher-level theories relevant to this question are limitless. Assistance could be sought, for example, from political science, psychology, regulatory theory, economics or moral philosophy. However, this thesis will not venture so far. Instead, it will look to theories based in other fields of law: contract and public law. At present trust law is strongly influenced by contract law ideas.[1] However, an alternative source of ideas

[1] See below Part II.

is available in public law, which offers the advantage of a highly developed regime for the regulation of discretionary power.[2] This chapter will make a fresh argument for the value of public law ideas in resolving the incoherence within discretionary trusts.

The first section considers a contractarian theory of discretionary trusts that is widespread in the cases and literature. This theory is founded on the organising principle that the trust instrument is the primary source of trust law. Thus, on this approach, the coherent response is that any question of regulation ought to be answered by interpretation of the trust instrument. However, as we shall see, this raises its own problem, which is the need to distinguish trusts from other agreements or arrangements. Currently, this is the irreducible core problem as the irreducible, unique core of a trust is needed to defend the distinctiveness of trusts. As we shall see these attempts are unsuccessful. More importantly, the irreducible core problem exposes the reality that no theory can rely on the trust instrument alone but must necessarily bring the trust instrument into relation with an understanding of the legal form of the discretionary trust.

The second section of this chapter presents an original alternative theory inspired by public law, which provides an understanding of the legal form of the discretionary trust in which trustees are meaningfully accountable to beneficiaries. Under this theory the leading principle in holding trustees accountable is identifying the purpose of the specific discretionary trust. All discretionary trusts are created in order to benefit identifiable people, in identifiable circumstances, and for identifiable reasons. When trustees are effectively bound to exercise their discretions in accordance with purpose the consequence is that high-accountability regulation is mandatory. This theory resolves the

[2] See below Part III(A).

incoherence problem, avoids the problem of the irreducible core, and maintains the legitimacy of the discretionary trust as an institution.

The difference between a contractarian and a public law theory of discretionary trusts might be presented as arguments for and against the principle of settlor autonomy. However, as will be demonstrated, this would not be accurate. Both accounts value the settlor's autonomy but understand settlor autonomy in different ways. The contractarian theory understands the settlor's autonomy as the freedom to enact self-government of a segregated fund through specifying the terms of a written instrument. The public law theory understands the settlor's autonomy as the freedom to create an enforceable relationship between the administrators of a fund and those intended to benefit from the fund. The contractarian account affords precedence to the settlor's act of deciding the terms of a formal instrument. The public law account affords precedence to the settlor's purpose for the fund, which must be to benefit people. Many discretionary trusts exhibit tension between the settlor's written instrument and the settlor's purpose, which will be resolved differently by each account.

## II CONTRACTARIAN THEORY: PRIMACY OF THE TEXT

In the cases and literature on trust law, a dominant idea is the contractarian theory of trusts. This theory treats the settlor's choices that are expressed in the trust instrument as the primary concern of trust law.[3] Contractarian ideas can be applied to resolve the incoherence at the heart of discretionary trusts. These ideas suggest that trustees'

[3] See *Purcell v Deputy Federal Commissioner of Taxation* (1920) 28 CLR 77, 84–5, where Knox CJ and Gavin Duffy J suggested that settlors could include any unusual provisions provided they were not prohibited by a rule of law or equity.

distributive decision-making in a particular trust should be regulated by the trust instrument. Any question about the meaning, existence or application of the trustees' duties, beneficiaries' rights, or ancillary rules should be answered by interpretation of the trust instrument. This is a 'contractarian' approach because in contract law, according to the dominant theories, the primary source of rights and duties is the parties' agreement, rather than the general law.[4]

This contractarian approach means that other factors, like the social context of the trust and the beneficiaries' expectations, should only affect their legal relationship by influencing the interpretation of the instrument.[5] For example, consider a hypothetical discretionary trust for two siblings settled by their deceased parents. In the absence of any evidence that the parents intended to discriminate between their children, the family relationship alone would give rise to an expectation that each sibling be granted substantial benefits and that any difference in benefits should be based on a good reason. However, let us assume that, on advice, the parents included terms in the trust instrument that excluded any duty to consider the purpose of the discretion, excluded any duty to

[4] See Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Lawbook, 5th ed, 2016) 39. The idea of contract law appealed to here is that found in classical contract theory, which sees contract law as merely enabling people to create their own private law: ibid 6-8. This view has been subject to criticism on the basis that contract law may impose duties, for example, by filling gaps in the contract: ibid 9. However, to date this criticism has not seriously disturbed the primacy of the text. For example, relational contract theories allow appeals to the context as well as the text, but, apart from statutory interventions, the text still takes precedence: ibid 32-5.

[5] Context is relevant to interpreting contracts and to determining if a contract exists (offer, acceptance, intention and consideration are all contextual questions). In principle it does not play a role in establishing the content of the contractual relationship, outside of some significant exceptions: modifying contractual content through statutory intervention, illegality and public policy; and filling gaps through frustration and remedial principles: see ibid 3–14. The extent to which these exceptions are in fact exceptions is contested: see, eg, Stephen Smith, *Contract Theory* (Oxford University Press, 2004). Indeed, Catherine Mitchell has argued that contract law should change to become truly contextual, to the point that the text of the contract need not be treated as of primary importance: *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing, 2013) 11.

consider factors other than the written terms of the discretion, and excluded any duty to exercise it as a reasonable trustee would. If the trust instrument is given primacy, then the context and expectations of the beneficiaries cannot override these clear terms. Therefore, if the trustees chose, on a whim, to distribute the entire fund to one sibling, then the decision would not be reviewable. This approach does produce a coherent answer to how discretionary trusts ought to be regulated, at least up to a certain point.[6]

The contractarian theory of trusts is frequently seen in the literature. JH Langbein famously argued that trust law, in substance, created a standardised contract that offered default rules, but where those rules could be modified at the will of the creating parties.[7] Justice Edelman has argued that, while the status of trustee may often lead to expectations that certain duties have been undertaken, any such duties are only implied terms and, therefore, must give way to the express terms of the trustee's undertaking.[8] Justice Campbell has claimed that the courts' only role in regulating trusts is to give effect to the settlor's intention.[9] The contractarian theory is also found in the literature that uses a

[6] The certain point is the irreducible core problem. See below Part II(B).

[7] JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105(3) *Yale Law Journal* 625, 660.

[8] James Edelman, 'The Role of Status in the Law of Obligations' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 21, 37. See also James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126(Apr) *Law Quarterly Review* 302; James Edelman, 'The Importance of the Fiduciary Undertaking' (2013) 7(2) *Journal of Equity* 128.

[9] JC Campbell, 'Access by Trust Beneficiaries to Trustees' Documents Information and Reasons' (2009) 3(2) *Journal of Equity* 97, 124. See also *Re Application for Information about a Trust* [2013] CA (BDA) 8 CIV (Bermuda) [31]; Jessica Palmer and Charles Rickett, 'The Revolution and Legacy of the Discretionary Trust' (2017) 11(2) *Journal of Equity* 157.

property-obligation dichotomy in theorising trusts,[10] where obligational conceptions are associated with contract.[11]

Contractarian ideas are also well established in the cases. Indeed, they are a natural fit with the history of trust law. The legal form of trusts first emerged by the courts giving legal effect to the words used in private documents.[12] This continues through trust drafters drafting new types of trusts, which may reshape the legal content of trust law.[13] The leading case in Australia that evidences a contractarian theme is *Byrnes v Kendle*, where the High Court confirmed that the settlor's intention to create a trust was to be assessed objectively and not governed by the settlor's unpublicised subjective intentions.[14] Gummow and Hayne JJ said that trusts were like contracts in that both were concerned with the outward manifestation of intention.[15] Heydon and Crennan JJ put forward the most contractarian position, which is that the text of an instrument *is* the intention of the author.[16] Indeed, one paragraph could be read as holding that the text contains the entire content of the trust relationship.[17] However, this would not be a correct reading because the Court did not take a strong contractarian approach in deciding what duties the trustee owed, in contrast to its approach to whether the trust existed. Each

[10] See Chapter 1 text to nn 63-76.

[11] See Peter Jaffey, 'Explaining the Trust' (2015) 131(Jul) *Law Quarterly Review* 377, 378–9; Palmer and Rickett (n 9) 157. But see Patrick Parkinson, 'Reconceptualising the Express Trust' (2002) 61(3) *Cambridge Law Journal* 657, 681.

[12] See John Baker, *The Oxford History of the Laws of England: Volume VI 1483–1558* (Oxford University Press, 2003) 654–5.

[13] See, eg, *Re Baden's Deed Trusts; McPhail v Doulton* [1971] AC 424 ('*Baden*').

[14] (2011) 243 CLR 253.

[15] Ibid 275 [59].

[16] Ibid 282–3 [95].

[17] Ibid 286 [103].

concurring judgment found that the trustee owed duties imposed by the general law that were not implied in the trust instrument.[18]

The problem with using contract ideas to resolve the problem of incoherence in the regulation of trustee discretion is that contract ideas produce their own incoherence problem. Contractarianism only requires a legal relationship to exist between the parties to the trust instrument, whereas it is a fundamental assumption of trust law that there is a legal relationship of rights and duties between the trustees and beneficiaries,[19] who are usually not parties to the instrument. A purely contractarian theory would allow settlors to create trusts that exclude any rights and duties between trustees and beneficiaries. Allowing this erasure of the trust relationship not only contradicts the fundamental assumption of trust law but means that trust contracts cannot be meaningfully distinguished from any other contract. This disconnect means that contractarianism requires some additional principle to supply the relationship between trustees and beneficiaries. The problem of this additional principle is the problem of the irreducible core.

### A *Irreducible Core Problem*

The irreducible core problem is the question of what minimum content a contract must contain to establish a trust.[20] This problem is usually approached from a contractarian

[18] Ibid 265 [22] (French CJ), 277 [67] (Gummow and Hayne JJ), 291–2 [119] (Heydon and Crennan JJ).

[19] See, eg, *Spellson v George* (1987) 11 NSWLR 300, 315–6 ('*Spellson*').

[20] See, generally, David Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47; Alexander Trukhtanov, 'The Irreducible Core of Trust Obligations' (2007) 123(Jul) *Law Quarterly Review* 342; T Zhong Wei Tan, 'The Irreducible Core Content of Modern Trust Law' (2009) 15(6) *Trusts & Trustees* 477; David Fox, 'Non-Excludable Trustee Duties' (2010) 17(1) *Trusts & Trustees* 17; Daniel Clarry, 'The Irreducible Core of the Trust' (LLM Thesis, McGill University, 2011).

perspective, in that the primacy of the trust instrument is not questioned.[21] Several answers to the problem can be found, each providing a different minimum content: honesty and good faith, fiduciary selflessness, defeasible fixed interests, and resulting trusts. All these answers concern the settlor's intention to create a trust. All require that intention to concern something more than a bare contract about assets. However, none of these principles is very well developed, nor do they satisfactorily resolve the irreducible core problem.

First, there is the decision-making duty of honesty and good faith. This was said by Millett LJ in *Armitage v Nurse* ('*Armitage*') to be the minimum necessary to give substance to a trust.[22] In essence, the argument is as follows: if the settlor has not removed the trustees' duties to act honestly and in good faith, then there is a presumption that the duties apply, which provides sufficient accountability for a trust to exist.[23] However, this argument is inadequate because, as discussed in Chapter 5, there is uncertainty about what honesty and good faith mean in relation to distributive discretions.[24] The principle in *Armitage* that honest trustees must act in what they believe is the best interests of the beneficiaries[25] does not readily translate from management discretions to distributive discretions because the interests of discretionary beneficiaries are in opposition to each other.[26] In the distributive context, honesty and good faith might be interpreted as

[21] See Tan (n 20) 483, where T Zhong Wei Tan suggests that the duties owed by a protector can be freely determined by the settlor because there is no rule against it.

[22] [1998] Ch 241 (CA), 253–4.

[23] See *Citibank NA v MBI Assurance SA* [2007] EWCA Civ 11 [82]; *Clayton v Clayton* [2015] 3 NZLR 293, 314-5 [52]-[53] ('*Clayton* (CA)').

[24] Chapter 5 Part III(E).

[25] *Armitage* (n 22) 251.

