CHAPTER 4

Capacity to Create a Trust

[4-01] An express trust may be created by a declaration inter vivos or by will. The person enabled by law to declare a trust of property is its beneficial owner.[1] Generally speaking, capacity to create a trust is coextensive with capacity to hold and dispose of any legal or equitable interest in property. The following paragraphs deal with cases where capacity may not be straightforward.

Minors

[4-02] In all Australian jurisdictions,[2] legislation now provides that persons will have, on attaining the age of 18, full capacity for all purposes of the law of that jurisdiction.

At common law, minors who are under the age of discretion are incapable of creating a trust inter vivos, for they are taken as having insufficient understanding of what is involved, or insufficient discretion to exercise sound judgment. There is authority that the age of discretion is 14 for males and 16 for females,[3] although the preferable view is that it depends on the understanding of the particular child and the nature of the particular transaction. In New South Wales, where the most elaborate legislative provision has been made, the statute refers to the 'age of understanding',[4] which although undefined presumably refers to the common law age of discretion.

In contrast with other legal systems, a parent or guardian does not have, at common law, the right to dispose of the minor's property.[5]

[4-03] In jurisdictions other than New South Wales, a trust inter vivos created by a minor after having reached the age of discretion is voidable and not void, and, unless repudiated when or within a reasonable time after the minor comes of age, would then be binding.[6]

1. *Tierney v Wood* (1854) 19 Beav 330 at 335–6; 52 ER 377 at 379.
2. Age of Majority Act 1974 (ACT) s 5; Minors (Property and Contracts) Act 1970 (NSW) s 8; Age of Majority Act (NT) s 4; Law Reform Act 1995 (Qld) s 17; Age of Majority (Reduction) Act 1971 (SA) s 3; Age of Majority Act 1973 (Tas) s 3; Age of Majority Act 1977 (Vic) s 3; Age of Majority Act 1972 (WA) s 5.
3. *Mills v IRC* [1973] Ch 225 at 240; [1972] 3 All ER 977 at 986.
4. Minors (Property and Contracts) Act 1970 (NSW) s 18.
5. *Field v Moore* (1855) 7 De G M & G 691 at 706–7; 44 ER 269 at 274–5; *Homestake Gold of Australia v Peninsular Gold Pty Ltd* (1996) 20 ACSR 67 at 75–6.
6. *Duncan v Dixon* (1890) 44 Ch D 211; *Edwards v Carter* [1893] AC 360; [1891–4] All ER Rep 1259; *Carnell v Harrison* [1916] 1 Ch 328; [1916–17] All ER Rep 827; and see *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643 at [45]–[62].

Where there is consideration for the settlement — and this is usually found to exist because the settlement of a minor is generally a marriage settlement — the contract is of that class of minor's contract which is valid and binding on the minor until disaffirmed either before or within a reasonable time after attaining majority. It would appear, however, that even in the absence of consideration, a settlement by a minor will be governed by the same rule. A minor may make a valid gift of chattels or personal property and if he or she makes such a gift upon declared trusts and then dies before attaining majority, the trust will stand.[7]

[4-04] In New South Wales, there are elaborate provisions[8] as to dispositions of property (which are defined to include the creation of a trust) by minors above the 'age of understanding'. If the trust is created 'for his benefit' then it is 'presumptively binding' upon the minor; if the settlement is voluntary, however, it is presumptively binding only if it was 'reasonable at the time it was made'. The term 'presumptively binding' in effect means as binding as if the actor had been of full age; dispositions not inherently of this character may be made so, during minority — by the court, after majority — by affirmation, and after death — by legal personal representatives.

[4-05] The law as to creation of testamentary trusts is less complex. At common law, infant males aged 14 and upward and infant females aged at least 12 could make valid wills of personalty;[9] but in all states a higher age is stipulated by statute. In all jurisdictions, the age of testamentary capacity for wills disposing of either realty or personalty is now 18; in all states except Western Australia, a married minor can make a will, and in New South Wales, South Australia, Tasmania and Victoria, a will made by a minor in contemplation of marriage will be valid upon the solemnisation of the marriage.[10] In New South Wales, a court may grant an unmarried minor leave to make a will.[11] Additionally, in South Australia and the Australian Capital Territory, a minor who is on military service may make a will;[12] in other jurisdictions, these provisions have been superseded by broader provisions governing informal wills.[13]

Persons of Unsound Mind

[4-06] Provision has long been made by statute for the control, custody and power of disposition of persons incapable of managing their own affairs to pass to the Crown, in which case a purported declaration of trust is void.[14] The High Court considered in some detail the effect of conveyances and contracts by persons of unsound mind, but whose capacity had not been removed by statute, in *Gibbons v Wright*.[15] The following propositions emerge:

(1) A contract or conveyance is void, both at common law and in equity, if the person was unaware and did not intend to sign the document, such that 'his mind did not go with his pen' and a plea of non est factum could be made.[16]

7. *Taylor v Johnston* (1882) 19 Ch D 603. In so far as it was held in this case that the gift was not even voidable within a reasonable time after majority, it would seem that this decision cannot stand: *Williams on Vendor & Purchaser*, 4th ed, pp 848–9; *Halsbury's Laws of England*, 5th ed, Vol 52, 2014, [211].
8. Minors (Property and Contracts) Act 1970; see D Harland, *The Law of Minors*, Butterworths, Sydney, 1974.
9. *Bishop v Sharp* (1704) 2 Vern 469; 23 ER 902.
10. Succession Act 2006 (NSW) s 5; Succession Act 1981 (Qld) s 9; Wills Act 1936 (SA) s 5(3); Wills Act 2008 (Tas) s 7; Wills Act 1997 (Vic) s 6.
11. Succession Act 2006 (NSW) s 16; and see *Application of* M (2000) 50 NSWLR 401 and P Powell (1993) 67 *ALJ* 25 at 27.
12. Wills Act 1936 (SA) s 11; Wills Act 1968 (ACT) s 16.
13. See, for example, Wills Act 2008 (Tas); Wills Amendment Act 2007 (WA); and R Croucher and P Vines, *Succession: Families, Property and Death*, 4th ed, LexisNexis Butterworths, Sydney, 2013, p 318.
14. *Re Walker* [1905] 1 Ch 160 at 171–3, 179; *Re Marshall* [1920] 1 Ch 284 at 288–9; [1920] All ER Rep 190 at 191–2; *Gibbons v Wright* (1954) 91 CLR 423 at 439–40; [1954] ALR 383 at 387. In New South Wales, see NSW Trustee and Guardian Act 2009 (NSW) Ch 4.
15. (1954) 91 CLR 423; [1954] ALR 383.
16. (1954) 91 CLR 423 at 443–4; [1954] ALR 383 at 389–90. *Blomley v Ryan* (1956) 99 CLR 362 at 401; *Bridgewater v Leahy* (1998) 194 CLR 457; 158 ALR 66 at [65].

(2) Powers of attorney are subject to a special rule. If a person executes a power of attorney while lacking the capacity to understand its general purport, it is void.[17]

(3) All other contracts and conveyances executed by persons who knew they were signing a document, but lacked the capacity to understand the nature of the transaction (that is, the general purport of the instrument or the effect of a wider transaction which the instrument is a means of carrying out), are not void, but may be voidable by the person or his or her representative, upon proof that the other party did not act in good faith or had knowledge of the person's lack of capacity.[18]

The same principles apply to trusts created by settlements made inter vivos for valuable consideration, and no different principles apply in respect of voluntary settlements.[19] Similar principles apply to persons temporarily incapacitated by alcohol.[20]

Bankrupts

[4-07] Control of a bankrupt's property vests in the trustee in bankruptcy; a purported declaration of trust by a bankrupt is therefore void. However, a bankrupt does have a right to the surplus after distribution and can validly constitute a trust in respect of that property.[21]

Corporations

[4-08] A corporation has the legal capacity and powers of an individual.[22] Even if the corporation's constitution or objects restrict or prohibit the exercise of its powers, an exercise of power is not invalid merely because it is contrary to the restriction or prohibition.[23]

17. (1954) 91 CLR 423 at 444–5, 448; [1954] ALR 383 at 390–1, 393.
18. (1954) 91 CLR 423 at 438, 441; [1954] ALR 383 at 386, 388.
19. *Crago v McIntyre* [1976] 1 NSWLR 729 at 742–74.
20. *Matthews v Baxter* (1873) 8 Exch 132.
21. *Bird v Philpott* [1900] 1 Ch 822 at 828; [1900–3] All ER Rep 439 at 442–3.
22. Corporations Act 2001 (Cth) s 124(1). For some limitations to, and the approach taken to, this section, see J Campbell, 'Corporate Law, the Courts and Corporate Personality' (2015) 33 *C&SLJ* 227.
23. Corporations Act 2001 (Cth) s 125.

CHAPTER 5

Express Trusts — Certainty of Intention, Subject Matter and Object

[5-01] In *Kauter v Hilton*,[1] Dixon CJ, Williams and Fullagar JJ referred to 'the established rule that in order to constitute a trust the intention to do so must be clear and that it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries'. Each of those requirements is considered below.

Certainty of Intention to Create a Trust

[5-02] A court cannot hold that an express trust exists unless it is satisfied that there was the intention to create such a trust. The question will be whether there is language or conduct which shows a sufficiently clear intention to create such a trust. No formal or technical words are required; any apt expression of intention will do.[2] The conclusion that the intention existed may be drawn as an inference from the available evidence. In order to infer intention, the court may look to the nature of the transaction and the whole of the circumstances attending the

1. (1953) 90 CLR 86 at 97; see also *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588; 171 ALR 568 at [29]; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493; 300 ALR 430 at [116]; *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62; 317 ALR 225 at [7], [109], [204].
2. *Re Armstrong* [1960] VR 202; *J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead Pty Ltd* [1985] VR 891; *Registrar, Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 165–6; 117 ALR 27 at 39.

relationship between the parties and known to them,[3] including commercial necessity.[4] If the inference to be drawn is that the parties intended to create or protect an interest in a third party, and the trust relationship is the appropriate means of creating or protecting that interest or of giving effect to the intention, then an intention to create a trust may be inferred. Such a trust is an express, not a constructive, trust and the earlier reluctance to infer such a trust no longer obtains, at least in Australia.[5]

The overall question is whether in the circumstances of the case, and on the true construction of what was said and written, a sufficient intention to create a trust has been manifested.[6] It is not necessary that the creator of the trust should know that the particular relationship intended to be created is in law a trust. A trust will be created, whether or not the creator is aware of it, provided that in substance the creator's actions have the legal effect of creating the relationship which is known in law as a trust. If the language manifests an intention to create that legal effect, then a trust will be created whether the words 'trust' or 'trustee' are used, or not. For example, in *Paul v Constance*,[7] where a man deposited the sum of £950 in a bank account in his own name on terms that both he and his mistress had equal access to it, often saying to her 'The money is as much yours as mine', the English Court of Appeal held that he owned all moneys in the account on trust for himself and her equally so that on his death she was entitled to a one-half share of the moneys then in the account.

However, in *Re Schebsman*, du Parcq LJ stated that 'unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the Court ought not to be astute to discover indications of such an intention'.[8] That passage has been repeatedly approved.[9]

In commercial documents, there will often be no suggestion that the parties in their written instrument did not mean what they said, or said what they meant. In such cases, where there is no sham or illegality, the use of language expressing a trust in terms will be effective to supply the requisite intention.[10] The matter was put thus by Gageler J:[11]

> Where there is no reason to consider that parties entering into a contract have not said what they meant or meant what they said, an express term in the contract that one party is to hold property on 'trust' for another party, or for a third party, will be recognised and enforced in equity as a trust. Conversely, where parties to a contract have refrained from contractual use of the terminology of trust, an intention to create a trust will be imputed to them only if, and to the extent that, a trust is the legal mechanism which is appropriate to give legal effect to the relationship, between the parties or between a party and a third party, as established or acknowledged by the express or implied terms of the contract.

3. *Inland Revenue Commissioners v Raphael* [1935] AC 96 at 142–3; *Swain v The Law Society* [1983] 1 AC 598 at 621–2; [1982] 2 All ER 827 at 840; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121, 148–9, 156; 80 ALR 574 at 583, 603–4, 609; *Walker v Corboy* (1990) 19 NSWLR 382 at 395–6; *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1991) 101 ALR 363 at 370–1; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 503; 102 ALR 681 at 693; *Di Pietro v Official Trustee* (1995) 59 FCR 470 at 484; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588; 171 ALR 568 at [34]; *Byrnes v Kendle* (2011) 243 CLR 253; 279 ALR 212 at [98], [102]–[114]. Generally, the only admissible subsequent words or conduct of the settlor will be those which are admissions against interest: *Shephard v Cartwright* [1955] AC 431 at 445; [1954] 3 All ER 649 at 652; *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 365; *Calverley v Green* (1984) 155 CLR 242 at 262; 56 ALR 483 at 496.
4. *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175 at 189; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121; 80 ALR 574 at 583.
5. *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 618–19; 78 ALR 1 at 9; and see Starke (1948) 22 *ALJ* 67 at 69; *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1956) 95 CLR 43 at 67; [1956] ALR 311 at 322; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 120–1, 140, 146–9, 156–7, 166; 80 ALR 574 at 582–3, 597, 602–5, 609–10, 616; and [2-23] above. For England, see the Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (1996), [2.8]–[2.9].
6. *Re Kayford Ltd (in liq)* [1975] 1 All ER 604 at 607; [1975] 1 WLR 279 at 281; *Tito v Waddell (No 2)* [1977] Ch 106 at 111; [1977] 3 All ER 129 at 132; *Walsh Bay Developments Pty Ltd v Federal Commissioner of Taxation* (1995) 130 ALR 415 at 422.
7. [1977] 1 WLR 195; [1977] 1 WLR 527.
8. [1944] Ch 83 at 104.
9. See *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 618; 78 ALR 1 at 9; *Byrnes v Kendle* (2011) 243 CLR 253; 279 ALR 212 at [49]; *Ashton v Pratt* (2015) 318 ALR 260 at [186].
10. *Lloyds & Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd* [1992] BCLC 609 at 613; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588; 171 ALR 568 at [34]–[35].
11. *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62; 317 ALR 225 at [109].

Less precise language may be used in wills. If the donor be appointed trustee or the property is given in trust, then there is a strong presumption of an intention to create a trust. In *Hammat v Chapman*,[12] a bequest was made in the following terms: 'I appoint my brother to collect my personal estate, and dispose in a way he thinks fit.' It was held that the legatee was absolutely entitled to the personal estate, and Harvey J said:[13]

> The cases of precatory trust generally take the form of a gift to a beneficiary, followed by the expression of a wish, or desire, or request, or demand. In most of these cases the decision depends upon the question whether effect should be given to what is in terms an absolute gift, or whether the words which follow the gift show an intention to create a trust which is binding upon the conscience of the donee.[14] The present case is not a case of that kind, but it is sought to bring it within a class of cases in which the beneficiary who takes the gift is expressed to be a trustee, or is described as holding a fiduciary office. In those cases the question generally is whether the nature of the trust has been sufficiently defined. Where an individual takes property as a trustee, or as an executor, *prima facie* he is not beneficially entitled to the property, but holds it for the persons whom the testator has marked out as the objects of his trust, or, if they are insufficiently defined, for the testator's next-of-kin. If in this case the will had said 'I give my personal estate to my brother … as a trustee' or 'I appoint him trustee of my personal estate' and had then gone on to say 'to dispose of in the way he thinks fit', it would be clear on the authorities that Mr Hammat could not claim the property himself, but the trust would fail in consequence of the beneficiaries not being sufficiently indicated.

In *Re Snowden (dec'd)*,[15] the deceased had told her solicitor that she was leaving her estate to her brother absolutely in order that the brother might split up the estate between her numerous relatives 'as he thought best'. Sir Robert Megarry VC held that she had merely imposed a moral or family, but not a trust, obligation upon her brother. On the other hand, in *Hunter v Public Trustee*,[16] a bequest 'upon trust' to pay all debts, etc, without any further disposition of the property was held to constitute the legatees beneficial owners.

[5-03] The view had been taken, based on the majority in *Commissioner of Stamp Duties (Qld) v Jolliffe*,[17] that an intention to create a trust would not be imputed where the settlor did not mean to create one. That view, which is inconsistent with the principles referred to above, was rejected in *Byrnes v Kendle*.[18]

Mr Kendle had executed an instrument declaring that he held an undivided half interest in land on trust for his wife. He was permitted to adduce evidence at trial to show that the document was never intended to operate as a binding declaration of trust of the land. He said that his intention was that half of the proceeds of the eventual sale would belong to his wife. It was held on appeal that in the absence of a submission that the instrument was a sham, or that there was some basis for setting it aside, evidence of his intention was inadmissible. The question, as framed by Gummow and Hayne JJ, with whom French CJ agreed, was not 'What did the parties mean to say?' but 'What is the meaning of what the parties have said?'

12. (1914) 14 SR (NSW) 416.
13. (1914) 14 SR (NSW) 416 at 418.
14. See [5-05].
15. [1979] Ch 528; [1979] 2 All ER 172. For another case where the requisite intention was lacking, see *Re Alitalia Linee Aeree Italiane SpA* [2011] 1 WLR 2049 at [32]–[36].
16. [1924] NZLR 882. See also *Longley v Longley* (1871) LR 13 Eq 133; *Re Stanford* [1924] 1 Ch 73; [1923] All ER Rep 589; *Re Rees* [1950] Ch 204; [1949] 2 All ER 1003. Even the naming of a person as a trustee may, if the context so requires, be disregarded: *Morrin v Morrin* (1886) 19 LR Ir 37.
17. (1920) 28 CLR 178; 26 ALR 210.
18. (2011) 243 CLR 253; 279 ALR 212.

Or, as it was put by Heydon and Crennan JJ, 'the question is what the settlor or settlors did, not what they intended to do'.[19]

The Australian position may be compared with what in the United States is known as the 'Totten trust', based upon the decision of the New York Court of Appeals in *Re Totten*,[20] which has been followed in a series of cases.[21] Under the Totten trust, in the words of the principal judgment:[22]

> A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust only, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor died before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance at hand at the death of the depositor. What this involves is a presumption (which may be contrasted with that underlying the resulting trust) of an intention to create a trust revocable by the settlor at will during his lifetime or until some earlier unequivocal expression of immediate intention.

Sham Trusts

[5-04] The legal notion of sham 'refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences'.[23] Lord Wilberforce said that 'to say that a document or a transaction is a "sham" means that while professing to be one thing, it is in fact something different'.[24]

The doctrine of sham is general, and extends to sham trusts.[25] In the case of a sham trust, steps will have been taken resulting in the form of a legally effective trust, but an intention that the true transaction be something different.[26] This may occur in a number of ways. A transaction with the ostensible appearance of a trust may be wholly or partly a sham. For example, there may be an intention genuinely held and documented to create a trust, but on different terms from that documented; that will be a sham trust.[27] Further, a settlor may validly constitute a trust, but a later settlement of property upon the terms of that trust may nonetheless be a sham.[28]

However, a sham trust arises not merely because it was entered into with an improper motive. A familiar example is a trust to defraud creditors. Such a trust is apt to be set aside pursuant

19. *Byrnes v Kendle* (2011) 243 CLR 253; 279 ALR 212 at [53], [113]; see at [13]–[18], [44]–[66], [91]–[118]. See also *Twinsectra Ltd v Yardley* [2002] 2 AC 164; [2002] 2 All ER 377 at [71].
20. 71 NE 748 (1904).
21. As to which, see *Scott on Trusts*, §8.3.2.
22. 71 NE 748 at 752 (1904).
23. *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; 211 ALR 101 at [46].
24. *WT Ramsay v Inland Revenue Commissioners* [1982] AC 300 at 323; [1981] 1 All ER 865 at 871. See also *Coshott v Prentice* (2014) 221 FCR 450; 311 ALR 428 at [63]–[64].
25. See M Conaglen, 'Sham Trusts' (2008) 67 *CLJ* 176.
26. *Lewis v Condon* (2013) 85 NSWLR 99; 304 ALR 410 at [59].
27. *Lewis v Condon* (2013) 85 NSWLR 99; 304 ALR 410 at [66].
28. *Official Assignee v Wilson* [2008] 3 NZLR 45 at [57]; see also *AG Securities v Vaughan* [1990] 1 AC 417. There is, however, less scope in the law of trusts for what has been called the notion of an 'emerging sham', which arises when a validly created legal relationship is by subsequent agreement permitted to allow 'its shadow to mask their new arrangement': *Marac Finance Ltd v Virtue* [1981] 1 NZLR 586 at 588. That is because it will be necessary to establish such an intention on the part of all beneficiaries or discretionary objects of the trust; otherwise conduct by the trustee and some of the beneficiaries will merely be in breach of trust: see *A v A* [2007] 2 FLR 467 at [42]–[44]; *Official Assignee v Wilson* [2008] 3 NZLR 45 at [57]; *Lewis v Condon* (2013) 85 NSWLR 99; 304 ALR 410 at [80]–[82]; *De Santis v Aravanis* (2014) 227 FCR 404; 322 ALR 475 at [57]–[65]; J Palmer, 'Dealing with the Emerging Popularity of Sham Trusts' [2007] *NZ Law Rev* 81 at 106.

to statute, but is different from the case where a settlor never subjectively intends a trust to be created at all.[29]

Because a necessary element of a sham trust is 'an objective of deliberate deception of third parties',[30] and because the doctrine is one in which the law has regard to the parties' subjective intention, it is a 'strong finding, and one which cannot be made if another inference is at least equally open'.[31]

Precatory Trusts

[5-05] The commonest difficulties are found not in cases where a settlor or testator has used the word 'trust' or 'trustee' but in cases where other words have been used expressive of a confidence or belief that the person to whom the property is given will use that property or portion thereof for the benefit of a third person. Where words of prayer, entreaty, recommendation, desire or hope are used instead of words of direction, it is always a question of construction whether a trust is intended, or whether there is a beneficial gift to the donee coupled with expressions of desire or hope which are not binding upon that donee. In cases where it is held that the words used do create a trust, such trusts are commonly called 'precatory trusts' although, the question of construction having been resolved,[32] they are no different from express declared trusts:

> When a trust is once established, it is equally a trust, and has all the effects and incidents of a trust, where declared in clearly imperative terms by a testator, or deduced upon a consideration of the whole will from language not amounting necessarily and in its prima facie meaning to an imperative trust.[33]

In *Re Williams*,[34] a testator by his will gave his residuary estate to his wife absolutely, and followed with the words: 'In the fullest trust and confidence that she will carry out my wishes in the following particulars'. The testator then set out the particulars, namely, that she would pay the premiums due during her life on a policy of insurance on her own life and that she, by her will, would leave the moneys payable under that policy and other moneys to the testator's daughter. It was held that the wife took the residuary estate of the testator absolutely and was unfettered by any condition or trust.