[26] *Gartside v Inland Revenue Commissioners* [1968] AC 553, 605–6 (Lord Reid).

embracing all decision-making duties. For example, it is possible to argue that acceptable standards of conduct for honest trustees would be to engage in a sound and reasonable decision-making process; therefore, a choice to make a decision without such a process would be dishonest.[27] On the other hand, there is an argument that honesty should be interpreted as deliberate deceit, which would encompass no decision-making duties.[28] A direct example of this uncertainty is the two appeal judgments in *Clayton v Clayton* ('*Clayton*').[29] The New Zealand Court of Appeal held that the core of a trust was present because the duties of honesty and good faith had not been excluded, although the Court did not consider what those duties meant.[30] The Supreme Court concluded the trustee owed no fiduciary duties in the exercise of distributive discretions[31] and that it was an open question whether he owed duties of honesty and good faith.[32]

Second, another way that decision-making duties could form part of the irreducible core is through fiduciary ideas of selflessness.[33] A clear example is found in Palmer and Rickett's obligational conception of discretionary trusts. Their account is highly contractarian: they state that trusts are 'more akin to contract-like voluntary

[27] Following *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 WLR 1476, 1480-1 [14]-[16], there would be no need to establish that the trustees knew what the acceptable standards of conduct for honest trustees were.

[28] See Chapter 5 Part III(E) on the different meanings that may be attributed to honesty.

[29] [2016] 1 NZLR 551 (SC) ('*Clayton*'). See also *Clayton* (CA) (n 23).

[30] *Clayton* (CA) (n 23) 315 [53].

[31] *Clayton* (n 29) 572 [64]-[68].

[32] Ibid 583-4 [124]-[127].

[33] To be clear, no claim is being made here that selflessness is an essential element of the concept of a fiduciary. It is only claimed that selflessness is strongly associated with the concept. As discussed in Chapter 5 text to nn 67-70, fiduciary norms may also include decision-making norms that are not associated with selflessness.

arrangements'[34] than gifts and are founded on deals between settlor and trustees.[35] However, they also recognise that the content of trust obligations cannot be 'determined entirely freely and autonomously',[36] which conflicts with contractarian ideas. One response[37] they present is a fiduciary norm: 'Central to the trust remains the notion that the trustee is not entitled to the benefit of the property.'[38] This idea, that a norm of selflessness is characteristic of a trust, can also be found in the case law.[39] However, the problem with elevating norms of selflessness as the irreducible core is that the rules embodying these norms — the proscriptive rules against conflict and profit — are easily excluded by the settlor's express or implied intention.[40] Indeed, these decision-making duties appear to be the most easily excluded. For example, in *Karger v Paul*, the trustees distributed the entire benefit of the trust assets to one of the trustees.[41] Any norm that the trustees should not benefit from the assets was completely disregarded and drew no comment from McGarvie J. The impossibility of fiduciary selflessness as the irreducible core of trusts can also be observed in self-contradicting definitions of trusts. For example, *Underhill and Hayton* gives a fiduciary definition of trusts — '[t]he archetypal fiduciary relationship is that of trustee and beneficiaries, the trustee with undivided loyalty to the beneficiaries having to further their interests and not his own' — but then immediately

[34] Palmer and Rickett (n 9) 157.

[35] Ibid 160.

[36] Ibid 176.

[37] Palmer and Rickett's other response is the duty of honesty and good faith: ibid 179.

[38] Ibid 176. See also Robert Stevens, 'Floating Trusts' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Oxford University Press, 2017) 113, 121.

[39] See, eg, *Spellson* (n 19) 315; *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62, 99 [106], 101 [110]-[111] (Gageler J).

[40] *Tempest v Lord Camoys* (1888) 58 LT NS 221, 223; *Hordern v Hordern* [1910] AC 465, 475; *Jones v Firkin-Flood* [2008] EWHC 2417 [266]-[267]. But see *Re Pauling's Settlement Trusts; Younghusband v Coutts & Co* [1964] Ch 303, 339.

[41] [1984] VR 161.

neutralises that definition — '(except to the extent authorised in the trust instrument).'[42] To the extent that fiduciary norms go beyond selflessness and include other decision-making duties,[43] there is even less clarity on the irreducible minimum.

Third, there is the idea that a defeasible fixed interest is sufficient to give substance to trusts.[44] This idea is clearly presented by Lionel Smith when he argues that every trust must include a 'trust in the narrow sense', meaning a beneficiary with a vested or contingent 'entitlement' to the trust assets.[45] However, this argument cannot explain discretionary trusts because a beneficiary whose interest is defeasible on the exercise of a discretion has no greater entitlement to the assets than any other discretionary beneficiary.[46] The only way that defeasible fixed interests could supply a minimum set of duties owed to beneficiaries would be if the trustees owed duties to default beneficiaries about how the discretion to defeat their interests was exercised. This would provide an irreducible core of decision-making duties. However, this would simply lead back to the question of what decision-making duties would be sufficient.

Fourth, recently, resulting trust ideas have been used in a way that suggests an irreducible core of trustee accountability. This follows Birss J's finding in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* ('*Pugachev'*) that a settlor had failed

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[42] David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (LexisNexis, 18th ed, 2010) 32 [1.50]. See also Ben McFarlane, 'The Centrality of Constructive and Resulting Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 183, 183; Stevens (n 38) 121.

[43] See, eg, *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 344-5 [174]; Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130(Oct) *Law Quarterly Review* 608, 617.

[44] See Chapter 4 Part II.

[45] Lionel Smith, 'Massively Discretionary Trusts' (2017) 70(1) *Current Legal Problems* 17, 19–21.

[46] See Chapter 4 Part II(E).

to dispose of his beneficial ownership of assets because his trustees were accountable to him rather than to the beneficiaries.[47] Birss J followed the New Zealand Supreme Court in *Clayton*, which had suggested a similar principle without committing to it.[48] The Court had said, in the context of a settlor appointing himself as sole trustee, that it was arguable this settlor's retention of broad powers for himself meant he failed to create a trust because he had not disposed of his assets to anyone.[49] In *Pugachev*, the settlor retained significant protector powers over the trustees, including powers to veto trustee decisions and remove the trustees. He also appointed himself a discretionary beneficiary. Birss J concluded that on the correct construction of the instrument the powers were intended to be exercisable for the settlor's personal benefit and were not subject to implied fiduciary duties.[50] Because the settlor had ceded neither control of the trust assets nor the power to get them back from the trustees, he remained the beneficial owner of the assets.[51] Birss J accepted that the beneficiaries were granted some rights,[52] albeit not rights that inhibited the settlor's control,[53] and they were not enough to form the irreducible core of a trust relationship.

The *Pugachev* solution is a response to the settlor control problem,[54] which is itself a result of the contractarian theory of trusts. Trust lawyers advise that settlors can grant

[47] [2017] EWHC 2426 (Ch).

[48] *Clayton* (n 29) 583–4 [124], [127].

[49] Ibid 583 [124].

[50] *Pugachev* (n 47) [248]-[278].

[51] Ibid [246].

[52] Ibid [220].

[53] Ibid [243]-[244].

[54] See, generally, Donovan Waters, 'Settlor Control: What Kind of a Problem Is It?' (2009) 15(1) *Trusts & Trustees* 12; Tsun Hang Tey, 'Settlor's Reserved Powers' (2009) 23(4) *Trust Law International* 183; Patrick O'Hagan, 'The Reluctant Settlor: Property, Powers and Pretences' (2011) 17(10) *Trusts & Trustees*

themselves control because contractarian principles allow settlors to include whatever terms they like.[55] However, the *Pugachev* solution is only a partial answer. It only provides an answer when the terms of the trust instrument interfere with the trustee-beneficiary relationship in a manner that gives the settlor effective control. It does not provide an answer for trusts where effective control has been granted by the settlor to a third party, for example a protector. Neither does it provide an answer where no one has effective control over the trustees, but no effective procedural entitlements are granted to the beneficiaries. To date, it remains to be seen whether the *Pugachev* principle will be developed into a threshold test for intention to create a discretionary trust that forms part of the irreducible core.

In summary, while the contractarian theory is intuitively attractive, it does not provide any criteria for the minimum content necessary for the trust's irreducible core. Currently, the available answers to the irreducible core problem are unsatisfactory: duties of honesty and good faith have no certain content in this context, fiduciary selflessness is not irreducible, defeasible interests cannot be meaningfully distinguished from other discretionary interests, and resulting trust principles provide a limited and uncertain threshold test. However, these tests do suggest that the necessary content of the discretionary trust relationship is to be found in mandatory decision-making duties.

905; Mark Bennett, 'Competing Views on Illusory Trusts: The *Clayton v Clayton* Litigation in Its Wider Context' (2017) 11(1) *Journal of Equity* 48.

[55] See, eg, Francis Barlow, 'The Flexibility of Family Trusts' (2013) 19(3–4) *Trusts & Trustees* 255.

## B *Contractarian Characterisation*

The contractarian theory of trusts and its irreducible core problem reveal an important issue in doctrinal methodology. As set out in Chapter 1, the actions of private individuals, such as the creation of trust instruments by settlors, do not have inherent legal meaning.[56] They are given legal meaning by being viewed through the legal system[57] and characterised[58] as fitting within a legal form,[59] such as the administrative or proprietary trust models. This means that interpreting or construing a trust instrument always involves an interaction between the text that the interpreter is reading and the preconceived legal forms and concepts that the interpreter brings to the text from her knowledge and experience of the legal system. An interpreter who holds a contractarian theory of trusts will bring a particular balance to the interaction between text and preconceived legal form but will not be able to escape that interaction.

The balance that the contractarian interpreter brings to the interaction between text and form is the prioritisation of text over form as much as possible. Contractarianism holds that the linguistic meaning of the text should be translated directly into legal meaning to the greatest extent available. The correlation is that legal forms should be a flexible as possible in order to accommodate the text's linguistic meaning. However, as we saw with the irreducible core problem, there is a limit. At the extremes, the trust's

[56] See Chapter 1 text to nn 35-45, 113-138.

[57] Margaret Davies, *Asking the Law Question* (Lawbook, 4th ed, 2017) 6, 144.

[58] See Paul Finn, 'Fiduciary Reflections' (2014) 88(2) *Australian Law Journal* 127, 142–3; James Allsop, 'Characterisation: Its Place in Contractual Analysis and Related Enquiries' (2017) 91(6) *Australian Law Journal* 471.

[59] On legal forms see Larissa Katz, 'Legal Forms in Property Law Theory' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 23, 23–4.

legal form is necessary to distinguish trust instruments from other contracts. Relegating the legal form to the role of maintaining conceptual classification means that the form will be relatively weak and insubstantial. It results in the low-accountability version of the administrative trust model.

The valuable insight that contractarianism offers is that there must be an interaction between legal form and trust instrument in determining the legal meaning of a trust. Recognising this allows us to consider other ways to approach that interaction.

## III PUBLIC LAW THEORY: PRIMACY OF THE PURPOSE

Public administrative law suggests there is an alternative way of approaching the interaction between legal form and trust instrument when interpreting discretionary trusts. The concept of the purpose of a discretion suggests an approach in which the discretionary trust's legal form is robust and takes a leading role in the characterisation of the trust instrument. The text of the trust instrument is still necessary to establish an overall intention to create a trust but, once that threshold is reached, the legal form of the trust does not need to be subordinated to the details of the text. A stronger legal form for discretionary trusts is comparable to the strong legal form for fixed trusts, which prevents settlors from weakening fixed beneficial interests in ways that contradict the proprietary model.[60]

The public law theory used here is an adaption of ideas found in public law, not an argument that trust law is part of public law.[61] The relationship between private law,

[60] See Chapter 2 Part IV.

[61] It is noted that similar reasoning to that presented in this section might be reached without the aid of public law. There are similar ideas in private law, such as fiduciary fidelity to purpose: see, eg, David

including fiduciary law, and public law has been subject to increasing scholarly interest in recent years. However, much of this interest has been in applying fiduciary law insights to public law;[62] there has been somewhat less consideration of the insights that public law can provide to private law.[63] The original argument proposed here is that the principles and doctrines of public law judicial review can be used to inspire the development of trust law judicial review and, hence, develop the administrative trust model into a coherent institution.

A summary of the argument is as follows. In public law, official discretion is subject to a regime of judicial review that uses a range of sophisticated mechanisms to provide greater accountability than currently present in trust law. Theoretical justifications for this high-accountability regime are of two main types: statutory interpretation and public purpose. The latter idea, in which public powers are fundamentally assumed to exist for purposes that are publicly beneficial, can be productively translated to the discretionary trust context. The fundamental purpose of distributive discretions is to benefit beneficiaries, but with flexibility about when, how and why they are to benefit. Discretionary trust law should be developed so that this purpose can be effectively enforced through high-accountability regulation of trustee discretion. Moreover, the difference between public and private law and the necessity for institutional legitimacy

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Pollard, 'Exercising Powers: Proper Purposes Rather than Best Interests' (2016) 30(2) *Trust Law International* 71. However, public law is drawn on because it is much more developed than these more fragmentary private law concepts, and because public law provides a fresh perspective on the regulation of discretion in private law.

[62] See, eg, Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press, 2011); Finn (n 58) 127–9; Benjamen Franklen Gussen, 'The State Is the Fiduciary of the People' [2015] (Jul) *Public Law* 440.