[5-06] In deciding whether or not a trust is created from precatory words, reported decisions are of limited assistance.

> You must take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe.[35]

Thus in *Gunter v Commissioner of Stamp Duties*,[36] the words 'I desire' were held in their context to create a trust in respect of the testator's expression of his desire. On the other hand, the

29. *Miles v Bull* [1969] 1 QB 258 at 264; *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897 at 921; *Barendse v Comptroller-General of Customs* (1996) 136 FLR 243 at 257–8; *Lewis v Condon* (2013) 85 NSWLR 99; 304 ALR 410 at [68].
30. *Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation* (2008) 238 CLR 516; 246 ALR 406 at [35].
31. *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 461; 82 ALR 530 at 544 per Lockhart J. See also *Official Assignee v Wilson* [2008] 3 NZLR 45 at [52]; *Lewis v Condon* (2013) 85 NSWLR 99; 304 ALR 410 at [62]–[63]; *Heazlewood v Joie de Vivre Canterbury Ltd* [2015] NZCA 213 at [44].
32. Cf *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436–7; 41 ALJR 348 at 350–1.
33. *Re Williams* [1897] 2 Ch 12 at 27 per Rigby LJ.
34. [1897] 2 Ch 12.
35. *Re Hamilton* [1895] 2 Ch 370 at 373 per Lindley LJ.
36. (1932) 33 SR (NSW) 95. See also *West v Federal Commissioner of Taxation* (1949) 79 CLR 319 ('it is my will and desire').

words 'I specially desire' were held in *Re Conolly*[37] not to create a trust. It is a question of construction of the instrument in each case. Where there is a real difficulty of construction, much will depend upon the initial presumption which is made in the approach to the question of construction. In earlier cases, precatory words tended to be construed 'as being prima facie euphemistic equivalents for more imperative forms, much as a master might give an order to a servant in the form of a request rather than a command'.[38] Thus in *Curnick v Tucker*,[39] where a testator left all his property to his wife for her sole use and benefit 'in full confidence' that she would dispose of it among their children during her lifetime and at her decease, it was held that the wife took a life interest only with a power of appointment among the children. So also in the case of *Gully v Cregoe*,[40] where the gift was to the wife forever, but with the addition of the words 'feeling assured and having every confidence that she would dispose of the same among the two daughters and their children', it was held that despite the words 'for ever', the wife took a life estate only. The older cases appear to proceed on the basis that where there was certainty as to the property and the objects, then any words of wish or desire would be held to raise a trust, but if the objects were not certain, then a trust could not be raised upon the words of desire any more than upon words of express trust.[41]

[5-07] In the last quarter of the nineteenth century, however, a change occurred in the approach of the courts to the question. The attitude that the use of precatory words was prima facie equivalent to the use of more imperative forms was discarded. The prima facie construction of words of request became that they were meant merely to be a request and not a binding obligation upon the donee. Thus in 1882 the Privy Council, in *Mussoorie Bank v Raynor*,[42] held that where property was left by a testator to his widow 'feeling confident that she will act justly to our children in dividing the same when no longer required by her' no trust for the children was created, and the opinion was expressed that for many years prior thereto the decisions had shown that the doctrine of precatory trusts was not to be extended.[43] In *Dean v Cole*,[44] the High Court held that where a testator appointed his wife and another person joint executors, and devised and bequeathed to his wife all his real and personal estate subject to the conditions following in the will, and later proceeded:

> I give all and every portion of my real and personal estate to my wife ... trusting to her that she will at some time during her lifetime or at her death divide in fair, just and equal shares between my children ... all such part and portion of my estate as she may be in the use and enjoyment of ...

no trust was imposed upon the testator's wife. This decision may be contrasted with the earlier English decisions where on similar words it was held that a life estate only was given to the wife.[45]

[5-08] It may now be said that precatory words are in themselves neutral.[46] If the words are precatory and no more, then even though the objects which a testator hopes will be benefited and the property by which he or she hopes they will be so benefited may be expressed with certainty, no trust will be created. On the other hand, if it appears from the whole document

37. [1910] 1 Ch 219.
38. Underhill, *Law of Trusts and Trustees*, 12th ed, p 38.
39. (1874) LR 17 Eq 320.
40. (1857) 24 Beav 185; 53 ER 327.
41. *Cary v Cary* (1804) 2 Sch & Lef 173. See also *Eaton v Watts* (1867) LR 4 Eq 151.
42. (1882) 7 App Cas 321.
43. Cf *Lambe v Eames* (1871) LR 6 Ch App 597.
44. (1921) 30 CLR 1.
45. See also *Strickland v Strickland* (1907) 7 SR (NSW) 657; *Re Atkinson* (1911) 103 LT 860; *Re Hill* [1923] 2 Ch 259; *Re Dulson* (1929) 140 LT 470; *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417; [1932] ALR 362; *Re Johnson* [1939] 2 All ER 458; *McPhee v Saunders* (1940) 57 WN (NSW) 101; *Re Favell (decd)* (1971) 2 SASR 246.
46. *Comiskey v Bowring-Hanbury* [1905] AC 84 at 89.

that a trust was intended, the fact that precatory words only have been used will not prevent a trust from being so created:[47]

> ... in each case the whole will must be looked at; and unless it appears, from the whole will that an obligation was intended to be imposed, no obligation will be held to exist ... It would, however, be an entire mistake to suppose that the old doctrine of precatory trusts is abolished. Trusts — ie, equitable obligations to deal with property in a particular way — can be imposed by any language which is clear enough to shew an intention to impose them.

If a testator uses words prior to the precatory words which, standing alone, would create a trust, and then in some respects uses words of request, very strong circumstances would be required to enable the court to say that those words of request cut down the prior express words of trust.[48]

[5-09] The question whether a trust has been created by the employment of precatory words usually arises in relation to wills. It is prudent when using words other than the usual words of trust or express direction with the intention that no trust should be created to add after the precatory words, further words such as 'without however imposing any binding trust' or 'but so that no binding trust is hereby created'.

[5-10] The fact that the gift is contained in a will, and the precatory words in a codicil, will be stronger evidence in favour of a trust than where the precatory words appear in the same instrument.[49] As has already been pointed out, no trust, whether couched in precatory language or otherwise, will be valid unless the subject matter and the object of the trust are expressed. The terms used are often very important in deciding not only whether the trust in any case would be void for uncertainty of subject matter or object, but also whether by the use of the precatory words a trust was intended at all. Thus, if the objects of the trust are expressed in general terms, that expression of the objects may be just sufficiently certain to enable a trust to be created if one was clearly intended. But if a doubt arises whether a trust was in fact intended, those same words may be a strong indication that there was no such intention. For example, if a testator gives property 'upon trust to be divided among my relations', the objects are expressed sufficiently to enable a valid trust to be created.[50] However, if a testator uses such words as 'I earnestly desire that provision be made thereout for my relations' in a gift of property, the general expression of the persons to be benefited, the object of the trust, will be an important factor in construing such an expression of desire as not creating a binding trust.[51] However, the absence of a certainly ascertainable object will not of itself prevent a court from construing precatory words as creating a trust. In *Re Pugh's Will Trusts*,[52] a bequest of residue to the executor of a will 'absolutely', followed by the words 'to dispose of the same in accordance with any letters or memoranda I may leave with this my will and otherwise in such manner as he may in his absolute discretion think fit' were construed as words of trust but, as the testator left neither letters nor memoranda, the executor held the residue on a resulting trust for the testator's next-of-kin.

[5-11] Furthermore, the form of words chosen may create neither a trust nor a moral obligation but rather a bare power. In *Re Altson*,[53] a statement in the deceased's will of her 'express wish' that certain commercial properties be leased to a named person at a specified rent, was construed as conferring a bare power upon the trustee of her estate; the trustee had a discretion to grant the lease and in the exercise of the discretion it would be proper to take into account the wish of the deceased to benefit the particular named person.

47. *Re Williams* [1897] 2 Ch 12 at 18–19.
48. *Hill v Hill* [1897] 1 QB 483. See also *Re Steele's Will Trusts* [1948] Ch 603; [1948] 2 All ER 193. Cf *Smith v Smith* (1903) 3 SR (NSW) 571.
49. *Re Burley* [1910] 1 Ch 215.
50. *Re Drigden* [1938] Ch 205. But see *Re Bond* (1876) 4 Ch D 238.
51. *Re Hill* [1923] 2 Ch 259.
52. [1967] 3 All ER 337; [1967] 1 WLR 1262.
53. [1955] VLR 281.

Illusory Trusts

[5-12] Even more misleading than the term 'precatory trust' is the term 'illusory trust'.[54] Whereas a precatory trust is a relationship which upon examination has been found to be in fact a trust, 'illusory trusts' are relationships which upon examination have been found not to be express trusts at all. There will not be a trust if the settlor has not manifested an intention of transferring the beneficial interest in the property to the apparent beneficiaries. The most important classes of such arrangements are revocable mandates, directions for management, governmental 'trusts', and certain commercial transactions.

Revocable Mandates

[5-13] Even though a person may dispose of property and use language which at first sight appears to intend to create a trust, nevertheless it may be shown that no trust was in fact intended and that the disposition was made exclusively for the disponor's personal convenience. In that case, no express trust is created, but only a resulting trust in favour of the disponor.[55] The commonest example is where a debtor conveys property to trustees on trust for the payment of his or her debts. In such a case, the question of construction arises whether a trust has in fact been created in favour of the creditors. The question always is: was it intended by the debtor that the creditors should be actual beneficiaries and that the trust should not be revocable, or was the arrangement merely for the debtor's personal convenience and own benefit — a mandate to the named trustee as agent of the debtor principal which was revocable by the debtor and which would be revoked in any event by the debtor's death or earlier bankruptcy?[56] Where a debtor without consideration and without any notice to the creditors conveys property to trustees in this manner, it is presumed that the debtor has done so with the intention that the trustees thereafter should act not exclusively for the benefit of the creditors as beneficiaries, but that they should be trustees of the property for, and at the same time the agent of, the debtor in the sense which has been described in [2-10]–[2-12] in considering the difference between a trustee and an agent. In such a case, the naming of the creditors in the deed does not show an intention to benefit them, but is merely part of the directions given to the trustee as agent concerning the manner in which, at that time, the debtor sees fit that they should act in the disposition of the property which has been transferred to them. The distinction was expressed by Sir George Turner VC in *Smith v Hurst*:[57]

> [The authorities] appear to me to result in this, that in cases of deeds vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered or modified by the party who has created the trust; but that in the cases of deeds purporting to be executed for the benefit of creditors the question whether the trusts can be revoked, altered or modified depends upon the circumstances of each particular case. It is difficult, at first sight, to see the distinction between the two classes of cases; for in each of the classes a trust is purported to be created, and the property is vested in the trustees; but I think the distinction lies in this: In cases of trust for the benefit of particular persons the party creating the trust can have no other object than to benefit the persons in whose favour the trust is created, and the trust being well created the property in equity belongs to the *cestui que trust* as much as it would belong to them at law if the legal interest had been transferred to them; but in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the Court there has to examine the circumstances, for the purpose of ascertaining what was the true purpose of the deed; and this examination does not stop with the deed itself, but must be carried to what

54. See, for example, *Kars v Kars* (1996) 187 CLR 354 at 371; 141 ALR 37 at 48–9.
55. *Beattie v Weine* (1908) 9 SR (NSW) 36, where it was held that a voluntary transfer of property to a trustee, to be applied for the benefit of the transferor in the absolute discretion of the trustee, could be revoked by the transferor.
56. See *Comptroller of Stamps v Howard-Smith* (1936) 54 CLR 614; [1936] ALR 198.
57. (1852) 10 Hare 30 at 47; 68 ER 826 at 833.