[63] Two instances are Matthew Conaglen, 'Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias' [2008] (Spr) *Public Law* 58; Toby Graham and Thomas Beasley, 'Trust the State: The Relevance of Principles of Public Law in Trust Law and Practice' (2019) 25(8) *Trusts & Trustees* 841.

provide sound reasons to increase accountability in trust law even beyond what is acceptable in public law.

### A *Accountability in Public Law*

There is a view within public law scholarship that accountability is a fundamental value.[64] Ellen Rock defines accountability as a coercive mechanism within a relationship that 'requires the *provision of an account or justification* for a chosen course of conduct' by one party to another.[65] Rock argues that in public law the objectives of accountability are transparency and control of public decision-makers.[66] However, accountability is also 'an *elusive and illusive concept*'[67] that is difficult to explain. As a standalone concept it may not contain very much substantive content; it may require that decisions be justified but does not provide the standards by which decisions should be justified.[68] We will attempt to explain accountability in public administrative law by demonstrating that standards of accountability are higher in public law than in trust law, and explaining how the purposes of public discretions play an important role in demanding that enhanced accountability.

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[64] Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 352–3; Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24(3) *Australian Journal of Administrative Law* 189.

[65] Rock (n 64) 192 (emphasis in original).

[66] Ibid 198–200.

[67] Ibid 192 (emphasis in original).

[68] Cane, McDonald and Rundle (n 64) 352; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 186–8 [3.370].

### *1 Accountability Mechanisms*

The mechanisms of judicial review in public law are comparable to judicial review of high-accountability discretionary trusts.[69] In fact, Dixon J's classic statement of the principles of judicial review in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* fits closely with contemporary trust law: the decision-maker must address the right question, not make mistakes of law, and take into consideration relevant factors, but not extraneous factors.[70] However, administrative law has undergone rapid development since 1949 and is now more sophisticated than trust law in exacting accountability.

There are many schemes by which judicial review actions can be categorised. For current purposes we will use the categorisation of grounds of review in Cane, McDonald and Rundle's *Principles of Administrative Law*, which includes the following categories: norms of procedural fairness, norms relating to the reasoning process, and norms of reasonableness.[71]

First, the norms of procedural fairness include the bias and fair hearing rules. The fair hearing rule ensures a fair procedure for those affected by public decisions,[72] because of the imbalance in power between state and citizen.[73] This rule has no direct equivalent in trust law.[74] There have been a few statements that trustees should consult beneficiaries

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[69] See, eg, Conaglen (n 63).

[70] (1949) 78 CLR 353, 360.

[71] Cane, McDonald and Rundle (n 64). Norms relating to the distinction between law and facts will be ignored as they are less relevant to trust law.

[72] See ibid 137–52; Mark Elliott and Jason NE Varuhas, *Administrative Law: Text and Materials* (Oxford University Press, 5th ed, 2017) 365–414.

[73] Judith Bannister, Gabrielle Appleby and Anna Olijnyk, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2015) 20.

[74] The orthodox position is that discretionary beneficiaries are not entitled to be consulted about distributions, or even informed of them: *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440; 42 ER 330,

as part of their duty to gather sufficient information to take into account relevant matters, but it has so far been restricted to obiter comments in charity and superannuation cases.[75]

The bias rule is similar to the fiduciary rule against conflicts of interest in trust law.[76] However, the public law test is broader than that in fiduciary law; it asks whether there is *any* reason to think that the decision-maker might not be impartial.[77] This means that a range of potential influences are recognised as relevant, including pecuniary interests, political interests, prejudices, and many types of personal and business relationships.[78] In contrast, although fiduciary law has the same goal of avoiding decisions made for improper reasons,[79] its test is whether the decision-maker's interests[80] or duties[81] conflict with their decision-making duties.[82] This test is limited because 'interest' has been assumed to be a pecuniary interest.[83] This means that some influences captured by the

333; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 431 (Mahoney JA) ('*Hartigan*'); *Stuart v Armourguard Security Ltd* [1996] 1 NZLR 484, 506; *X v A* [2000] 1 All ER 490, 496.

[75] See *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 718 ('*Scott*'); *Edington v Board of Trustees of State Public Sector Superannuation Scheme* [2015] QSC 245 [50], [57], affd [2016] QCA 247.

[76] See Conaglen (n 63).

[77] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343 [2] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Ebner*'); *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet Ugarte [No 2]* [2000] 1 AC 119, 133 (Lord Browne-Wilkinson).

[78] *Ebner* (n 77) 348-50 [22]-[31]. See also Bannister, Appleby and Olijnyk (n 73) 503–4; Lord Woolf et al, *De Smith's Judicial Review* (Sweet & Maxwell, 8th ed, 2018) 558-65 [10-045]-[10-058] ('*De Smith*').

[79] See Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7(2) *Journal of Equity* 87, 97–8; JE Penner, 'Is Loyalty a Virtue, and Even If It Is, Does It Really Help Explain Fiduciary Liability?' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 159, 168–9; Remus Valsan, 'Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment' (2016) 62(1) *McGill Law Journal* 1.

[80] *Boardman v Phipps* [1967] 2 AC 46.

[81] *Clark Boyce v Mouat* [1994] 1 AC 428; *Bristol and West Building Society v Mothew* [1998] Ch 1.

[82] Speculatively, a historical cause of the narrower test might be that the core rule of pecuniary conflicts was framed in terms of the remedy of an account of profits, which presupposes a pecuniary interest: see *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J).

[83] See *Newgate Stud Co v Penfold* [2004] EWHC 2993 (Ch) [231]-[230] ('*Newgate*'), where David Richards J noted that the authorities all defined a director's interest as a personal financial interest. See

bias test, such as a close personal friendship,[84] are not captured by the conflicts rule.[85] An example of the difference is the rules for professional trustees who wish to engage their own firm to perform trust work. If they may gain some pecuniary benefit from sending work to their own firm, then engaging their firm is recognised as a conflict.[86] However, where they take steps to disclaim any pecuniary benefit, a number of cases have held that trustees will not breach the profit rule by sending work to their colleagues[87] and, by implication, will not breach the conflict rule.[88] This is despite the obvious ongoing personal and business relationships between the professional trustee and her or his colleagues. Moreover, in one area trust law does recognise that personal and business relationships can bias trustees. When the courts are asked to appoint trustees they are reluctant to appoint relatives for this reason.[89] However, this bias will not disqualify anyone from acting as a trustee or being appointed by anyone other than the courts.[90] One exception to the narrow conception of fiduciary conflict is a company law case.[91] In

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also *Breen v Williams* (1996) 186 CLR 71, 136, where Gummow J held out pecuniary interests as the only possible interests that might generate conflicts in a doctor-patient relationship.

[84] *De Smith* (n 78) 558 [10–045].

[85] There are good arguments that they ought to be captured. Cf Lionel Smith, 'Conflict, Profit, Bias, Misuse of Power: Dimensions of Governance' in Paul B Miller and Matthew Harding (eds), *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge University Press, forthcoming).

[86] *Williams v Barton* [1927] 2 Ch 9, 12.

[87] *Clack v Carlon* (1861) 30 LJ Ch 639; *Re Mundy; Lucas v The Equity Trustees Executors & Agency Co Ltd* [1938] VLR 119.

[88] *Re Doody; Fisher v Doody* [1893] 1 Ch 129, 133–5 (Stirling J); *Re Gates; Arnold v Gates* [1933] Ch 913, 916–7.

[89] *Wilding v Bolder* (1855) 21 Beav 222; 52 ER 845; *Scaffidi v Montevento Holdings Pty Ltd* (2011) 6 ASTLR 446, 476 [178] (Murphy JA and Hall J) revd (2012) 246 CLR 325.

[90] In *Montevento Holdings Pty Ltd v Scaffidi* (2012) 246 CLR 325, the High Court allowed an appeal by finding that there was no reason why a corporation directed and controlled by a beneficiary should be disqualified from acting as a trustee. Control over a corporation is one of the most influential relationships that can exist between legal persons.

[91] See Rosemary Teele Langford, *Company Directors' Duties and Conflicts of Interest* (Oxford University Press, 2019) 203-4 [7.44]-[7.45].

*Newgate Stud Co v Penfold*, David Richards J recognised that a close personal, non-financial, relationship might unacceptably compromise a director's decision-making,[92] despite not being a breach of the strict self-dealing conflicts rule. He concluded that such a relationship would place the onus on the fiduciary to justify the transaction as fair and in the best interests of the company.[93]

Second, the norms relating to the deliberation process are expressed in a similar fashion in both trust law and public law, with emphasis on relevancy and purpose grounds.[94] However, more intensive review is available in public law. In relation to the relevancy grounds there is increasing acceptance that the weight given to a relevant consideration is reviewable.[95] In *Minister for Immigration and Citizenship v Li* ('*Li*'), the plurality held that the tribunal had given too much weight to one factor and not enough weight to another.[96] In the UK, according manifestly disproportionate weight to relevant factors is reviewable.[97] The authors of *De Smith* argue that the combined effect of the cases is a common law duty to fairly balance competing considerations.[98] However, this conclusion is complicated by European Union human rights law, which has been distinguished from the common law on the basis that it does require review of weight.[99]

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[92] *Newgate* (n 83) [240].

[93] Ibid [242].

[94] See *Esso Australia Ltd v Australian Petroleum Agents' and Distributors' Association* [1999] 3 VR 642, 651–2 [39] ('*Esso*'); *Edge v Pensions Ombudsman* [2000] Ch 602 (CA), 628 ('*Edge*').

[95] Contrast *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2011] 1 AC 437, 461 [70] (Lord Collins).

[96] (2013) 249 CLR 332, 365–6 [72], [74], 369 [85] (Hayne, Kiefel & Bell JJ).

[97] *R (Gallagher) v Basildon District Council* [2011] PTSR 731, 747 [41]; *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, 1626–7 [107] (Lord Sumption).

[98] *De Smith* (n 78) 602-4 [11-029]-[11-031], 634-7 [11-073]-[11-076], 640-1 [11-084].

[99] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547–8 [27] (Lord Steyn) ('*Daly*').

In relation to purpose, the courts have looked to context to find that discretions may have particular purposes that severely limit the decision-makers' breadth of discretion.[100] A famous example is the Pergau dam case where the purpose of a discretion to grant foreign aid was to assist economically sound projects, although the text of the statute contained no such limitation.[101]

The ancillary rules around access to reasons for decisions are important here. Decision-making norms are more effective in public law than in trust law because there is greater access to reasons. This is despite the common law position, in *Public Service Board (NSW) v Osmond* ('*Osmond*'), that there is no general duty to provide reasons.[102] In Australia, the common law is supplemented by numerous statutory duties to give reasons,[103] for example, in New South Wales there is a court rule that any judicial review claimant can demand a statement of reasons.[104] This is part of a trend towards recognising that the duty is desirable in most circumstances.[105] Scholars have recognised that it is necessary to look at reasons when the grounds include purpose and relevancy.[106] In the United Kingdom a duty to give reasons will be readily implied from the context,[107] and

[100] Elliott and Varuhas (n 72) 236–46.

[101] *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte World Development Movement Ltd* [1995] 1 WLR 386, 402 (Rose LJ).

[102] (1986) 159 CLR 656. See also *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531, 564 (Lord Mustill) ('*Doody*').

[103] See, eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13; *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 13; *Judicial Review Act 1991* (Qld) Part 4; *Administrative Decisions Review Act 1997* (NSW) ss 49-52; *Judicial Review Act 2000* (Tas) Part 5.

[104] *Uniform Civil Procedure Rules 2005* (NSW) r 59.9.

[105] *Stefan v General Medical Council* [1999] 1 WLR 1293, 1300–1; *Gosford Waterfront Alliance Inc v TO Gosford Pty Ltd [No 2]* (2016) 220 LGERA 253, 274 [52].

[106] Bruce Chen, 'A Right to Reasons: Osmond in Light of Contemporary Developments in Administrative Law' (2014) 21(4) *Australian Journal of Administrative Law* 208; Ronald Sackville, 'The Evolution of the Duty of Decision-Makers to Give Reasons' (2016) 23(3) *Australian Journal of Administrative Law* 128.

[107] *Doody* (n 102) 561–4 (Lord Mustill). See also Elliott and Varuhas (n 72) ch 11.

the lower courts have developed a range of exceptions where reasons will be required, including when reasons are necessary in order for people to determine whether they have an action for review.[108] In Australia, in *Osmond* itself Deane J recognised that fairness or legitimate expectations might lead to an implied statutory obligation to give reasons, unless explicitly excluded.[109] It is possible that the only reason a common law duty to give reasons has not been recognised is that there is already sufficient access under statute to meet claimants' needs.[110] In addition, in contrast to the position in trust law, the lack of a general duty has never been construed as an immunity.[111] An adverse inference can be drawn from a failure to give reasons.[112] For example, in *Li*, the High Court overturned a decision that lacked 'an evident and intelligible justification'.[113] Justice Ronald Sackville has said extra-curially that the threat of adverse inferences was 'vigorously employed' to require decision-makers to give reasons.[114]

Third, the norm of reasonableness has allowed increasingly intense review of decision outcomes since *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* ('*Wednesbury*').[115] In contrast, even *Wednesbury* unreasonableness alone is controversial in trust law.[116] In the United Kingdom, several factors have increased the standards of

[108] *De Smith* (n 78) 446-8 [7-101]-[7-102]; Chen (n 106) 223–4.

[109] *Osmond* (n 102) 676. See also *A-G (NSW) v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729, 734–5 (Priestley JA).

[110] See Chen (n 106) 214–6; Sackville (n 106) 141–2; Aronson, Groves and Weeks (n 68) 633–8 [8.450].

[111] See Chapter 6 Part II(B) on the trustees' immunity from giving reasons.

[112] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1032 (Lord Reid), 1049 (Lord Hodson), 1053 (Lord Pearce); *Osmond* (n 102) 663–4 (Gibbs CJ).

[113] *Li* (n 96) 367 [76] (Hayne, Kiefel and Bell JJ).

[114] Sackville (n 106) 141.

[115] [1948] 1 KB 223.

[116] *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, 901–2 (Lord Normand); *DNZ Property Fund Management Ltd v Argosy Property Management Ltd* (2011) 3 NZTR 21 [55]-[56].

reasonableness required of decision-makers. The idea that the intensity of review will vary with the context has replaced the single high standard in *Wednesbury*.[117] Factors such as legitimate expectations and fundamental rights will increase the courts' scrutiny of decisions.[118] The introduction of further doctrines such as proportionality[119] and substantive legitimate expectations[120] have also increased the United Kingdom courts' scrutiny of the merits of decisions. In Australia, unreasonableness review was rarely invoked prior to *Li*.[121] However, in that case, the plurality of the High Court held that the reasonableness review was not limited to bizarre or irrational decisions.[122] They held that a tribunal's decision was impaired because the tribunal had presented no good reason for its decision.[123] This is significant because it reverses the burden of proof. The claimant did not need to prove that no reasonable person could have made that decision, which would require them to argue all hypothetical reasons; instead, it was up to the decision-maker to justify the decision.[124] The ongoing impact of this apparently watershed decision is yet to be realised.

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[117] *Daly* (n 99) 548–9 [32] (Lord Cooke). See also MB Rodriguez Ferrere, 'An Impasse in New Zealand Administrative Law: How Did We Get Here?' (2017) 28 *Public Law Review* 310, on variable intensity review in New Zealand.

[118] *De Smith* (n 78) 643-51 [11-087]-[11-103].

[119] Elliott and Varuhas (n 72) 270–84; *De Smith* (n 78) [11-085]-[11-086].

[120] *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213. See also Elliott and Varuhas (n 72) 207–16; *De Smith* (n 78) 641-2 [12-045]-[12-064].

[121] *Li* (n 96).

[122] Ibid 364 [68] (Hayne, Kiefel and Bell JJ).

[123] Ibid 367 [76].

[124] Greg Weeks and Matthew Groves, 'Editorial: The Enduring Mystery of Minister for Immigration and Citizenship v Li' (2017) 24(3) *Australian Journal of Administrative Law* 145, 146.

Overall, public law judicial review, by default, holds decision-makers highly accountable by demanding that they be able to justify their decisions as fairly made, properly reasoned and reasonable.

### *2 Reasons for Accountability*

Having established that public law holds decision-makers accountable to a relatively high level, the next question is to ask why that is the case. This question is necessary because, as Conaglen cautions, trust law and public law can only be meaningfully compared to the extent that they have similar rationales.[125] High-accountability regulation in public law is only relevant to the regulation of discretionary trusts if the justification for the former is comparable in some respect to the latter.

One broad theory for the justification of judicial review in public law is the 'ultra vires' principle, which is that public decision-makers must only make decisions within the scope of their legal authorisation.[126] The current trend in Australia emphasises statute, and statutory interpretation, as the primary source for judicial review principles.[127] This justification for judicial review has similarities to the contractarian theory in trust law. However, Wade and Forsyth argue that the rule of law demands more than simply acting

[125] See Conaglen (n 63) 82–3.

[126] Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 27–8; Cane, McDonald and Rundle (n 64) 350–1. Historically, the ultra vires principle was significant in limiting the scope of judicial review but was gradually supplanted by expanded grounds of review: Cane, McDonald and Rundle (n 64) 101–2.

[127] Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(2) *Federal Law Review* 153. See also Fox-Decent (n 62) 23–6. The current trend in Australian law emphasises jurisdictional error for constitutional reasons and is a type of ultra vires reasoning: Cane, McDonald and Rundle (n 64) 101–2. However, it does not appear to be as restrictive as the traditional ultra vires principle because the concept of jurisdictional error has expanded to include many grounds of review and the courts appear able to use statutory interpretation to achieve intensive review: see generally ibid 97.

within authorised limits.[128] Such a narrow conception of the rule of law would mean that the accountability of decision-makers could be avoided simply by granting broader discretions.[129]

An alternative broad theory of judicial review is the common law theory. It holds that the courts impose general principles that limit public discretions beyond the demands of the particular statute.[130] This public law approach is relatively strong in the United Kingdom where judges have suggested that Parliamentary ouster of judicial review would not be acceptable.[131] The common law theory is associated with rule of law concerns; Wade and Forsyth argue that the rule of law demands that discretions be limited and not so broad that they are arbitrary.[132] It is also associated with concerns about democracy,[133] institutional design,[134] fairness,[135] the public interest,[136] and good administration.[137] A general principle in this field is the idea that public law necessarily exists for the public interest, which means that discretion must be limited and controlled. Jason Varuhas argues that the major developments in administrative law in the 1970s and 1980s were

[128] Wade and Forsyth (n 126) 15.

[129] See David Hume, *Broad Discretions and Constitutional Limitations: Current Issues* (SSRN Scholarly Paper No ID 2303229, Social Science Research Network, 30 July 2013) <https://papers.ssrn.com/abstract=2303229>; Edward Elliott, 'Judicial Review of Police Decisions to Not Investigate Reported Crimes: The Barriers to Success' (2015) 22(4) *Australian Journal of Administrative Law* 219.

[130] See Dawn Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' [1987] (Win) *Public Law* 543; Paul Craig, 'Competing Models of Judicial Review' [1999] (Aut) *Public Law* 428.

[131] Lord Woolf, 'Droit Public: English Style' [1995] (Spr) *Public Law* 57; *De Smith* (n 78) 16-8 [1-026]-[1-029].

[132] Wade and Forsyth (n 126) 15.

[133] Bannister, Appleby and Olijnyk (n 73) 12–5.

[134] Cane, McDonald and Rundle (n 64) 354–5.

[135] Bannister, Appleby and Olijnyk (n 73) 20.

[136] *De Smith* (n 78) 12 [1-016].

[137] Ibid 12 [1-017].

driven by 'an idea of public law as concerned with the regulation of public power in the public interest and according to precepts of good administration'.[138]

The two broad theories of judicial review bring us to the idea of purpose. Purpose can be understood here as having two layers: the universal and the particular. As Varuhas argues, the universal purpose of public discretions is the public interest. Lord Nicholls once held that 'Parliament confers powers on public authorities for a purpose. An authority is entrusted and charged with responsibilities, for the public good.'[139] There is a strong normative claim that the universal Parliamentary purpose in granting any public discretion is to benefit the public. This conception of purpose is not concerned with the actual intentions of legislators but with the purpose that a reasonable legislator would have had when enacting legislation with discretionary powers.[140] This universal purpose influences the interpretation of statutory purposes that determine the particular purposes of statutory discretions. In *Li* the plurality held that 'where discretions are ill-defined (as commonly they are) it is necessary to look to the scope and purpose of the statute conferring the discretionary power and its real object. The ordinary approach to statutory construction, … requires nothing less.'[141] Thus, the statutory purposes determine how

[138] Jason Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 45, 46.

[139] *Stovin v Wise* [1996] AC 923, 935 (dissenting). See also *HTV Ltd v Price Commission* [1976] ICR 170, 185 (Denning LJ); *Warringah Shire Council v Pittwater Provisional Council* (1992) 26 NSWLR 491, 508 (Kirby P); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 40 [96] (McHugh J).

[140] See Dale Smith's second understanding of statutory purpose: 'What Is Statutory Purpose?' in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law Under a Democratic Constitution* (Hart Publishing, 2019) 13.

[141] *Li* (n 96) 363–4 [67] (citations omitted).

the discretion is intended to benefit the public, while the universal purpose determines how we understand the statutory purposes.

The universal purpose of public discretion – the public interest – overlays particular statutory purposes and influences how we understand the role of public decision-makers. The public interest demands that public officers act pursuant to their statutory purposes when wielding public power, and it demands that public officers be held accountable for doing so. If public officers are not accountable, then it cannot be known or verified whether they are, in fact, pursuing or hindering the statutory purposes. Moreover, the public interest demands that when determining the purpose of a statutory power we can assume that Parliament's purpose was to benefit the public, rather than, for example, any political goal that may have motivated the statute. Thus, the universal purpose of the public interest both requires that a high-accountability regime regulate public decision-makers and directs that regime to only enforce purposes that benefit the public.

In summary, in public law we find three justifications for high-accountability regulation that are relevant to discretionary trusts. First, the ultra vires theory looks to a statutory foundation for regulation. Second, the common law theory demands good administration separate from the statutory foundation. Third, the universal purpose of public discretions is to benefit the public, which means that public officers must be accountable for forwarding the particular purposes of authorising statutes. As explained further below, these three justifications have parallels in trust law: the trust instrument provides a constitutive foundation for regulation similar to the ultra vires doctrine; the institutional position of trustees as custodians of wealth demands good administration; and the universal purpose of discretionary trusts is to benefit beneficiaries, which requires

that trustees be accountable in forwarding that purpose. The next part of the chapter explores these similarities and their relevance to the development of trust law.

### B *Adopting Purposive Regulation in Trust Law*

The public law system of high-accountability regulation of discretion provides an aspirational model for discretionary trusts. Trust law should hold trustees accountable to the beneficiaries for how they exercise their discretions in a meaningful way. A high-accountability model for discretionary trusts can be developed that draws on the more sophisticated accountability mechanisms available in public law. This will present the law of discretionary trusts in its best light, because it will better fit the fundamental principle that a trust is a meaningful relationship of rights and duties between trustees and beneficiaries. In short, public law shows how the legal form of discretionary trusts can be developed so that all discretionary beneficiaries have the same set of procedural entitlements that enable them to hold trustees accountable for making sound, reasoned decisions.

The object of this part of the chapter is to ask in more detail how high-accountability regulation of discretionary trustees could work. It remains a fundamental norm of trust law that trusts are created by settlors not by the courts, which raises the question of how high-accountability regulation can be reconciled with settlor autonomy. That is, how can we use a legal form of discretionary trusts in which trustees are accountable when interpreting trust instruments? In addition, while the same general duties could be applied to all discretionary trustees, consideration needs to be given to how those duties are given shape in particular trusts. These issues can be effectively addressed by drawing on public law's purposive approach. The idea of universal and particular purposes can be applied

to discretionary trusts in such a manner that it 1) mandates a high-accountability regulatory regime, 2) shapes the application of regulatory duties, and 3) is consistent with settlor autonomy.

An obvious objection is that trust law does not incorporate the same universal purpose as that seen in public law. Distributive discretions are not conferred on trustees for the public good. While private law may ultimately exist for the public good,[142] it is more immediately concerned with private interests.[143] This difference underlies judicial scepticism about the relevance of public administrative law to trust law. In *Pitt v Holt*, in the Court of Appeal, Mummery LJ emphatically stated that any comparison between administrative law and trust law was unhelpful and unnecessary because the 'public interest basis' of the former rendered the two conceptually distinct.[144] This sceptical view has been shared by other judges although without the clear reference to the purpose of public law.[145] However, the purposive regulation found in public law is relevant to trust law even though discretionary trusts are not created to advance the public good.

Numerous judges have found it useful to compare how public law and trust law regulate decision-making.[146] Discretionary trusts do exist for a distinctive universal purpose, which can provide the foundation for a purposive, high-accountability regulatory

[142] See Steve Hedley, 'The Rise and Fall of Private Law Theory' (2018) 134(Apr) *Law Quarterly Review* 214.

[143] See Varuhas (n 138) 52.

[144] [2012] Ch 132, 204–5 [235] ('*Pitt* (CA)').

[145] *Telstra Super Pty Ltd v Flegeltaub* (2000) 2 VR 276, 285 [33] (Batt JA); *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409, 420 [29] ('*Barr*'); *Pitt v Holt* [2013] 2 AC 108, 123 [11] ('*Pitt*'); David Hayton, *Law of Trusts and Equitable Remedies* (Sweet & Maxwell, 11th ed, 2001) 718.