> has subsequently occurred, because the party who has created the trust may, by his own conduct, or by the obligations which he has permitted his trustee to contract, have created an equity against himself.

[5-14] The presumption is that no trust was intended in favour of the creditors.[58] However, circumstances either in the deed itself or outside the deed may displace the presumption. Thus a conveyance on trust to make good breaches of trust committed by the disponor in respect of certain trust property was held to be irrevocable in *Sharpe v Jackson*.[59] Another indication of an intention to create a true trust is where there is an ultimate gift-over of residue after satisfaction of debts.[60] So also if the trust is not to take effect until after the death of the creator of the trust.[61] In these three classes of case, the intention to create a trust may be gathered from the terms of the document in light of the circumstances existing at the time. Thus, applying these principles, it has been held that a life assurance policy was held on trust for certain of the creditors of the assured by reason of an informal arrangement of which the creditors were aware, and subject to a gift-over of the balance.[62]

[5-15] A fourth case is where the creditors are parties to the deed. It was held in *MacKinnon v Stewart*[63] that the deed is irrevocable in favour of such creditors. That decision may be placed on two grounds. First, it may be that the deed is irrevocable because a true trust is created thereby. A second view is that the deed in such circumstances is irrevocable because the arrangement, although not strictly a trust in favour of the creditors, is contractually binding upon the debtor.

[5-16] The distinction in such a case brings no difference in effect. However, there are further cases where the deed may be revocable until the creditors have had notice of its existence and have actually acquiesced in it or acted under its provisions and complied with its terms. In those situations, even though they have not executed the deed, the disposition in their favour will nevertheless become irrevocable.[64] In such a case, it is not possible to apply to the creation of the arrangement the tests of intention which are applicable to the creation of a trust. The intention to create a trust must exist at the time of its alleged creation. In the class of case now being considered, it is assumed that such an intention to create a trust did not exist at the time of the making of the deed. Can it then be said that the deed becomes irrevocable in favour of creditors, who with knowledge of it have acted under its provisions, because a trust has been created? The answer is, it seems, that the deed becomes irrevocable because the debtor is estopped from alleging the absence of an intention to create a trust.

Directions as to Management

[5-17] It is not uncommon for a testator or settlor, after disposing of property in favour of certain persons, to direct that a certain other person be employed in some capacity connected with that property, for instance, to manage the property at a salary. In such a case, it is presumed that no trust was intended in favour of the manager. The appointment of agents in respect of trust property, where it is permitted to a trustee to employ such agents, is one of a trustee's discretionary powers. It is not presumed that the creator of the trust has intended to dictate to the trustee how the power is to be exercised. A difficulty in construing such provisions as binding trusts is that of ascertaining what property in favour of such a person appointed as manager or the like, is bound in his or her favour under the trust.[65]

58. *Smith v Hurst* (1852) 10 Hare 30; 68 ER 826; *Johns v James* (1878) 8 Ch D 744; *Ellis & Co v Cross* [1915] 2 KB 654.
59. [1899] AC 419; [1895–99] All ER Rep 755.
60. *Godfrey v Poole* (1888) 13 App Cas 497.
61. *Synnot v Simpson* (1854) 5 HL Cas 121 at 139; 10 ER 844 at 851; *Re Fitzgerald's Settlement* (1887) 37 Ch D 18.
62. *Rostirolla v Fiakos (No 2)* [2002] FCA 1562.
63. (1850) 1 Sim NS 76; 61 ER 30. See also *Wilding v Richards* (1845) 1 Coll 655; 63 ER 584.
64. *Biron v Mount* (1857) 24 Beav 642; 53 ER 506.
65. *Beckford v Beckford* (1783) 4 Bro Parl Cas 38; 2 ER 26; *Shaw v Lawless* (1838) 5 Cl & F 129; 7 ER 353; *Finden v Stephens* (1846) 2 Ph 142; 41 ER 896.

[5-18] If, however, the presumption against construing such provisions as constituting trusts is overcome by a direct expression by the settlor of an intention to create a trust in that regard, a binding trust to employ may be created. Thus in *Taylor v Lewis*,[66] a testator by a codicil to his will provided: 'I hereby direct that my son shall manage my trust estates until the final distribution of the same, and shall receive and collect and bank all moneys, and shall be paid a salary of £2 10s weekly.' It was held that the plaintiff had no right to a continuation of the salary after the whole estate had been converted into money and invested, and the trustees had no further need of his services. In that case, the limitation on the trustee's duty to employ was implied from the language used by the testator, but it was not held that there was not a duty to employ until the conversion of the trust estates. However, in *Re Larkin*,[67] the words: 'I direct [my trustee] to employ my son in the care and management of my estate and to pay him £6 a week for his trouble therein' were held not to create a trust in favour of the son, although it was further held that if the trustee company did employ him it was bound to pay him the sum mentioned while he was so employed. It is to be noted that the obligation to pay the sum mentioned in certain events was recognised so that, to that extent, an equitable interest was created in the son.

[5-19] There is some authority for the proposition that under no circumstances can a trust be created by a direction to employ a named person.[68] This has been placed on the ground that such a trust would be inconsistent with a gift of the property, or alternatively on the ground that it would fetter the trustee's discretion. To express this as a rule of law and not as a presumption of the intention of a settlor is, it is suggested, not in accord with Australian authority and would preclude a form of arrangement which can have all the essential elements of a trust.

Governmental 'Trusts'

[5-20] Although it is beyond question that the Crown can be a trustee of property, in public law the mere use of the word 'trust' in relation to Crown or governmental property usually does not denote a trust enforceable in a court of equity. In *Kinloch v Secretary of State for India in Council*,[69] the House of Lords held that when a Royal Warrant recited that the Crown held certain booty captured in the Indian Mutiny 'in trust for the use of' certain claimants whose claims had previously been upheld by Dr Lushington, to whom the matter had been referred by an Order in Council, it did not declare a trust in the legal sense. Lord Selborne LC said:[70]

> Now the words 'in trust for' are quite consistent with, and indeed are the proper manner of expressing, every species of trust — a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and at its nature and effect.

The words in the Royal Warrant were held to refer to a trust in 'the higher sense'. This decision was applied by Sir Robert Megarry VC in *Tito v Waddell (No 2)*, where the following was said of the word 'trust':[71]

> The word is in common use in English language, and whatever may be the position in this court, it must be recognised that the word is often used in a sense different from that of an equitable obligation enforceable as such by the courts. Many a man may be in a position of trust without being a trustee in the equitable sense; and terms such as 'Brains Trust', 'Anti-trust', and 'Trust Territories', though commonly used, are not understood as relating to a trust as enforced in a court of equity.

66. (1891) 12 LR (NSW) Eq 258.
67. (1913) 13 SR (NSW) 691.
68. *Beckford v Beckford* (1783) 4 Bro Parl Cas 38; 2 ER 26; *Shaw v Lawless* (1838) 5 Cl & F 129; 7 ER 353; *Finden v Stephens* (1846) 2 Ph 142; 41 ER 896; and see *Public Curator of Queensland v Union Trustee Company of Australia Ltd* (1922) 31 CLR 66 at 74–5; 28 ALR 438 at 441.
69. (1882) 7 App Cas 619.
70. (1882) 7 App Cas 619 at 625–6.
71. [1977] Ch 106 at 211; [1977] 3 All ER 129 at 216.

The correctness of *Kinloch's* case was reaffirmed by the House of Lords in *Town Investments Ltd v Department of the Environment*.[72]

[5-21] In Australia, the High Court has applied those authorities in *Registrar, Accident Compensation Tribunal v Federal Commissioner of Taxation*,[73] emphasising that *Kinloch's* case states a rule of construction that clear words are required before a 'true trust', as opposed to a trust 'in the higher sense', is found — even if the language of trust be used — and that the subject matter and context were important, in some cases 'more revealing of intention than the actual language used'. There, it was held that the legislation providing for the administration of workers' compensation payments did constitute the Registrar a trustee in the ordinary sense, there being no governmental interest or function involved in the obligations to invest and hold the money until distribution, and notwithstanding a provision which freed him from 'any law relating to the administration of trust funds by trustees'. In contrast, there was no trust enforceable by the court in *Aboriginal Development Commission v Treka Aboriginal Arts and Crafts Ltd*,[74] which concerned the remission of funds from one federal body to another, both held to be mere instruments of government policy, pursuant to a resolution that the funds were 'for the funding towards operational costs of Treka Aboriginal Arts and Crafts Ltd'.

The High Court has reviewed, in *Bathurst City Council v PWC Properties Pty Ltd*,[75] the long history of 'public trusts' created by Crown grant.[76] Those obligations may be enforceable at the suit of the Attorney-General as a matter of public law,[77] but do not give rise to a trust enforceable in equity.

Commercial Transactions

[5-22] In many commercial transactions, there can be agreements that property be dealt with in a certain way which falls short of creating a trust with respect to that property. Thus, in *Re Wall*,[78] Lockhart J held that where two creditors agreed with their debtor that the latter should sell certain land owned by him and pay them an agreed sum from the proceeds, there was no intention to create a trust of the proceeds of sale. Likewise, where moneys are advanced for a specific purpose, questions can arise whether a trust arises: see the analysis of *Barclays Bank Ltd v Quistclose Investments Ltd*[79] and *Re Australian Elizabethan Theatre Trust*[80] in Chapter 2.

Communication of Intention

[5-23] A trust may be created without communication to the beneficiary.[81] Where a trust is created by the appointment of trustees and the conveyance or transfer of property to them, it is almost certain that there will be found some communication of the intention to create a trust.

72. [1978] AC 359; [1977] 1 All ER 813. See also *New South Wales v Commonwealth (No 3)* (1932) 46 CLR 246 at 260–1; *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 at 416; P Finn, 'Public Trusts, Public Fiduciaries' (2010) 38 *Fed LR* 335.
73. (1993) 178 CLR 145 at 162–3; 117 ALR 27 at 31–7.
74. [1984] 3 NSWLR 502 at 513.
75. (1998) 195 CLR 566; 157 ALR 414 at [44]–[65].
76. See also J Barratt, 'Public Trusts' (2006) 69 *MLR* 514.
77. *Attorney-General (NSW) v Parramatta City Council* (1949) 49 SR (NSW) 283 at 290–2; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566; 157 ALR 414 at [65]–[67]; *Attorney-General v Blake* [1998] Ch 439 at 459–60; [1998] 1 All ER 833 at 847.
78. (1979) 25 ALR 615.
79. [1970] AC 567; [1968] 3 All ER 651.
80. (1991) 30 FCR 491; 102 ALR 681.
81. *Middleton v Pollock* (1876) 2 Ch D 104 at 106; *Rose v Rose* (1986) 7 NSWLR 679 at 686.