[146] *Wild v Pensions Ombudsman* [1996] 2 FLR 680, 688; *Scott* (n 75) 715–6; *Esso* (n 94) 651–2 [39]; *Edge* (n 94) 628; *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 417 [20] (Lord Woolf MR); *Wong v Burt* [2003] 3 NZLR 526, 532–4 [18]; *Erceg v Erceg* [2016] 2 NZLR 622, 630 [32], affd [2017] 1 NZLR 320. See also Graham and Beasley (n 63).

regime. The brief answer is that settlors necessarily create discretionary trusts to benefit beneficiaries, with flexibility about when, how and why they benefit. The insight from public law is that trustees should be held accountable for carrying out this purpose. The purposive approach contrasts with contractarianism: the latter holds trustees accountable to what the settlor expresses in the trust instrument, whereas the former holds trustees accountable to the settlor's intentions and expected outcomes concerning who will benefit from the trust. The rest of this chapter sets out the purposive approach and assesses how it fits with the text of trust instruments.

### *1 Purpose in Discretionary Trusts*

The universal purpose of trusts is to benefit beneficiaries. A trust is a relationship where trustees hold assets for the benefit of others and those others can enforce that relationship. This purpose is shared by both fixed and discretionary trusts. The difference between the two is that the purpose of fixed trusts is to provide precise benefits to certain people, while the purpose of discretionary trusts is flexibility over when, how and why the beneficiaries benefit. The conclusion we must draw is that the purpose of a discretionary trust is not to benefit every eligible beneficiary, but to benefit beneficiaries in different degrees in accordance with the settlor's intentions. The insight we draw from the comparison with public law is that for the universal purpose to be meaningful the trustees must be subject to regulation that holds them to that purpose. In short, the purposive approach to discretionary trust regulation is to hold trustees accountable for distributing benefits to beneficiaries in the circumstances and for the reasons that the settlors intended.

A pre-condition for the application of the purposive approach is that beneficiaries must be able to access evidence of the trustees' reasons in order to determine whether or not the trustees' have distributed benefits for the reasons that the settlors intended. At the least, the current uncertainty about the application of civil procedure rules to trustees' reasons must be resolved in the beneficiaries' favour. As in public law, a trustees' refusal to give reasons should be interpreted as evidence of an absence of good reasons.[147] Moreover, trust law should recognise, like public law, that a positive, independent duty to give reasons is desirable in most circumstances.[148] These reforms are consistent with settlor autonomy as they are necessary to enforce the settlor's purpose.

An illustration of the purposive approach to trustee regulation is found in *Australian Incentive Plan Pty Ltd v Attorney-General (Vic)* ('*Australian Incentive*'), where the primary beneficiaries were employees and the secondary beneficiaries were charities.[149] The primary purpose of the trust was to incentivise employees. However, this meant that where incentivisation was impossible, due to the employer company being in liquidation, providing benefits to the employees did not fulfil the purpose of the discretion. The Victorian Court of Appeal held that in these circumstances the purpose of the discretion was fulfilled by distributing to the secondary beneficiaries.[150]

*Australian Incentive* also demonstrates an important distinction between purpose and motive.[151] A settlor may have a variety of reasons for setting up a discretionary trust,

[147] See above text to nn 111-4.

[148] See above text to nn 102-10.

[149] (2012) 44 VR 661.

[150] Ibid 668-70 [36]-[42] (Nettle JA), 691-2 [129]-[132] (Davies AJA).

[151] *Topham v The Duke of Portland* (1863) 1 De G J & Sm 517; 46 ER 205, 227; *Australian Incentive* (n 149) 690 [126] (Davies AJA).

some of which may conflict with holding trustees accountable, and some of which may not be concerned with which beneficiaries are to benefit. However, these reasons are not themselves the purposes of a discretionary trust. The purpose must still be to benefit the beneficiaries;[152] therefore, the settlor's motives are only relevant to the extent that they are concerned with the circumstances, reasons and degrees to which beneficiaries should benefit. Davies AJA applied this distinction in *Australian Incentive*.[153] He noted the argument that the settlor's motive for including the default provision for charities may have been to avoid the trust failing if there were no employee beneficiaries. However, rather than suggesting that there was no actual intention to benefit charities, this motive confirmed that a purpose of the trust was to benefit them in the event that incentivising employees was not achievable.[154]

Another illustration of the purposive approach is *Blair v Vallely* ('*Blair*'), which concerned New Zealand trustees holding farming assets.[155] The settlor's six children were beneficiaries under an 'absolute and uncontrolled' distributive discretion.[156] Following expiry of the discretion at the end of the trust period, there was a default trust in favour of the children equally. There was nothing in the trust instrument stating the purpose of the discretion. Nevertheless, Wild J accepted evidence from the children that

[152] Cf JE Penner, 'Purposes and Rights in the Common Law of Trusts' (2014) 48(2) *Revue Juridique Themis* 579, where Penner explains fixed interests that are defined as the amount necessary to complete a task, for example, the education of a beneficiary. In these trusts the purpose of education is a motive that is relevant to defining the extent of the intended benefit to the beneficiary. In a similar way, the motives of the settlor settling a discretionary trust are relevant to understanding the when, how and why the beneficiaries are intended to benefit.

[153] *Australian Incentive* (n 149) 690 [126].

[154] Ibid.

[155] [2000] WTLR 615.

[156] Ibid 620.

their father intended them to benefit equally from the trust.[157] This meant that the discretion's purpose was to provide flexibility in the timing of their respective benefits, but no flexibility in overall financial benefit. However, Wild J found that the settlor had an additional purpose for the trust, which was to assist male children in establishing their own farms by giving them use of the trust farm. The children were to pay commercial rates for this use, but it provided them an opportunity to start farming with reduced transaction costs. Wild J concluded that it would be inconsistent with this purpose for the trustees to give more assets to the children who had not become farmers and had ended up less wealthy.[158] This interpretation of the purpose of the discretion demanded a rigorous standard of decision-making from the trustees. The relative financial positions of the children were not 'proper' considerations in light of the purpose and it was unreasonable for the trustees to place weight on them.[159] Moreover, the beneficiaries were entitled to have the trustees explain the reasons for their decisions.[160] This case illustrates how trustees can be held accountable to a high standard for making decisions and not according to their 'gut feeling as to what was a fair outcome'.[161]

In both of the above cases the purpose of a discretionary trust is discerned by looking beyond the trust instrument to the evidence about when, how and why the settlor intended the beneficiaries to benefit. This is necessary because most discretionary trust instruments create flexibility of distribution, and designate a range of eligible beneficiaries, but do not state the purpose of that flexibility. Thus, the choice is either

[157] Ibid 631–2.

[158] Ibid 636.

[159] Ibid.

[160] Ibid.

[161] Ibid 635.

flexibility with no purpose or to discern the purpose from other evidence. The range of evidence that is relevant to discerning the purpose should include any evidence of which a trustee would be aware, including contextual evidence of the purpose of the discretion and any direct evidence of the settlor's intentions communicated to the trustees. While *Australian Incentive*[162] and *Blair*[163] illustrate this process with relatively straightforward trusts, the following paragraphs will consider two more complex circumstances: broad discretions and living settlors.

In contrast to the above two cases, we next consider trusts with broad classes of eligible beneficiaries. When a settlor establishes such a trust it may usually be assumed that she or he does not intend all beneficiaries to benefit. Instead, the settlor's purpose will be to prefer some beneficiaries over others. Frequently, there will be clear distinctions between higher and lower priority beneficiaries, for example, the trust instrument may identify 'primary' or 'specified' beneficiaries.[164] Even when the trust instrument is silent the courts have little difficulty in discerning that some beneficiaries are intended to benefit to a greater degree.[165] Moreover, like *Australian Incentive*[166] and *Blair*,[167] it will also be discernible that settlors intend that beneficiaries should benefit in certain circumstances and for certain reasons. An example of the purposive approach to a broad discretion is *Schmidt v Rosewood Trust Ltd*, where almost everyone in the world

[162] *Australian Incentive* (n 149).

[163] *Blair* (n 155).

[164] See *Foley v Gleeson* [2013] QSC 234 [38]; *Mandie v Memart Nominees Pty Ltd* [2016] VSCA 4 [11].

[165] See *Murphy v Murphy* [1999] 1 WLR 282, 292; *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 723 [33], 735 [68] ('*Schmidt*'); *Erceg v Erceg* [2017] 1 NZLR 320 (SC), 340 [60]-[62] ('*Erceg*').

[166] *Australian Incentive* (n 149).

[167] *Blair* (n 155).

was a beneficiary.[168] Nevertheless, there was a clear intention to benefit one man significantly more than the rest of the world because he was the son of a settlor.[169] In contrast, it is common for charities to be named as default beneficiaries, but only be intended to benefit in rare circumstances. This can occur with 'black hole' or 'Red Cross' trusts where the only beneficiary identified in the trust instrument is a charity and the intended primary beneficiaries are included as the anonymous objects of a broad power.[170] The motive for such a structure is often to avoid including the names of intended beneficiaries in documents.[171]

A circumstance where the purposive approach is particularly complex is a living settlor. In the cases above, the settlors were dead or in administration.[172] As the authors of *Lewin on Trusts* state, the trustees 'are to make choices which the settlor could have made himself';[173] however, where settlors are living, they can inform the trustees directly what choices they would make, for example, through updated letters of wishes.[174] This raises the question of what the purpose of a trust is when the purpose can change with the wishes of the settlor. One answer would rely on the classic trust principle that after creating the trust the settlor 'drops out of the picture'.[175] This would suggest that only the settlor's wishes at the time of the creation of the trust are relevant; any later wishes

[168] *Schmidt* (n 165).

[169] Ibid 720 [19]-[20], 723 [33].

[170] Paul Matthews, 'The Black Hole Trust: Uses, Abuses and Possible Reforms' [2002] *Private Client Business* 42.

[171] See *Schmidt* (n 165) 723 [34].

[172] *Australian Incentive* (n 149); *Blair* (n 155); *Schmidt* (n 165).

[173] Lynton Tucker et al, *Lewin on Trusts* (Sweet & Maxwell, 19th ed, 2015) 1313 [29–162] ('*Lewin*').

[174] See *Hartigan* (n 74) 431 (Mahoney JA); *Barr* (n 145); *Lewin* (n 173) 1313-4 [29-163].

[175] See Donovan Waters, 'Trusts: Settlor Reserved Powers' (2006) 25 *Estates, Trusts & Pensions Journal* 234, 238.

must be ignored. However, this has not drawn significant support.[176] Another answer is that at least one purpose of inter vivos discretionary trusts is to maintain settlors' influence over the distribution of their former assets. That is, the flexibility[177] promoted by trust practitioners is flexibility for settlors. Therefore, the purpose of the trust is not to benefit beneficiaries in a particular way, but to cater to the settlor's changing wishes about who should benefit. An example of this reasoning in practice is *Abacus Trust Co (Isle of Man) v Barr*, where a trustee's decision was overturned due to failure to take adequate care to find out the settlor's wishes.[178] A purpose of catering to the settlor's wishes means that often the trustees will carry out those wishes, although the trustees must continue to exercise their own independent judgment about how best to fulfil this purpose,[179] and may need to balance this purpose with other purposes.

A complication that this answer poses for settlors is that a trust that caters to one's wishes has significant economic value. This is particularly so when the settlor is also a beneficiary. Trustees who act in accordance with the purpose of catering to the settlor's wishes will likely distribute assets to the settlor if she or he wants them in the future. An example of this economic value is *X v X [Family Trust]*, which is one of the few cases where settlors were beneficiaries but had relinquished their protector powers of control over the trustees.[180] This left the trustees with more independence than trustees who are

[176] See *Hartigan* (n 74) 431 (Mahoney JA); *Barr* (n 145).

[177] It is a common refrain in the trust profession that the purpose of distributive discretions is flexibility simpliciter: see, eg, Briony Hutchens, 'Passing Control of a Discretionary Trust to the next Generation' (2018) 40(5) *Bulletin (Law Society of SA)* 26.

[178] *Barr* (n 145).

[179] *Pitt* (n 145) 137 [66].

[180] [2009] NZFLR 956, 962 [28].

subject to typical protector powers.[181] When the settlors divorced, they asked the trustees to resettle the trust into two trusts, with one under each settlor's separate control. The trustees respected the settlors' wishes, in accordance with the reasoning above, and agreed to distribute half the trust fund for the settlors' benefit. The trustees did not accede to the settlors' full request because they believed the trust's purpose was to benefit the settlors' children, as well as catering to the wishes of the settlors.[182] A settlor's economic interest in a trust is enhanced where they retain private powers of control over the office of trustee, such as powers to remove and replace the trustee.[183] The purposive approach does not create this economic complication for settlors, instead it gives legal recognition to the existing fact that trustees largely do follow the wishes of settlors and that this has economic value.

The final complication with the purposive approach and living settlors is when the settlor is bankrupt. The usual reasoning that is followed in these cases is found in *Re Cooper St Property Trust [No 2]*.[184] The settlor transferred commercial real estate to a corporate trustee that was owned and directed by the settlor, and he retained the power to remove and appoint trustees. As well as appointor, the settlor was a named discretionary beneficiary, and everyone else in the world was an unnamed discretionary beneficiary.[185] These circumstances strongly suggest that the settlor's purpose was solely to benefit

[181] See Chapter 6 Part II(D).

[182] *X v X [Family Trust]* (n 180) 962-3 [28]-[35].

[183] See *Pugachev* (n 47) [265]-[278].

[184] [2017] VSC 291 ('*Cooper*').

[185] The trustee had power to nominate anyone in the world to the class of people to which assets could be distributed. As noted in Chapter 4 n 186, a person is still a discretionary beneficiary when distribution operates in two steps: 1) appointment of the person to a class of 'beneficiaries' and 2) appointment of assets to the person. That is, any power in the trustee to add people to a class of beneficiaries is inherently a power to distribute to anyone who can be added.

himself. Proceedings were commenced because the settlor went bankrupt and his trustee in bankruptcy applied to appoint a new trustee. McMillan J refused because he found that the proposed trustee was likely to distribute the assets to the bankrupt settlor, which would then be available to his creditors. McMillan J held that this would not be in the interests of the beneficiaries as a whole.[186] McMillan J's decision is unsound because it does not consider the purpose of the trust, which the circumstances suggest was primarily to benefit the settlor alone. The interests of the beneficiaries as a whole are to have the trust carried out in accordance with its purpose. Another possible response is that the settlor would not benefit if assets were distributed to him while he was bankrupt,[187] therefore, the purpose of the trust would not be fulfilled by such a distribution. This raises a question of public policy. There is a long-standing principle that interests terminable upon bankruptcy are a fraud on the bankruptcy laws.[188] In keeping with the spirit of this principle the bankruptcy status of a beneficiary should be an irrelevant consideration. This is consistent with the principle that a trustee in bankruptcy stands in the shoes of the bankrupt.[189] Any other position will mean that discretionary trustees are allowed, or even required, to undermine the bankruptcy legislation.

In summary, the purposive approach, inspired by public law, provides a pathway to holding discretionary trustees accountable for adhering to the settlor's purpose. The settlor's purpose is understood as a her or his reasons for when, how and why the

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[186] *Cooper* (n 184) [36].

[187] See *Erceg* (n 165) 348 [99].

[188] See *Ex parte Jay; Re Harrison* (1880) 14 Ch D 19, 25; *Re Burroughs-Fowler* [1916] 2 Ch 251; *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758, 779–81 (Lord Cross); *Mosaic Oil NL v Angari Pty Ltd (No 2)* (1990) 20 NSWLR 280.

[189] *Wood v W & G Dean Pty Ltd* (1929) 43 CLR 77, 87 (Isaacs J); *Sharpe v Smail* (1975) 5 ALR 377, 379 (Gibbs J); *Official Assignee v Wilson* [2008] 3 NZLR 45, 50 [19] (Robertson and O'Regan JJ).

beneficiaries should benefit. Evidence of the settlor's purpose is relevant if it would be known to the trustees exercising the discretion and may include the context of the trust, the settlor's motives for establishing the trust, the settlor's relationships with the beneficiaries, and direct evidence of the settlor's wishes.

### *2 Purposive Regulation and Exclusion Clauses*

Thus far, we have discussed high-accountability purposive regulation as a default system. In the cases above the courts have looked beyond the text to find other evidence of the settlor's purpose and held the trustees accountable. We have not considered situations where the trust instrument attempts to expressly reduce trustees' accountability by excluding necessary regulatory mechanisms. This section argues that high-accountability regulation should override exclusion clauses and apply as the mandatory mode of regulation for all discretionary trusts. This marks a clear departure from the contractarian theory. It means that the balance in how legal form and trust instrument interact should be tilted in favour of the legal form. Express terms in the trust instrument that contradict the high-accountability legal form should be either struck out as repugnant or interpreted as negating intention to create a trust. This is an argument that high-accountability regulation of distributive discretions ought to be the irreducible core of the discretionary trust relationship.

The central argument for why high-accountability regulation should be mandatory is that it is essential for the legitimacy of discretionary trusts. The purposive approach means that a discretionary trust always exists for the purpose of benefiting certain people. Trustees should be held irreducibly accountable for properly administering trusts in

accordance with that purpose. However, before setting out that argument there are three objections to be considered.

*(a) Objections*

The three objections to elevating high-accountability regulation over exclusion clauses in trust instruments are consent, Parliamentary sovereignty in public law, and the settlor's autonomy.

The first objection is found in Justice Edelman's contractarian theory of fiduciary law under which the source of duties is consent-based: the fiduciary's undertaking.[190] On this account, trustees can only legitimately be subject to duties that they consent to in their undertakings, or that can be implied from those undertakings.[191] Therefore, it could be argued that any principle that looked to purpose, as informed by the context, to override the express terms of undertakings would be illegitimate.

The response to this theory is Matthew Harding's argument that equity creates institutions.[192] Harding reasons that trusts are institutions that can be selected by private parties and modified to a certain extent, but which are imbued with norms, and a legal form, that cannot be contracted out of.[193] Trusts have institutional principles and structures that are constitutionally superior to the trust instrument, which is merely a

[190] Edelman, 'When Do Fiduciary Duties Arise?' (n 8); Edelman, 'The Importance of the Fiduciary Undertaking' (n 8); Edelman, 'The Role of Status in the Law of Obligations' (n 8).

[191] Edelman, 'When Do Fiduciary Duties Arise?' (n 8) 302.

[192] Matthew Harding, 'Fiduciary Undertakings' in Paul B Miller and Andrew S Gold (eds), *Contract, Status and Fiduciary Law* (Oxford University Press, 2016) 71; Matthew Harding, 'Equity and Institutions' in Irit Samet, Dennis Klimchuk and Henry Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, forthcoming).

[193] Harding, 'Equity and Institutions' (n 192); Harding, 'Fiduciary Undertakings' (n 192) 87–8.

document (or other act) that causes the trust to come into being.[194] This means that the relevant consent is not consent to an agreement, but consent to act in an established role within an institution known to law. Thus, any undertaking to act as trustee necessarily means the trustee's consent to the institutional norms that are attached to status as trustee. If the settlor and trustees attempt to negate those norms by modifying them in the trust instrument then that will only show that they had incompatible intentions, the priority of which must be resolved. Was there no consent to, or intention that, they act as trustees? Or is the attempt to render the trustees unaccountable of no effect given their consent to act as trustees, which necessarily requires accountability?

The second objection is that in public law the relevant instruments — statutes — do have primacy over the norm of accountability. Accountability is subject, at least to some degree, to the higher constitutional norms of the sovereignty of Parliament and separation of powers.[195] Thus, one could argue that the lesson of public law is that exclusion clauses must be respected. There are two responses to this objection: in public law exclusion clauses are not given full effect, and the reasons for giving them some effect do not apply in trust law.

First, the courts have avoided giving effect to exclusion provisions in statutes that attempt to limit the extent of judicial review. When interpreting statutes, the courts strongly presume that Parliament does not intend to undermine the rule of law by

[194] On causative events see Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1, 8–10.

[195] See *De Smith* (n 78) 16 [1-026].

excluding judicial review.[196] The United Kingdom experience is particularly telling because, unlike Australia,[197] judicial review is not constitutionally entrenched. In *Anisminic v Foreign Compensation Commission*,[198] the House of Lords went so far as to render an entire class of exclusion clauses ineffective. A statute provided that the decisions of a commission were not to be questioned, but the House of Lords held that its decisions could nevertheless be reviewed because any jurisdictional error would mean that the commission was not questioning a valid decision. And because almost any reviewable error can be jurisdictional these exclusion clauses have been rendered ineffective.[199] Subsequently, some judges have commented in obiter that the United Kingdom Parliament does not have the constitutional ability to exclude judicial review.[200]

Second, the constitutional reasons for respecting statutory exclusion clauses do not apply to trust instruments. In public law, a core theoretical concern is the legitimacy of judicial review.[201] The doctrines of Parliamentary sovereignty and separation of powers demand that the courts be careful not to overreach their constitutional limits and to respect Parliament's authority to make laws.[202] This means that the courts must pay some respect to exclusion clauses, especially when judicial review comes under political attack.[203] In

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[196] *R v Blakeley; Ex parte the Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54; *Anisminic Ltd v Foreign Compensation Comission* [1969] 2 AC 147 ('*Anisminic*'); Elliott and Varuhas (n 72) 533–4.

[197] See *Australian Constitution* ss 75(v), (iii), (ii).

[198] *Anisminic* (n 196).

[199] Ibid 171 (Lord Reid), 195, 207 (Lord Pearce). See also *De Smith* (n 78) 218-9 [4-033].

[200] See *R (Jackson) v A-G* [2006] 1 AC 262, 302–3 [102] Lord Steyn, cf 318 [159] Baroness Hale. See also Lord Woolf (n 131).

[201] Bateman and McDonald (n 127) 173–5.

[202] See Elliott and Varuhas (n 72) 12–24; Cane, McDonald and Rundle (n 64) 20–5.

[203] See Bateman and McDonald (n 127) 172–3, who argue that the political threat to judicial review caused judges to adopt a more restrictive statutory interpretation approach to judicial review in Australia.

contrast, settlors have no constitutional authority that must be respected by the courts. Equity grants courts an inherent jurisdiction over trusts as they are a creation of equity.[204] Therefore, there is no reason relating to Parliamentary sovereignty why the courts should allow exclusion clauses that infringe upon the integrity of the trust as an institution. The only constitutional issue arising with trusts is the principle that the courts should not deprive anyone of their property rights.[205] However, this does not affect discretionary trusts, because there are no proprietary claims against the trust assets that would be disturbed by the courts' review jurisdiction.[206] The trustees' power to determine distributions is not a beneficial property interest that is constitutionally protected.[207] Therefore, if the courts accepted that high-accountability purposive regulation was an essential part of the nature of discretionary trusts, then there is no constitutional barrier to finding exclusion clauses repugnant to that nature.

The third potential objection is that imposing high-accountability regulation violates the autonomy of settlors who choose to diminish the accountability of trustees. There are two responses to this objection. There is an argument that reducing the range of types of trusts available to settlors reduces their options, and it is widely accepted that having adequate options to choose between is necessary to living an autonomous life.[208] A better argument, from Harding, is that accepting low-accountability discretionary trusts impairs settlor autonomy because it reduces the number of distinct legal forms by which settlors

[204] *Crociani v Crociani* [2014] UKPC 40 [36].

[205] *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337, 354 (Gibbs J).

[206] See Chapter 4 text to n 151.

[207] The courts have an inherent jurisdiction to remove the trustees' legal title: see *Letterstedt v Broers* (1884) 9 App Cas 371, 386.

[208] See Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press, 2014) 52–3. Harding uses a conception of autonomy associated with the work of Joseph Raz.

can dispose of their assets.[209] We can develop Harding's argument by reasoning that low-accountability trusts diminish the trustee-beneficiary relationship, and make it difficult, if not impossible, to meaningfully distinguish a trust from any other contract relating to assets. As Harding argues, accommodating settlors' desire for bespoke trusts may undermine autonomy because it will make a distinctive type of property arrangement less distinctive, and reduce the range of meaningfully different options.[210]

Moreover, it is true that overriding exclusion terms violates the settlor's intention that the trustees not be accountable. However, it must be borne in mind that settlors have multiple purposes. A settlor who wants trustees not to be accountable will, nevertheless, have settled the trust for the purpose of setting the assets aside to benefit certain people in the future for certain reasons. The courts cannot give legal effect to both these purposes. The law must choose between enforcing the settlor's purpose that the trustees not be accountable and enforcing the settlor's purpose that the assets be distributed to benefit those that the settlor intended to benefit. When faced with this choice the courts ought to respect the settlor's purpose of benefiting the beneficiaries rather than the settlor's purpose of protecting the trustees.

Overall, trust law is not the servant of settlors. It enables settlors to achieve outcomes, but there is no force to the argument that trust law should facilitate all ends that settlors hope to achieve. Trust law should only facilitate settlors' ends to the extent that settlors intend to create meaningful trust relationships.

[209] Harding, 'Equity and Institutions' (n 192) 27–9.

[210] Ibid 28–9.