However, where a person is alleged to have created a trust by declaration of trust over property, but has not communicated the declaration to any other person, a strong presumption arises that despite the private use of the language of trust, no firm and irrevocable intention had been formed to create a binding trust by the declaration.[82]

Certainty of Subject Matter

[5-24] The subject matter of the trust must be certain — that is, it must be clear what the property is upon which the trust is to operate.[83] There can be no trust without property; that is fundamental. Consequently, if there is no property upon which the trust can take effect, or if it is so described by the settlor that it cannot be identified, there can be no trust. For example, if a testator leaves $1000 to A and requests that if anything of it remains at A's death, it be left to the Sydney Hospital, 'what remains of it' is too vague a description to enable the court to enforce any trust in respect of it.[84] Likewise, where the subject matter is an undifferentiated portion of a parcel of shares,[85] or of a deposit in a bank account.[86] However, in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)*,[87] the appellant, which sold steel, had the benefit of a Romalpa clause that obliged, inter alia, the respondent purchaser of steel to hold so much of the proceeds of its own manufacturing processes as related to the steel, on trust for the seller. There was no uncertainty in the subject matter of a trust being part of the payments made to the respondent by third parties, the trust arising as those payments were received by the respondent.[88] Further, the fact that extensive analysis was required to determine the true construction of the clause did not result in uncertainty.[89]

In a strongly criticised decision,[90] the English Court of Appeal held it was effective for the owner of a parcel of 950 shares in a private company to declare a trust of 5% of those shares without otherwise specifying those of the parcel of shares to which the trust attached.[91] Following a careful and comprehensive review of Australian, English and North American authorities, Campbell J decided to follow that decision in a closely comparable case.[92]

Directions by a testator to a legatee 'to consider my near relations'[93] 'as I should consider them myself or to reward my old tenants and servants'[94] according to their deserts have been held to be void for uncertainty as to the property to be bound by the trust. A direction or request that a donee 'make ample provisions' for a third party created no trust in favour of the latter,[95] but a direction to receive a 'reasonable income' was sufficiently certain.[96]

82. *Re Cozens* [1913] 2 Ch 478.
83. *Federal Commissioner of Taxation v Clarke* (1927) 40 CLR 246.
84. *Sprange v Barnard* (1789) 2 Bro CC 585; 29 ER 320; *Henderson v Cross* (1861) 29 Beav 216; 54 ER 610; *Parnall v Parnall* (1878) 9 Ch D 96; *Rodger v Rodger* (1893) 12 NZLR 392; *Re Jacob* (1897) 16 NZLR 52; *Re Dunstan* [1918] 2 Ch 304; [1918–19] All ER Rep 694; *Winter v Grady* (1921) 21 SR (NSW) 686; *Re Ferguson* [1957] VR 635.
85. *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271.
86. *Re Appleby's Estate* (1930) 25 Tas LR 126.
87. (2000) 202 CLR 588; 171 ALR 568.
88. See Chapter 6 'Express Trusts — Complete Constitution or Consideration'.
89. See (2000) 202 CLR 588; 171 ALR 568 at [13]–[25], especially at [15], citing *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436–7; 41 ALJR 348 at 350–1.
90. D Hayton, 'Uncertainty and Subject-Matter of Trusts' (1994) 110 *LQR* 335; and see *Re Harvard Securities Ltd* [1997] 2 BCLC 369 at 381–5, ultimately holding that English and Australian law diverged in this respect.
91. *Hunter v Moss* [1994] 3 All ER 215; [1994] 1 WLR 452.
92. *White v Shortall* (2006) 68 NSWLR 650, appeal dismissed [2007] NSWCA 372, a result which is approved by the Full Federal Court in *Commissioner of Taxation v ElecNet (Aust) Pty Ltd* [2015] FCAFC 178 at [81]–[84] and *Lewin on Trusts*, [3-007].
93. *Sale v Moore* (1827) 1 Sim 534; 57 ER 678.
94. *Knight v Knight* (1840) 3 Beav 148 at 177–8; 49 ER 58 at 69–70.
95. *Winch v Brutton* (1844) 14 Sim 379; 60 ER 404; *Re Bond* (1876) 4 Ch D 238. See, however, *Broad v Bevan* (1823) 1 Russ 517n; 38 ER 198; *Re Moore* (1886) 54 LT 231.
96. *Re Golay's Will Trusts* [1965] 2 All ER 660; [1965] 1 WLR 969.

Even property which is incapable of assignment, such as a contract involving personal skill or confidence, may be held on trust.[97]

Certainty as to the Object of the Trust

[5-25] The objects of a private trust must be identified with sufficient certainty, failing which the trust will be invalid.[98] The requisite level of certainty depends on whether the trustees are obliged to distribute to a class of beneficiaries (a *fixed* trust), or have a discretion to select beneficiaries within a class to whom distributions are to be made (a *discretionary* trust).

[5-26] In the case of a fixed trust, the objects must be defined with sufficient precision to satisfy 'list certainty'. That will occur if it is possible for the trustees, or the court in their stead, to identify all of the beneficiaries. In *Kinsela v Caldwell*,[99] the High Court said 'it is sufficient that the provisions of the trust ensure that upon that date the beneficiaries can be ascertained with certainty'.[100] Stronger statements, to the effect that complete identification is not merely sufficient but necessary, may be found in the authorities, reasoning that it is a breach of trust in such a case merely to divide the fund up among those present.[101]

Provided no perpetuity is involved, it is not necessary that the class be known prior to the date of distribution: it is sufficient that on that date they can be ascertained with certainty.[102] Indeed, what is required is that the court be satisfied that 'a complete list of the beneficiaries could probably be compiled'.[103] However, in *West v Weston*, confronted with evidence that it was more probable than not that there were unidentified members of a large class of beneficiaries of a fixed trust in favour of 'the issue living at my death of my four grandparents', Young J proposed and applied a modification of the rule, namely, that 'the rule will be satisfied if, within a reasonable time after the gift comes into effect, the court can be satisfied 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'.[104] That modification is inconsistent with the tenor of what the High Court said in *Kinsela v Caldwell*, extracted above, which is to be taken as affirming the conventional test, rather than admitting the possibility that some lesser test might also suffice.[105]

[5-27] Mere difficulty in ascertaining the identity of the members of the class does not render the trust invalid; courts are accustomed to resolving such evidentiary difficulties.[106] However, the position is different if there is conceptual uncertainty. Thus a trust for distribution in equal

97. *Don King Inc v Warren* [2000] Ch 291 at 320–1; [1998] 2 All ER 608 at 633–4; *McGowan v Commissioner of Stamp Duties* [2002] 2 Qd R 499 at [14]; *Barbados Trust Co Ltd v Bank of Zambia* [2007] 1 Lloyd's Rep 495; and see A Trukhtanov (2007) 70 *MLR* 848; P Turner [2008] *CLJ* 23.
98. See C Emery (1982) 98 *LQR* 551; P Creighton (2000) 22 *SydLR* 93.
99. (1975) 132 CLR 458 at 461; 5 ALR 337 at 339.
100. Cf P Matthews (1984) 48 *Conv* 22 but see J Martin (1984) 48 *Conv* 304; D Hayton (1984) 48 *Conv* 307.
101. *Re Gulbenkian's Settlement Trusts* [1970] AC 508 at 524; [1968] 3 All ER 785 at 792–3; *McPhail v Doulton* [1971] AC 424 at 453–4; [1970] 2 All ER 228 at 244; *Re Beckbessinger* [1993] 2 NZLR 362 at 369–70; *Commissioner of State Revenue v Viewbank Properties Pty Ltd* (2004) 55 ATR 501 at [20]–[21].
102. *Kinsela v Caldwell* (1975) 132 CLR 458 at 461; 5 ALR 337 at 339; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493; 300 ALR 430 at [117].
103. *Re Saxone Shoe Co Ltd's Trust Deed* [1962] 2 All ER 904 at 913; [1962] 1 WLR 943 at 955, not following *Re Eden* [1957] 2 All ER 430; [1957] 1 WLR 788.
104. (1998) 44 NSWLR 657 at 664.
105. See P Creighton (2000) 22 *SydLR* 93 at 97–8; validity might still have been achieved on orthodox principles had the evidence permitted a finding as to the maximum number of beneficiaries, thereby permitting a partial distribution and paying the balance into court: see *Re Gulbenkian's Settlement Trusts* [1970] AC 508 at 524; [1968] 3 All ER 785 at 793.
106. See, for example, *Re Coxen* [1948] Ch 747 at 759–60; [1948] 2 All ER 492 at 501–2; *Re Baden (No 2)* [1973] Ch 9 at 29; [1972] 2 All ER 1304 at 1309.

shares to 'my old friends' would be uncertain, in the absence of it being admissibly demonstrated that those words had a precisely defined meaning.[107]

[5-28] In the case of a *discretionary* trust, the objects must be defined with sufficient certainty to satisfy 'criterion certainty', and, perhaps, there may in addition be a 'loose class' or 'administrative workability' requirement.[108] In *McPhail v Doulton*,[109] a majority of the House of Lords discarded the former rule (list certainty) and held that 'the test for the validity of trust powers ought to be similar to that accepted by this House in *Re Gulbenkian's Settlements* for [non-trust] powers, namely, that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class'. Thus it is not necessary to identify every member of the class, and mere evidentiary difficulties in respect of some members do not prevent validity, although conceptual certainty (which can be elusive) is required.[110]

McPhail v Doulton provoked intense controversy at the time,[111] and left open the question of its applicability in Australia. It has now come to be regularly applied in Australia and New Zealand,[112] and should be taken to represent the law.

[5-29] In *McPhail v Doulton*, Lord Wilberforce also suggested that trust powers might have to satisfy an additional requirement: that they form a 'loose class'.[113] His Lordship envisaged a case where 'the meaning of the words used is clear' (that is, criterion certainty exists) 'but the definition of beneficiaries is so hopelessly wide as not to form "anything like a class" so that the trust is administratively unworkable or … one that cannot be executed', suggesting that a trust power in favour of 'all the residents of Greater London' might well fail on this ground. Although his Lordship did not advance any reasons to justify this view, there is much to justify it both on authority and in principle. As far as authority goes, trust powers in favour of anyone, or anyone but the trustees, have always been held bad.[114] As far as principle is concerned, unless there is some requirement of class certainty it is not easy to see how any person at all would have sufficient locus standi to enforce the trust; if the chosen class were impossibly wide, it would seem absurd that merely anyone could institute equity proceedings seeking to compel the trustee to exercise the trust power. In *Blausten v IRC*,[115] the English Court of Appeal, dealing with a mere power, not a trust power, held that, in any event, class certainty did exist; and, of the judges who heard that case, Buckley LJ was of the view that Lord Wilberforce's requirement of 'class certainty' applied equally to trust powers and to mere powers. This line of reasoning has been cogently attacked[116] as importing into the requirements for the validity of mere powers a test which properly belongs only to trust powers. Then, in *Re Manisty's Settlement*,[117] Templeman J (correctly, it is submitted) declined to follow the application by Buckley LJ of the requirement of class certainty to mere powers. That case concerned a settlement enabling a trustee to appoint to a class of beneficiaries. It also provided for the exclusion of certain persons from that class and that the trustees were empowered at their absolute discretion to declare that any person, corporation or charity (other than a trustee or a member of the excluded class) be

107. *Re Gulbenkian's Settlement Trusts* [1970] AC 508 at 524; [1968] 3 All ER 785 at 792; *McPhail v Doulton* [1971] AC 424 at 457; [1970] 2 All ER 228 at 247.
108. See [5-29].
109. [1971] AC 424; [1970] 2 All ER 228.
110. See *Re Baden (No 2)* [1973] Ch 9; [1972] 2 All ER 1304.
111. Thus, for example, Crane (1970) 34 *Conv* 287 described it as 'revolutionary'; see also the 6th edition of this work at [252]–[257].
112. *Horan v James* [1982] 2 NSWLR 376; *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 277; *Re Beckbessinger* [1993] 2 NZLR 362 at 369; *McCracken v Attorney-General* [1995] 1 VR 67 at 71; *Re Blyth* [1997] 2 Qd R 567.
113. [1971] AC 424 at 457; [1970] 2 All ER 228 at 247.
114. See *Neo v Neo* (1875) LR 6 CP 381; *In the Will of Bourk* [1907] VLR 171; *Re Dwyer* [1916] VLR 114; *Re Chapman* [1922] 1 Ch 287; *Re Carville* [1937] 4 All ER 464; *Re Hollole* [1945] VLR 295; *Re White* [1963] NZLR 788; *Re Pugh's Will Trusts* [1967] 3 All ER 337; [1967] 1 WLR 1262.
115. [1972] Ch 256; [1972] 1 All ER 41.
116. By (among others) I Hardingham in (1972) 46 *ALJ* 293.
117. [1974] Ch 72; [1973] 2 All ER 1203.

included in the class of beneficiaries. His Lordship pointed out that there was, in the case of mere powers (and, manifestly, it was a case of a mere power not a trust power) no authority compelling the importation of the requirement of class certainty; and that on principle such a requirement ought not be imported. In the case of mere powers, no question can ever arise of a member of the class of beneficiaries enforcing any trust, and the duty of the donee of the power to consider and investigate does not require or make necessary that the objects of the power should constitute any sort of class, loose or otherwise. Templeman J's decision was followed by Sir Robert Megarry VC in *Re Hay's Settlement Trusts*.[118]

But all this leaves undecided the major problem, namely, what did Lord Wilberforce mean by 'a loose class'? He surely did not mean that all 'beneficiaries' of a trust power have to have a common characteristic; partly because that would mean one could never have a hybrid trust power, as opposed to a special trust power, and partly because such a trust would reimport into trust powers the very sort of test which the majority of the House of Lords in *McPhail v Doulton*[119] found unacceptable. It is respectfully suggested that all his Lordship should be taken to have meant is that 'the range' (of beneficiaries) 'constitutes a readily identifiable, numerically and geographically discrete grouping'.[120] However, one commentator[121] after a review of the authorities and academic writing concludes that the juridical basis for the 'workability criterion' remains nebulous but, surprisingly, says that this 'need not trouble us unduly' because the concept 'should not be hedged around with theoretical strictures' and that because many settlements 'fulfil important socio-welfare functions' the court should be left 'to devote its scarce resources thereto without being sidetracked by the whimsical and unworkable'.

[5-30] If a trust fails for want of certainty of object, the property is held on resulting trust for the settlor (or, if dead, the residuary beneficiaries under the settlor's will). If, however, a trust fails *both* for uncertainty of intention and for uncertainty of object, then the person to whom the property has been given will retain it unfettered by any trust.[122] Thus, where a testator gave property to a donee and expressed a desire, in language leaving it uncertain whether a trust was intended, that the donee would distribute it as he thought would be most agreeable to the testator's wishes, it was held that the donee was entitled to the property absolutely.[123]

118. [1981] 3 All ER 786; [1982] 1 WLR 202.
119. [1970] AC 508; [1968] 3 All ER 785.
120. I Hardingham (1975) 49 *ALJ* 7. The requirement was applied in England in *R v District Auditor, Ex parte West Yorkshire Metropolitan County Council* [1986] RVR 24, noted C Harpum [1986] *CLJ* 391: a trust for the benefit of 'any or all or some of the inhabitants of the County of West Yorkshire' was held invalid for administrative unworkability. See also *Re Harding* [2008] Ch 235; [2007] 1 All ER 747 at [15].
121. I Hardcastle, 'Administrative Unworkability — A Reassessment of an Abiding Problem' (1990) 54 *Conv* 24 at 33.
122. *Sale v Moore* (1827) 1 Sim 534; 57 ER 678.
123. *Stead v Mellor* (1877) 5 Ch D 225. But see also *Thomson v Shakespear* (1860) 1 De GF & J 399; 45 ER 413; *In the Will of Bourk* [1907] VLR 171; *Re Dwyer* [1916] VLR 114.

whether a direct conveyance without consideration and without the expression of a use now gives rise to the presumption of a resulting trust.[193]

In New South Wales, Queensland, Victoria, Western Australia and the Northern Territory, legislation provides that no use shall be held to result merely from the absence of consideration in a conveyance of land as to which no uses or trusts are therein declared and that every limitation which may be made by way of use operating under the Statute of Uses or the Act may be made by direct conveyance without the intervention of uses.[194] The question is whether these provisions prevent the implication of a resulting trust as well as a resulting use. It has been answered, somewhat controversially, in the affirmative.[195]

Voluntary Transfers of Personalty

[12-21] The position in regard to a voluntary transfer of personalty is uncertain. The point was not discussed in *Irons v Smallpiece*,[196] which is the leading authority for the proposition that a gift of personalty is complete at common law if it is accompanied by delivery or is evidenced by deed. Usually, of course, there is direct evidence of intention but if the transferor and transferee are both dead, the question whether the presumption of a resulting trust arises would be of vital importance. In *Fowkes v Pascoe*,[197] Sir George Jessel MR expressed a decided view that the presumption did arise but James LJ, on appeal, was only prepared to assume it.[198] In *Moore v Whyte (No 2)*,[199] Harvey J expressed an equally decided view that no presumption arose and relied on the clear statement to this effect in *George v Bank of England*[200] but the Full Court on appeal did not directly decide the point. There are dicta of Cotton LJ in *Standing v Bowring*[201] referring particularly to a transfer into the joint names of the transferor and the transferee, which favour the presumption. It may be that such a position is different from the position of a transfer into the name of another alone, but there appears to be no real distinction in principle.

193. For a discussion on this controversy, see H G Hanbury, *Modern Equity*, 3rd ed, pp 180–2.
194. See Conveyancing Act 1919 (NSW) s 44; Property Law Act 1974 (Qld) s 7; Property Law Act 1958 (Vic) s 19A; Property Law Act 1969 (WA) ss 38, 39; Law of Property Act (NT) s 6. The latter provision is made by the Civil Law (Property) Act 2006 (ACT) s 223. The Statute of Uses itself has been repealed in its application to New South Wales, Queensland, Victoria and the Northern Territory by Imperial Acts Application Act 1969 (NSW) s 8; Property Law Act 1974 (Qld) s 3; Imperial Acts Application Act 1980 (Vic) s 5; and Law of Property Act (NT) Sch 4.
195. *Newcastle City Council v Kern Land Pty Ltd* (1997) 42 NSWLR 273 at 280–1; *Bhana v Bhana* (2002) 10 BPR 19,545 at [15]–[27]; cf *Ryan v Hopkinson* (1990) 14 Fam LR 151 at 155. See generally D Ong, *Trusts Law in Australia*, 4th ed, pp 444–7.
196. (1819) 2 B & Ald 551; 106 ER 467.
197. (1875) LR 10 Ch App 343 at 345n.
198. *Fowkes v Pascoe* (1875) LR 10 Ch App 343 at 348; [1874–80] All ER Rep 521 at 524.
199. (1922) 22 SR (NSW) 570; 39 WN (NSW) 194.
200. (1819) 7 Price 646; 146 ER 1089.
201. (1885) 31 Ch D 282 at 287; [1881–5] All ER Rep 702 at 704.

CHAPTER 13

Constructive Trusts

Introduction

Contrast with Express and Implied/Resulting Trusts

[13-01] The constructive trust differs in essential respects both from the express and the resulting or implied trust.[1] It differs from the express trust in that it is raised by operation of law often without reference to the intentions of the parties concerned[2] and indeed largely

1. See M Cope, *Constructive Trusts*; A J Oakley, *Constructive Trusts*, 3rd ed; D Wright, *The Remedial Constructive Trust*.
2. *Muschinski v Dodds* (1985) 160 CLR 583 at 613; 62 ALR 429 at 450.

contrary to the desires and intentions of the constructive trustee. Further, a constructive trust arises without satisfaction of the requirements as to writing which statute imposes in respect of express trusts, both testamentary and inter vivos.[3] The constructive trust differs from the resulting or implied trust in that, although a resulting or implied trust also arises by operation of law in the case of presumed resulting trusts as distinct from automatic resulting trusts, the courts presume that a trust was actually intended and in the face of evidence to the contrary, may conclude that the presumption has been rebutted. In the case of a constructive trust, the inquiry is not solely as to the actual or presumed intentions[4] of the parties, but as to whether, according to the principles of equity, it would be a fraud for the party in question to deny the trust. As Cardozo CJ put it, 'When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee'.[5] It has been said that the trust is constructive in the sense that equity construes the circumstances by explaining or interpreting them; equity does not construct the trust, rather it attaches legal consequences to the circumstances.[6] Moreover, the constructive trust demands the staple ingredients of express and resulting or implied trusts: subject matter, trustee, beneficiary and personal obligation attaching to the trust property.[7]

Conventional Categories of Constructive Trust

General

[13-02] The difficulty is in isolating or defining those circumstances in which equity will treat it as unconscionable for a party to deny the trust. Up to a point, the difficulty is diminished by the existence of well-recognised categories of cases in which a constructive trust arises. These categories are not uniform in the sense that the incidents of the trusts involved vary; in one category the obligation is to account for a profit, in another to hand over specific assets, in another to effect restitution for a loss. The categories may all reflect equity's concern with fraud, but they have distinct characteristics. They include the following:

(1) Cases (more fully discussed later in this chapter) in which a profit is made improperly by a fiduciary, who may but need not be already a trustee under an express trust. The leading case is *Keech v Sandford*.[8] The lease of a market was held in trust for an infant and before the lease expired the lessor refused to renew to the infant. The trustee then took the renewal for himself, but Lord King LC held that the trustee was trustee for the infant of the renewed lease and must assign it to him and account for the profits received in the meantime; the trustee was 'the only person of all mankind who might not have the lease'.