*(b) Argument for Mandatory High-accountability Regulation*

The most straightforward argument for mandatory high-accountability regulation is that it is necessary for discretionary trusts to cohere with the fundamental principle that trusts create meaningful relationships between trustees and beneficiaries. Only where trustees are reliably accountable for how they exercise distributive discretions will the trustee-beneficiary relationship be meaningful. A more sophisticated version of this argument is that the weak relationship found in low-accountability trusts lacks legitimacy because it produces consequences that are disproportionate to the quality of the legal relationship.

In this argument, proportionality is understood as two variable quantities that have a constant ratio.[211] The two variable quantities will be disproportionate if the ratio is not constant. The two variable quantities that we are concerned with in discretionary trusts are 1) the quality of accountability in the trust relationship and 2) the proprietary consequences of the trust relationship. The current state of the first variable is described in Chapters 5 and 6, which demonstrated that the accountability in discretionary trust relationships varies on a spectrum from low-accountability trusts to high-accountability trusts. Importantly, at the low-accountability end of the spectrum, the trustees are subject to little more accountability for how they deal with the trust assets than an absolute owner is for how she or he deals with her own assets. This spectrum of accountability can be understood to have a smooth gradient as there are many factors that can imbue a trust with more or less accountability. The current state of the second variable is described in Chapter 3, which demonstrated that the existence of a discretionary trust relationship has

[211] *Oxford English Dictionary* (online at 17 December 2019) 'proportional' (def 3).

a ring-fencing effect that isolates trust assets from any positive beneficial proprietary claims. Unlike the first variable, this variable does not have a smooth gradient of different degrees of ring-fencing. Instead, the consequences are binary: if there is a trust, then the assets are ring-fenced; and if there is not a trust then the assets are not ring-fenced, but owned absolutely by the owner.

In their current state, these two variables are disproportionate because they do not maintain a constant ratio. This is illustrated in Figure 2 below. The degree of accountability in the trust relationship steadily decreases from the right to the left, where the beneficiaries of a low-accountability trust are little more able to hold the trustees accountable than if there was no trust. In contrast, the proprietary consequences remain constant until the point at which there is no trust. This produces an inconstant ratio between the degree of accountability and the proprietary consequences.

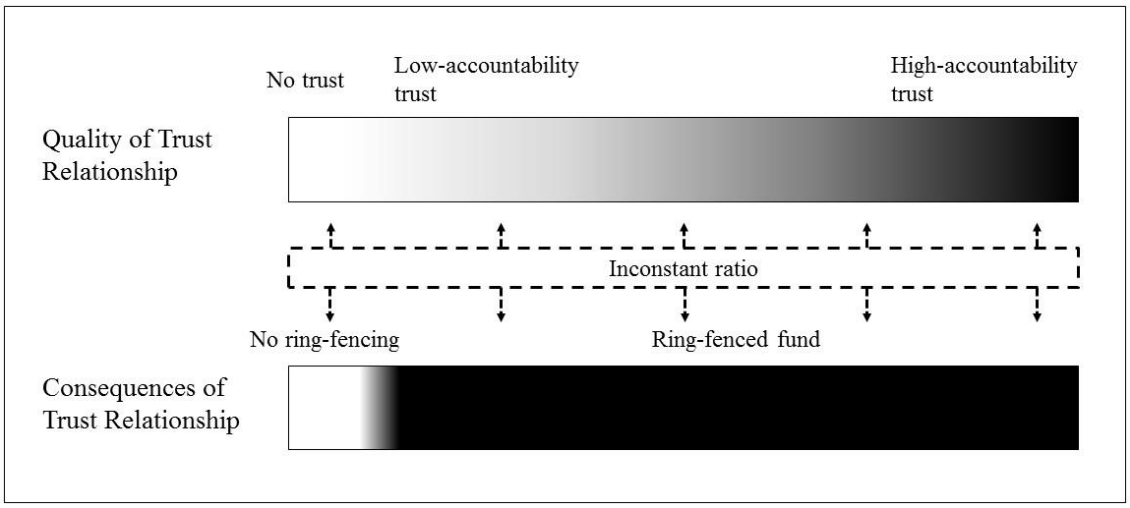

Figure 2: Disproportionality Between Quality and Consequence

The disproportionality between degree of accountability and consequence undermines the legitimacy of trusts as an institution. The ring-fencing of funds is a serious consequence because it removes assets from the patrimonial assumption that assumes

assets can be set off against liabilities.[212] This consequence is a legitimate consequence when it is paired with the serious effect of a high-accountability trust relationship. However, it is not a legitimate consequence when it is paired with a low-accountability trust that is little different to absolute ownership.

An example of the disproportionality evident in discretionary trusts is *Swishette Pty Ltd v Australian Competition and Consumer Commission*.[213] In this case a Mr Laski defrauded visa applicants and the ACCC brought claims against him for breach of the Australian Consumer Law. The ACCC attempted to enforce the claims against a discretionary trust associated with Mr Laski. The Full Court of the Federal Court of Australia held that this claim could not succeed because, as a discretionary beneficiary, Mr Laski had no entitlement to the assets of the trust.[214] That is, the assets were ring-fenced from Mr Laski's liabilities. This conclusion was reached even though Mr Laski was a discretionary beneficiary of the trust, held all the typical protector powers, and was the sole director of the trustee.[215] The evidence showed that Mr Laski treated the trust assets as if he were the absolute owner.[216] The possibility that the other beneficiaries could have held the trustee accountable for the action it took to Mr Laski's benefit is infinitesimal. The lack of proportionality in Mr Laski having a trust fund under his control, yet benefiting from the proprietary effects of a trust undermines the legitimacy of trust law.

[212] See Chapter 3 Part V(C).

[213] (2017) 249 FCR 483.

[214] Ibid 493 [26].

[215] Ibid 486–7 [8].

[216] Ibid 487 [10].

In contrast to the current situation in trust law, the purposive approach would increase the legitimacy of discretionary trusts by bringing proportionality to the quality and consequences of the discretionary trust relationship. It would do this by curtailing the spectrum of trustee accountability. A trust instrument that appeared to create a low-accountability trust would, nevertheless, be interpreted as creating a high-accountability trust by holding trustees accountable to the purpose of the trust. Therefore, a trust instrument would either successfully establish a high-accountability trust or fail to create a trust at all. This would bring the quality of the trust relationship and the consequences of the trust relationship into a constant ratio. A high-accountability trust produces a ring-fencing effect and failure to create a trust produces no ring-fencing effect. This is illustrated in Figure 3.

In summary, trusts are fundamentally enforceable relationships between trustees and beneficiaries. For such relationships to have integrity and legitimacy they need to be enforceable in fact and not solely in theory so that the significant proprietary consequences of a trust are proportionate to the quality of the trust relationship. The mandatory imposition of procedural entitlements that enable beneficiaries to hold trustees accountable in adhering to the settlor's distributive purpose is a way to achieve that legitimate relationship in accordance with settlors' autonomy. Indeed, it is submitted that granting beneficiaries effective procedural rights is 'necessary for the reasonable or effective operation'[217] of a discretionary trust.

[217] *Hawkins v Clayton* (1988) 164 CLR 539, 573 (Deane J).

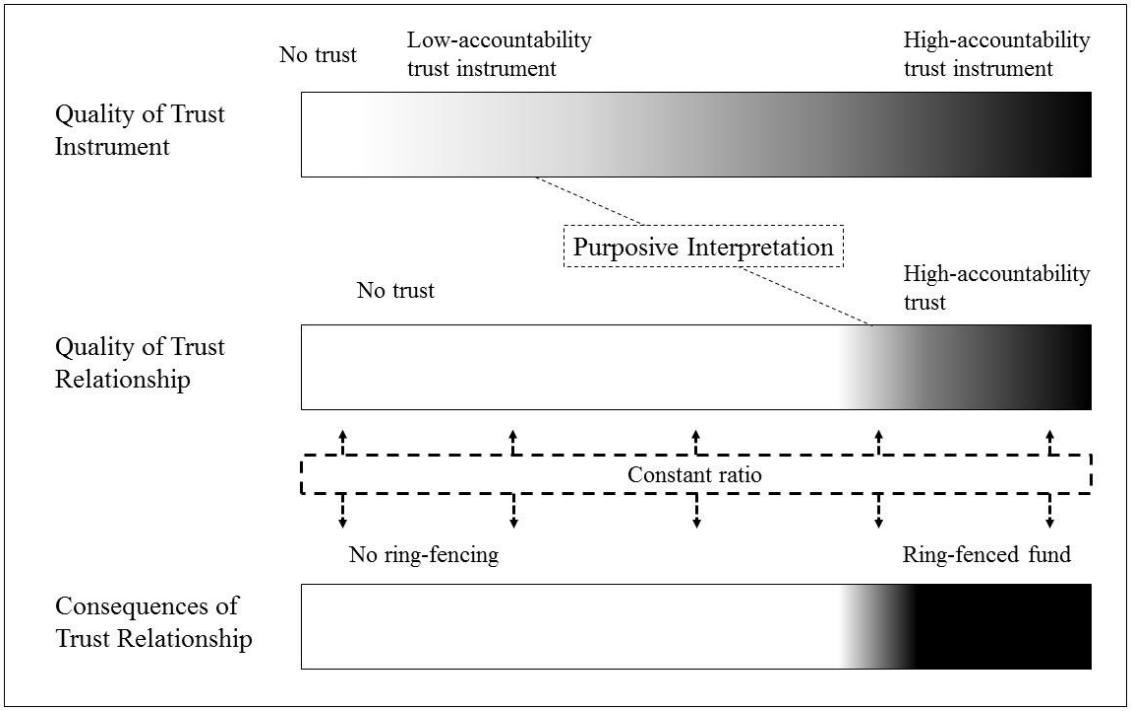

Figure 3: Proportionality Between Quality and Consequence

### *3 Argument for Enhanced Accountability*

In addition to the argument that high-accountability regulation should be mandatory for discretionary trusts, there is a further argument that the accountability of trustees should be developed further. This argument arises from recognition that the constitutional reasons for limited review in public law do not apply in trust law. This can be identified through the distinction between judicial review and merits review.

In public law a distinction is made between merits review — which goes directly to the substance of a decision — and judicial review — which does not. In *A-G (NSW) v Quin* ('*Quin*'), Brennan J stated: 'The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.'[218] This same distinction is also

[218] *A-G (NSW) v Quin* (1990) 170 CLR 1, 36 ('*Quin*').

found in trust law. Some judges have considered any attempt by the courts to usurp the role of the trustees to be illegitimate, because that would be contrary to the will of the settlor who reposed the discretion in the trustees.[219] For example, in *Jeffcoat v Queensland Coal & Oil Shale Mining Industry (Superannuation) Ltd*, Kiefel J stated that the courts' review jurisdiction 'would not extend to the appropriateness or correctness of the decision arrived. It would be limited to the integrity of the process undertaken',[220] which is the standard distinction between merits and judicial review.

However, the distinction between merits review and judicial review is difficult to maintain as that distinction is impossible to define.[221] Traditionally, the distinction was made by claiming that only the legality of a decision was reviewed.[222] However, it has become generally accepted that many grounds of review go beyond legality. For example, in *Quin* Brennan J accepted that *Wednesbury* unreasonableness allowed review of the merits of the decision.[223] The further development of the unreasonableness grounds by variability of intensity, proportionality, and substantive expectations in the United Kingdom, and the *Li* decision in Australia,[224] has made the distinction even more difficult to defend.[225] Nevertheless, in public law the imperfect distinction is retained because it performs an important constitutional function. A court that engaged in merits review with no constraint would be overreaching its constitutional authority and illegitimately

[219] *Baden* (n 13) 442 (Lord Hodson dissenting).

[220] [2000] FCA 655 [23].

[221] Cane, McDonald and Rundle (n 64) 23.

[222] *Quin* (n 218) 36 (Brennan J). See also *Pitt* (CA) (n 144) [235] (Mummery LJ).

[223] *Quin* (n 218) 36.

[224] See above text to nn 115–124.

[225] Elliott and Varuhas (n 72) 7; Cane, McDonald and Rundle (n 64) 22–25.

exercising the authority of the executive.[226] Thus, while merits review cannot be distinguished from judicial review, it acts as a self-imposed restraint on the *degree* to which the courts intervene.

When we move to trust law, there is no principle of the separation of powers. Thus, there is no constitutional reason why the courts cannot tell a trustee that they made the wrong decision on the merits; after all, judges do have the expertise to determine how trusts should be administered. The only good reasons why the courts should resist intervening in discretions are practical. First, an argument could be made that the courts should not be too ready to intervene because this would reduce certainty of title for those receiving distributions.[227] However, this concern is ameliorated by the bona fide purchaser for value rule that protects subsequent transferees and the rule that innocent recipients of misapplied trust assets will not be personally liable.[228] Second, there is an argument that the courts could be overburdened by more trustees seeking the courts' approval in advance of distributions. This would also impose cumulative costs on trust funds. These practical reasons recommend that the courts should not review trustee distribution decisions too intensely; however, they must be balanced against the justice of giving effect to the real intentions of settlors and upholding the institutional integrity of trusts.

[226] Cane, McDonald and Rundle (n 64) 23–4.

[227] Certainty of title is a significant value in property law. Indeed, it underlies the wealth of statutory reform of land law through the Torrens statutes of Australia and New Zealand.

[228] This assumes that the rule in *Ministry of Health v Simpson* [1951] AC 251 does not apply to trusts as well as estates, which is controversial: see Lionel Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116(Jul) *Law Quarterly Review* 412, 437–8.

There is existing evidence in trust law that merits review can be embraced. It is found in those cases where judges have themselves made a substitute decision rather than referring it back to trustees.[229] This is critical because in public law the remedy of substituting the decision-maker's decision with the court's decision is available on merits review in an appeal, but not under judicial review.[230] Any court granting this remedy must engage in merits review[231] as the court must determine an appropriate decision to replace the trustees' impaired decision. This does not necessarily mean that the court determines what the single correct decision was, but rather that it determines a range of reasonable outcomes and selects within that range.

## IV CONCLUSION

The public law theory of discretionary trusts provides a route to resolve the problem of incoherence we identified in Chapters 5 and 6. The elevation of accountability in distribution as part of the form of discretionary trusts provides an organising principle around which the rules of trustee decision-making could be moulded. Establishing accountability to the settlor's purposes, understood broadly, as the primary principle in the hierarchy would increase certainty. The principles and doctrines of public law are a useful resource for mechanisms that can be used to hold trustees accountable to beneficiaries, although adopting them would not prevent further legal development as views on how trustees should best be held accountable will inevitably continue to change.

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[229] *Cock v Smith* (1909) 9 CLR 773 (HCA), 811 (O'Connor J); *Klug v Klug* [1918] 2 Ch 67, 71; *Baden* (n 13) 457; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1632; *Bridge Trustees Ltd v Noel Penny (Turbines) Ltd* [2008] Pens LR 345; *Australian Incentive* (n 149).

[230] Cane, McDonald and Rundle (n 64) 20–1; Aronson, Groves and Weeks (n 68) 171–2 [3.300].

[231] The inverse does not hold. The absence of the substitutive appeal remedy does not exclude merits review: see Cane, McDonald and Rundle (n 64) 22.

Mandatory high-accountability regulation would also resolve the problem of the irreducible core. It provides a conception of discretionary trusts that is more substantive than current conceptions of the irreducible core. And the fact that accountability has primacy over the text of the trust instrument means that reducibility is not a concern. It means that the nature of discretionary trusts is simply not amenable to being reduced or diminished.

# CHAPTER 8

# CONCLUSION

Over the last two centuries, trust law practice has led to settlors granting ever more discretion to trustees. On the management side of the trustees' role, this increased discretion is necessary to allow trustees to negotiate a more complex and dynamic economy. Methods and standards of best practice for managing wealth are constantly changing and trustees require flexibility to respond to those changes.[1] On the distributive side of the trustees' role, discretion has increased largely to achieve desirable taxation outcomes. Granting discretion to trustees renders intended beneficiaries uncertain, and thus untaxable in the present.[2]

The question raised by these changes in trust practice is whether they have affected the doctrinal form of trusts. Changes to the trustees' management role have transformed beneficiaries' interests into interests in a fund rather than in specific assets,[3] and have transformed trusteeship into a more active role.[4] Changes to the trustees' distributive role, through the rise of discretionary trusts, are equally significant and have transformed the nature of the relationship between trustees and beneficiaries. These latter changes challenge the monist account of trust law that is committed to a central unity in express

[1] See WA Lee, 'Trustee Investing: Homes and Hedges' (2001) 1(1) *QUT Law and Justice Journal* 3. See also Bevis Longstreth, *Modern Investment Management and the Prudent Man Rule* (Oxford University Press, 1986) ch 2.

[2] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 723 [34]. See also Yuri FR Grbich, Gregory D Munn and Harry Reicher, *Modern Trusts and Taxation* (Monash University Faculty of Law, 1978).

[3] See RC Nolan, 'Property in a Fund' (2004) 120(Jan) *Law Quarterly Review* 108.

[4] See Stuart Anderson, 'Property' in *The Oxford History of the Laws of England: Volume XII 1820–1914 Private Law* (Oxford University Press, 2010) 1, 268–9, 278–87.

trusts.[5] The purpose of this thesis has been to assess the coherence of changes to the distributive role of trustees that have been brought about by the growth of discretionary trusts. An underlying assumption of the thesis is that the distributive nature of trusts forms one of the fundamental building blocks of property law.[6] The trustee 'obligation to hold [assets] for the benefit of others'[7] sits alongside other fundamental building blocks of property law like gifts, sales and security interests.

The research questions set for this thesis concern what 'holding for the benefit of' means in the context of different trusts. The argument presented in response to the four questions is summarised as follows. First, there are two distinct answers to what holding assets for the benefit of others means.[8] Second, this bifurcation in meaning has been produced by the development of discretionary trusts. Third, the answer to what that trustee obligation means in relation to discretionary trusts remains subject to considerable incoherence. And fourth, higher-level theories of the trust are available to resolve that incoherence.

The current literature addressing these research questions has largely used a frame that distinguishes between proprietary and obligational models of the trust. Discretionary trusts have been associated with a move towards a more obligational conception of the trust.[9] This thesis has eschewed the established dichotomy between proprietary and

[5] See Chapter 1 text to n 6-12.

[6] See *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588, 595 [5] (Gaudron, McHugh, Gummow and Hayne JJ).

[7] *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614, 622 (Dixon J).

[8] Ibid.

[9] See David Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117(Jan) *Law Quarterly Review* 96; Patrick Parkinson, 'Reconceptualising the Express Trust' (2002) 61(3) *Cambridge Law Journal* 657; JE Penner, 'Exemptions' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing,

obligational models because that dichotomy is entangled with the longstanding debate about the nature of beneficial interests as rights *in personam* or rights *in rem*.[10] Instead, this thesis has framed the question by starting with Peter Jaffey's point that all trusts have proprietary and obligational dimensions.[11] The thesis has focused on the beneficiaries' *in personam* rights against trustees because it is this relationship of rights and duties between trustee and beneficiary that is the core of the trust. All other trust doctrine, including any rights against third parties, is secondary to the trust relationship. However, the thesis has progressed beyond Jaffey's insight to defend the proposition that different beneficiaries have conceptually distinct personal rights against trustees.

The foundational claim of the thesis is that there is a clear distinction between the rights and duties that exist in fixed trusts and those in discretionary trusts. Chapter 2 provides an account of fixed trusts, in which the trustee-beneficiary relationship is characterised by strict duties to distribute the benefit of trust assets to beneficiaries. The individual beneficiaries' distributive entitlements are immune from divestment at the volition of any other human. This right-duty relationship can be accounted for with a proprietary model in which beneficiaries hold a valuable economic right to access assets. Chapter 3 provides a contrasting account of the discretionary trust powers that were approved in *Re Baden's Deed Trusts; McPhail v Doulton*.[12] In these trusts the trustee-beneficiary relationship is characterised by the trustees' power to distribute the benefit of trust assets, subject to duties that constrain the exercise of the power. The beneficiaries

2002) 241; Jessica Palmer and Charles Rickett, 'The Revolution and Legacy of the Discretionary Trust' (2017) 11(2) *Journal of Equity* 157.

[10] See Palmer and Rickett (n 9) 160.

[11] Peter Jaffey, 'Explaining the Trust' (2015) 131(Jul) *Law Quarterly Review* 377.

[12] [1971] AC 424.

have no distributive entitlements to the assets, but only have procedural entitlements to have the distributive procedure carried out properly. The outer boundary, or ring-fencing effect, of this relationship can be accounted for with a proprietary model. However, a proprietary model, even one invoking collective rights, cannot account for the relationship between trustee and beneficiary. Instead, a satisfactory account is provided by an administrative model in which trustees are accountable for how they exercise their distributive discretion. While the distinction between fixed and discretionary trusts is established in the literature, this thesis provides an original account of that distinction based on the analysis of the trustee-beneficiary relationship in the two types of trusts and the underlying normative principles that provide a coherent account of those relationships.

As identified at the end of Chapter 3, the distinction between fixed and discretionary trusts is doctrinally important. The distinction can be traced through many contemporary topics of interest in trust law such as rights to information and the beneficiary principle. The distinction is relevant to a coherent account of trusts as part of equity more broadly and is of serious importance to a coherent relationship between trust law and the rest of the legal system. The advent of the administrative trust model impacts how trusts affect other areas of laws that have a structure based on the patrimonial assumption. The administrative model of trusts allows autonomous funds of assets that are isolated from the world of individual wealth ownership. These ramifications suggest that the distinction between fixed and discretionary trusts will provide a fruitful avenue for future research.

The remainder of the thesis develops the foundational distinction in two directions. First, in Chapter 4, the distinction is expanded by its application to trusts that appear to

combine both fixed and discretionary features. These very common trusts typically are structured as a fixed trust for one class of beneficiaries, subject to a discretionary mere power to distribute to another class of objects. Close analysis of these trusts reveals that the trust in default cannot coherently be understood as a fixed trust. Neither the beneficiaries of the fixed trust nor the discretionary objects have any distributive entitlements, but both have procedural entitlements. A coherent assessment, which has substantial support in the case law, is that trust powers and mere powers are both accounted for under the administrative discretionary trust model.

Second, the distinction is extended internally to argue that the internal structure of discretionary trusts is currently incoherent. While it is clear that the trustee-beneficiary relationship in discretionary trusts is characterised by procedural entitlements, it is unclear exactly what those procedural entitlements are. Chapter 5 reviews the variety of trustee duties that have been applied to regulate how trustees exercise their distributive discretions and reveals that there is much uncertainty in what decision-making duties exist and what they mean. Chapter 6 reviews how ancillary rules affect the effective enforcement of trustees' decision-making duties and how contextual variables affect how and when those duties are applied to different trusts. The consequence of these layers of uncertainty is that there is a spectrum of trustee regulation ranging from high-accountability trusts, where discretionary beneficiaries have strong and effective rights to hold trustees to account, to low-accountability trusts, where discretionary beneficiaries have weak rights and cannot effectively hold trustees to account for how they distribute the benefit of trust assets. Moreover, there is no hierarchy of principles by which the courts can determine whether trustees in a particular context should be subject to low or high accountability regulation.

When we look forward to how trust law could resolve the incoherence at the heart of discretionary trusts, what is required are higher-level theories, as explored in Chapter 7. Contractarian theories have proved popular in trust law[13] and would resolve the question of how trustees should be regulated as simply a question of how settlors intended them to be regulated. However, this solution raises the problem of the irreducible core of trusts, which requires the trust concept to have some core substance that goes beyond settlors' intentions in order to distinguish trusts from contracts. An original contribution of this thesis is to look to public law for an alternative theory of discretionary trusts. Public law provides an account of the regulation of discretion in which a discretion-holder is held to a high standard of accountability in adhering to the purpose of the discretion. If this were translated to discretionary trusts, then trustees would be subject to mandatory duties that required them to account for how their exercises of discretion forwarded the purpose of the discretion. Indeed, differences between public law and trust law justify imposing a higher standard of accountability on trustees than on public officials: trusts are a creature of the courts' equitable jurisdiction whereas public powers are a creature of Parliamentary sovereignty.

The future of trust law remains uncertain. It is possible that a contractarian theory of trusts will prevail, causing trusts to become a type of contract without privity rules. It is possible that trusts will become progressively aligned with company law, such that they are essentially a type of firm.[14] It is possible that the administrative model of trusts could be extended further than proposed in this thesis and applied to both fixed and

[13] See, eg, JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105(3) *Yale Law Journal* 625.

[14] Cf Victorian Law Reform Commission, *Trading Trusts: Oppression Remedies* (Final Report No 30, January 2015) 18-9 [2.48]-[2.52].

discretionary trusts, such that all distributions of trust assets are subject to administrative regulation by the courts.[15] While these approaches would resolve some of the current incoherence in trust law arising from discretionary trusts they would also result in the loss of much that is valuable in trust law. The distinction between proprietary and administrative of trusts is preferable because it preserves the proprietary principles that have developed over the long history of fixed trusts. This equitable inheritance should not be thrown away simply because of a failure to distinguish it from problems associated with the newer discretionary trusts.

[15] Compare proposed law reforms in New Zealand that would subject the distribution of all trust assets to the overarching administrative control of the New Zealand Family Court applying principles of family property law: New Zealand Law Commission Te Aka Matua o te Ture, *Review of the Property (Relationships) Act 1976* (Report No 143, 28 June 2019) 280-93 [11.65]-[11.108].

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