(2) Cases in which the defendant holds the legal title to property on trust for the plaintiff because it was acquired under a transaction liable to be set aside in equity, for example, for

3. See [7-02].
4. Intention does play a significant role, however, in relation to constructive trusts over property used in the course of a relationship between cohabiting couples after that relationship is terminated: see [13-44]–[13-54].
5. *Beatty v Guggenheim Exploration Co* 122 NE 378 at 380 (1919), applied in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 108; 55 ALR 417 at 462–3; *KAP Motors Pty Ltd v Commissioner of Taxation* (2008) 168 FCR 319; 246 ALR 395 at [41]–[42] (discussing receipt by dealer of money from distributor on the footing it would apply the money in payment of a tax which dealer was obliged to pay).
6. Scott and Fratcher, *The Law of Trusts*, 4th ed, Vol 5, §462.4, approved in *Giumelli v Giumelli* (1999) 196 CLR 101; 161 ALR 473 at [2]. See also J Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 *LQR* 66 at 76–86.
7. *Muschinski v Dodds* (1985) 160 CLR 583 at 613–14; 62 ALR 429 at 450–1. The preceding four sentences in the text as they stood in the 6th edition were quoted with approval in *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 185 ALR 1 at [297].
8. (1726) Sel Cas t King 61; 25 ER 223. See S M Cretney, 'The Rationale of *Keech v Sandford*' (1969) 33 *Conv (NS)* 161; D R Paling, 'The Pleadings in Keech v Sandford' (1972) 36 *Conv (NS)* 159; J Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks*, p 577.

fraud, mistake, undue influence or as a catching bargain.[9] In the eyes of equity, the plaintiff retained an equitable interest in the subject asset which was transmissible and assignable as an estate, not a bare cause of action.[10]

> In general, where there is a contract for the sale of property by A to B made in breach of a fiduciary duty owed to A by B (or by C in whose breach B knowingly participated), pursuant to which the legal title to the property has been transferred from A to B, the transaction is in equity voidable at the instance of A, who may (if necessary) obtain an order for rescission setting it aside. Unless and until A effectively avoids the transaction and (if necessary) obtains an order for rescission, B's property rights as a result of the transaction remain unaffected. However if A does effectively avoid the transaction and (if necessary) obtains an order for rescission, the parties will be treated in equity as if the transaction had never been effected; in other words equity will treat B as if he had held the property in trust for A, that is, as a constructive trustee, ab initio. A constructive trust arises in such circumstances as a consequence of the effective avoidance or rescission of the transaction. Where, for whatever reason, the transaction has not been and cannot be effectively avoided and rescission is unavailable, it remains effective and no constructive trust can arise. ...[11]

It has been said that requiring rescission protects the rights of third parties before equity grants a proprietary remedy (for example, a constructive trust), and prevents recovery under the contract of loan as well as having the proprietary remedy.[12] Related to the instances discussed earlier in this sub-paragraph are cases of proprietary estoppel, in which one remedy may be the conferral of some proprietary right in the plaintiff over the defendant's property.[13] These in turn are related to the more defensible aspects of the process by which rights on the break up of cohabiting couples are protected, discussed below.[14]

(3) Cases in which equity gives effect to its principles of conversion and performance and to the maxim that equity regards as done that which ought to be done; instances are provided by agreements for value to assign future property for value, absolutely or by way of charge,[15] by mutual wills, and by the relationship between vendor and purchaser under uncompleted contracts for sale of land.[16] Mutual wills and vendor-purchaser trusts are further described in this chapter. A related instance is the trust of the purchase money held by a mortgagee who has exercised a power of sale.[17]

(4) Cases in which, with or without receipt of trust property, a third party instigates or participates in a breach of trust or other fiduciary duty with the requisite degree of knowledge.

9. See *Meagher, Gummow and Lehane's Equity*, Chs 12–16. And as to conveyances by mistake, see *Leuty v Hillas* (1858) 2 De G & J 110; 44 ER 929.
10. Pomeroy, *Equity Jurisprudence*, 5th ed, Vol IV, [1053]; *Meagher, Gummow and Lehane's Equity*, [4-165]–[4-180].
11. *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1990) 19 NSWLR 143 at 153. See also *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 387–90; 65 ALR 193 at 204–6; *Lonrho plc v Fayed (No 2)* [1991] 4 All ER 961 at 971–2; [1992] 1 WLR 1 at 11–12; cf *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 45 ACSR 244 at [74]–[79]. The need for an order for rescission would arise where a party to the proceedings disputes the effectiveness of the avoidance or the interests of third parties are involved: *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198 at [197]. For similar reasoning in relation to tracing, see *Shalson v Russo* [2005] Ch 281 at [111]–[127]. See also *Independent Trustee Services Ltd v G P Noble Trustees Ltd* [2013] Ch 91; [2012] 3 All ER 210. The law as stated in the *Greater Pacific Investments* case was questioned but not changed in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22 at [254], [277]–[281]. See further *Australasian Annuities Pty Ltd v Rowley Super Fund Pty Ltd* (2015) 318 ALR 302 at [124]–[129], [309]–[312]; *Thomas v Arthur Hughes Pty Ltd* (2015) 107 ACSR 443 at [66]–[73].
12. *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 45 ACSR 244 at [82].
13. See *Meagher, Gummow and Lehane's Equity*, [12-055] and [17-065]–[17-130]; *Yaxley v Gotts* [2000] Ch 162 at 176–7; [2000] 1 All ER 711 at 721–2; *Banner Homes plc v Luff Developments Ltd* [2000] Ch 372 at 383–5; [2000] 2 All ER 117 at 125–7.
14. See [13-44]–[13-54].
15. *Meagher, Gummow and Lehane's Equity*, [6-190]–[6-415].
16. *Meagher, Gummow and Lehane's Equity*, [6-050]–[6-055].
17. *Charles v Jones* (1887) 35 Ch D 544 at 549–50; *Lloyds Bank NZA Ltd v National Safety Council of Australia Victorian Division (in liq)* (1993) 115 ALR 93; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269; 260 ALR 71 at [35].

The leading authority is *Barnes v Addy*,[18] where Lord Selborne LC made a general statement of principle in the course of holding solicitors not liable to make good the loss to a trust estate effected by a sole trustee appointed against their advice but with their assistance in the necessary conveyancing.

Another method of analysing constructive trusts was put thus by Millett LJ, following in the footsteps of Ungoed-Thomas J:[19]

> ... [T]he expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.
>
> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust.

He instanced secret trusts,[20] imperfectly recorded transactions, and cases where the defendant tried 'to keep for himself property which the plaintiff trusted him to buy for both parties'.[21] Other examples would include the vendor-purchaser constructive trust, the mortgagee constructive trust, constructive trusts arising under mutual wills, and constructive trusts arising after the collapse of a joint venture.[22] He continued:

> The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief'...[23]

An example of 'constructive trusts' in the second class are those 'where the equity is fastened upon the trustee not because he intended to become the fiduciary of property but because of the character of his dealings and in spite of his intention to take the property for himself'.[24] That use of language refers to various types of personal liability imposed on a defendant of

18. (1874) LR 9 Ch App 244 at 251–2, discussed further at [13-33]–[13-40].
19. *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 408–9. He made a similar point in *Lonrho plc v Fayed (No 2)* [1991] 4 All ER 961 at 969–70; [1992] 1 WLR 1 at 9–10. See also *Cattley v Pollard* [2007] Ch 353; [2007] 2 All ER 1086 at [60]–[64]; *Jasmine Trustees Ltd v Wells & Hind (a firm)* [2008] Ch 194; [2007] 1 All ER 1142 at [39]–[44]. The genesis of this idea seems to lie in *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 2 All ER 1073 at 1095, 1097; [1968] 1 WLR 1555 at 1579, 1582. The statements in that case were approved by Millett LJ in the *Paragon Finance* case and by Lord Sumption JSC in *Williams v Central Bank of Nigeria* [2014] AC 1189; [2014] 2 All ER 489 at [9]–[10].
20. See [7-15]–[7-36].
21. *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 409.
22. See [13-52].
23. The quotation is from Ungoed-Thomas J's reasons for judgment in *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 2 All ER 1073 at 1097; [1968] 1 WLR 1555 at 1582. An exposition of the ambiguities in the expression 'constructive trust' is given in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22 at [667].
24. *Cohen v Cohen* (1929) 42 CLR 91 at 100; 35 ALR 204 at 207 per Dixon J.

the same kinds as would be imposed on an express trustee. The defendant is a 'constructive trustee' in the sense that he is 'liable to account as a trustee'. But since the defendant is not in fact a trustee, Lord Millett has urged instead the formula 'accountable in equity'.[25] Examples of Lord Millett's second class are those liable under either limb of *Barnes v Addy*.[26] Lord Millett viewed the first category as containing institutional constructive trusts and the second as 'merely a remedial mechanism by which equity gave relief for fraud'.[27] He seemed to see the distinction as being 'between an institutional trust and a remedial formula — between a trust and a catch-phrase'.[28]

Some forms of constructive trust do not create or recognise any proprietary interest.[29] Even where it is open to the court to impose a constructive trust of a kind which does, the court will first seek to decide whether there is an appropriate equitable remedy falling short of imposing the trust.[30] One reason, for example, for not imposing the trust may be the unfair priority it gives the plaintiff over other creditors.[31]

Borderline Categories: Trustee de Son Tort

[13-03] There are borderline categories. The *first* is that of the trustee de son tort. In *Mara v Browne*,[32] Smith LJ said:

> [W]hat constitutes a trustee de son tort? It appears to me if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong — ie, a trustee de son tort, or, as it is also termed, a constructive trustee.

It may be accurate to treat trusteeship de son tort as a species of constructive trust, but it is a constructive trust of a special kind. In *Life Association of Scotland v Siddall*,[33] Turner LJ, in the course of holding accountable as a trustee a woman who had taken it upon herself to sell the trust property and receive the purchase money, held that her conduct was the 'equivalent' of a written declaration of express trust. The result was that rules as to limitation of actions applied to her as if she were an express, not a constructive, trustee.[34] The alleged trustee may have acted honestly; the alleged trustee may have believed that he or she was validly appointed an express trustee, ignorant of a fatal defect therein,[35] and the breach of trust may have been a technical one. But the alleged trustee is liable by reason of the de facto assumption of office and can be in no better position in respect of a breach than an express trustee would be.

25. *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366; [2003] 1 All ER 97 at [141]–[142]. The expression 'accountable in equity' includes liability to pay equitable compensation and liability to account for profits: *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 at [74]–[84].
26. (1874) LR 9 Ch App 244 at 251–2. See *Williams v Central Bank of Nigeria* [2014] AC 1189; [2014] 2 All ER 489 at [9]; *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 at [70].
27. *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 409.
28. *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 413.
29. *Giumelli v Giumelli* (1999) 196 CLR 101; 161 ALR 473 at [4].
30. *Muschinski v Dodds* (1985) 160 CLR 583 at 623; 62 ALR 429 at 458; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566; 157 ALR 414 at [40]–[43]; *Giumelli v Giumelli* (1999) 196 CLR 101; 161 ALR 473 at [10] (constructive trust not imposed for reasons specific to the case: see [49]). See also *Edmunds v Pickering (No 4)* (2000) 77 SASR 381 at [189]–[191]; *Draper v Official Trustee in Bankruptcy* (2006) 156 FCR 53; 236 ALR 499 at [99], [105]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209 at [200]; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; 266 ALR 462 at [126]. Cf *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357 at [11]; *Parsons v McBain* (2001) 109 FCR 120 at [11]–[16]; *In de Braekt v Powell* (2007) 33 WAR 389 at [26].
31. *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566; 157 ALR 414 at [42].
32. [1896] 1 Ch 199 at 209. See also *James v Williams* [2000] Ch 1; [1999] 3 All ER 309.
33. (1861) 3 De G F & J 60 at 72; 45 ER 800 at 805.
34. See *Meagher, Gummow and Lehane's Equity*, Ch 36; R P Austin, 'Constructive Trusts', in P D Finn (ed), *Essays in Equity*, 1985, p 169.
35. As in *Pearce v Pearce* (1856) 22 Beav 248; 52 ER 1103.

Borderline Categories: Recipients of Trust Property

[13-04] The *second* borderline category concerns third parties who have received trust property in such circumstances that equity will hold them bound by the trust. While the third parties are often called constructive trustees,[36] they are more properly treated as persons against whom the beneficial interest under the primary trust persists because they cannot set up a title as bona fide purchaser of the legal title without notice.[37] The third party will be subjected to the prior beneficial interest not so much by dint of the imposition of a fresh trust as by the operation against the third party of the rules as to priority between legal and equitable titles. But while these may be a sufficient basis for equity to compel the third party to hand back the property, what if the third party has dissipated it? The notion of constructive trust then provides a basis not for proprietary relief but for personal accountability.

Borderline Categories: Tracing

[13-05] A *third*, and related, category concerns the rules as to tracing. They permit the earmarking of mixed funds and the identification of assets despite transmogrification thereof, and, where they apply, they do so in aid of equitable rules as to priority by lengthening the arm of equity. The relationship between the doctrine of constructive trust and the remedy of tracing is still unclear. On one view, tracing can only be used against persons who occupy and abuse a fiduciary position (not limited to that of trustee) and constructive trusts apply to property thus acquired by such persons, so that the remedy of tracing and the institution of the constructive trust are coextensive and applicable only to fiduciaries (and those claiming through them). On another view, the two institutions are coextensive but not limited in their application to fiduciaries. On yet another view, there is no necessary relationship between tracing, a remedy which may be employed against a range of persons in a variety of situations, and the doctrine of constructive trusts which is not, on this approach, seen as a remedy but a specific institution. This last characterisation of constructive trusts is commoner in England than Australia.[38]

Borderline Categories: Non-compliance with Formalities

[13-06] A *fourth* borderline category concerns what appear to be express trusts which fail to comply with formalities as to writing but which are nevertheless enforced on the footing that it would be fraudulent for the alleged trustee to set up the statute.[39] Secret trusts may fall into this category.[40] In some cases, for example *Bannister v Bannister*,[41] the trusts are described as constructive. But the better view is that the removal of fraudulent reliance on the statute clears the way to show an express trust as what was intended.[42] There are also cases where, although there is no real doubt as to the placement of the borderline, trusts are consigned to the wrong category. In *Malsbury v Malsbury*,[43] the plaintiff and his wife contributed funds to the purchase of a house by their son and daughter-in-law on terms that they might live there and be taken care of by the younger couple. Needham J held there to be an express trust

36. *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210 at 1234–5; [1972] 1 WLR 602 at 631–3; *Peffer v Rigg* [1978] 3 All ER 745 at 752; [1977] 1 WLR 285 at 294.
37. *Rolfe v Gregory* (1864) 4 De G J & S 576; 46 ER 1042; *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 at 247 (reversed on other grounds (1984) 156 CLR 41; 55 ALR 417).
38. Lord Neuberger, 'The Remedial Constructive Trust — Fact or Fiction', Lecture delivered on 10 August 2014 to the Banking Services and Finances Law Association Conference, New Zealand. <https://www.supremecourt.UK/docs/speech-140810.pdf>. See [13-10].
39. See [7-09]–[7-13].
40. *Ottoway v Norman* [1972] Ch 698; [1971] 3 All ER 1325.
41. [1948] 2 All ER 133.
42. The last 24 words as they appeared in the 7th edition were quoted with approval in *Wade v Wade* [2009] WASC 188 at [84].
43. [1982] 1 NSWLR 226.

to that effect enforceable under the above principles despite the lack of writing. The trust did not specify what would happen if the son and daughter-in-law ceased to cohabit. But it was held that the estranged couple held the legal title upon constructive trust for themselves and the plaintiff (his wife had died) in shares proportionate to their respective contributions towards the purchase. A more precise analysis may have been that the contributions raised a presumption of resulting trust, rebutted for the period in respect of which the express trust operated, but thereafter arising.

Borderline Categories: Vendor-purchaser Trust before Completion

[13-07] The *fifth* borderline category contains the trust said variously to arise between vendor and purchaser on or after exchange and on or before completion. There is general agreement that the treatment of the purchaser as having a beneficial interest in the land before completion depends upon the availability of specific performance against the vendor. It follows that if under Crown lands legislation no transfer may be made without the consent of the responsible Minister, then no beneficial interest in the purchaser arises before the consent is obtained.[44] There has been much debate as to the stage at which the beneficial interest arises. The debate assumes that the mere availability of specific performance will not necessarily suffice for specific performance is a remedy in the face of repudiation by the defendant before due date for completion.[45] The authorities were surveyed by Mason J in *Chang v The Registrar of Titles*[46] in the following terms:

> Lord Eldon considered that a trust arose on execution of the contract.[47] Plumer MR thought that until it is known whether the agreement will be performed the vendor 'is not even in the situation of a constructive trustee; he is only a trustee sub modo, and providing nothing happens to prevent it, it may turn out that the title is not good, or the purchaser may be unable to pay'.[48] Lord Hatherley said that the vendor becomes a trustee for the purchaser when the contract is completed, as by payment of the purchase money.[49] Jessel MR held that a trust sub modo arises on execution of the contract but that the constructive trust comes into existence when title is made out by the vendor or is accepted by the purchaser.[50] Sir George Jessel's view was accepted by the Court of Appeal in *Rayner v Preston*.[51]

In *Chang's* case, Jacobs J[52] warned against the transposition into the law of vendor and purchaser of the law governing the rights and duties of trustees; where there were rights outstanding on both sides the description of the vendor as trustee tended to conceal the essentially contractual relationship which governed the rights and duties of the parties. Jacobs J

44. *McWilliam v McWilliams Wines Pty Ltd* (1964) 114 CLR 656 at 660–1.
45. *Turner v Bladin* (1951) 82 CLR 463; *Hasham v Zenab* [1960] AC 316.
46. (1976) 137 CLR 177 at 184; 8 ALR 285 at 290–1. Cf *Re Johnston* (1906) 25 NZLR 564. See also *Sonenco (No 77) Pty Ltd v Silvia* (1989) 24 FCR 105 at 125; 89 ALR 437 at 457; *Road Australia Pty Ltd v Commissioner of Stamp Duties* [2001] 1 Qd R 327 at [14]–[22]; *Nolan v Collie* (2003) 7 VR 287 (discussing whether the trustee of this kind of constructive trust has a right of indemnity); *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; 201 ALR 359 at [47]–[53]; *Meagher, Gummow and Lehane's Equity*, [6-050]–[6-055]. As to contracts to buy shares, see *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 31; 29 ALR 289 at 302; *Lion Nathan Brewing Investments Pty Ltd v Commissioner for ACT Revenue* (1997) 79 FCR 177 at 185; 149 ALR 335 at 342. The vendor as trustee is under a duty to preserve the property in its state at the time of the contract, but was held not obliged to impose covenants on the purchasers of nearby land: *Englewood Properties Pty Ltd v Patel* [2005] 3 All ER 307; [2005] 1 WLR 1961. That case also shows that among the trustee's duties are the duty to keep the property in a proper state of cultivation and preservation, to prevent removal of soil by a trespasser, not to abandon rubbish on the property and not to let a business sold with the premises to lapse: at [48].
47. *Paine v Meller* (1801) 6 Ves 349; [1775–1802] All ER Rep 155; *Broome v Monck* (1805) 10 Ves 597 at 606; [1803–13] All ER Rep 631; (1805) 32 ER 976.
48. *Wall v Bright* (1820) 1 Jac & W 494 at 501; 37 ER 456.
49. *Shaw v Foster* (1872) LR 5 HL 321.
50. *Lysaght v Edwards* (1876) 2 Ch D 499.
51. (1881) 18 Ch D 1.
52. (1976) 137 CLR 177 at 189–90; 8 ALR 285 at 295.

doubted whether a vendor could be described as a trustee 'within the meaning of the Trustee Act' unless settlement had taken place and all that remained to be done was to transfer the outstanding legal estate.

Finally, in *Kern Corp Ltd v Walter Reid Trading Pty Ltd*,[53] Deane J said it was wrong to characterise as that of a trustee the position of an unpaid vendor of land under an uncompleted contract of sale, notwithstanding that pending payment of the purchase price the purchaser has an equitable interest in the land which reflects the extent to which equitable remedies are available to protect the contractual rights of the purchaser.

Nevertheless, for some purposes, equity does regard the purchaser as having, before completion, a beneficial interest in the property if specific performance would be available against the vendor. Thus, the purchaser has an insurable interest;[54] the executors of a deceased vendor are bound to treat the proceeds of sale when received as passing under the will as personalty not realty, although the legal title had still been in the vendor at the time of death;[55] and it may be that pending completion the vendor would not be entitled to create a mortgage or charge otherwise than subject to the purchaser's rights.[56] An extreme example is provided by *Lake v Bayliss*.[57] There the vendor resold and conveyed the land to a third party who took free from any interest therein of the plaintiff who was the purchaser under an uncompleted prior contract. However, Walton J treated the proceeds of sale received by the vendor on completion of the second sale as representing trust property (the land), and held that the plaintiff had a right to those moneys in exchange for performance of the plaintiff's obligations under the first contract. Finally, it will be recalled that in *Breskvar v Wall*[58] the High Court, in deciding a dispute between holders of unregistered interests as to priority, treated the interest of a purchaser under an uncompleted contract with the registered proprietor as an equitable interest to which the claim of the former registered proprietor to be restored to the register was, on the facts, postponed. Reference should be made to a further analysis of the problem elsewhere.[59] It concludes that using the language of trusts to describe the relationship between vendor and purchaser in the interval that separates contract and conveyance is out of favour. But so long as the limited and specific purposes served by calling a particular aspect of the relationship a 'trust' relationship are remembered, the nomenclature is not incorrect, though there are certainly disadvantages as well as advantages in its use. The disadvantages include confusion. The advantages include highlighting relevant similarities with express trusts. However, when the contract of sale is made, it can be said that a trust has been created, because, subject to defences, any later purchaser will be bound by the first purchaser's interest. When the agreed time for conveyance arises, the purchaser's 'trust' becomes stronger as the vendor's rights before that day terminate. The payment of the full purchase price causes the purchaser's 'trust' to strengthen further, because it increases the likelihood that a suit for a decree of specific performance will succeed. At each of these stages the purchaser is a beneficiary under a 'constructive trust' for the purposes of exceptions created to the Statute of Frauds by such doctrines as the doctrine of part performance.

[13-08] Further, as a matter of statutory construction, in particular situations the interest of a purchaser under an uncompleted contract may be treated as a property right. Examples are

53. (1987) 163 CLR 164 at 191; 71 ALR 417 at 434. See further *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; 201 ALR 359 at [47], [53]; *Englewood Properties Ltd v Patel* [2005] 3 All ER 307; [2005] 1 WLR 1961 at [40]–[43]; *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545; 224 ALR 79 at [72], [93].
54. *Rayner v Preston* (1881) 18 Ch D 1 at 15.
55. *Brown v Heffer* (1967) 116 CLR 344; [1968] ALR 89; see also *Fairweather v Fairweather* (1944) 69 CLR 121 at 154; [1944] ALR 190 at 204–5.
56. *Shanahan v Fitzgerald* [1982] 2 NSWLR 513 at 515.
57. [1974] 2 All ER 1114; [1974] 1 WLR 1073.
58. (1971) 126 CLR 376; [1972] ALR 205; see *Meagher, Gummow and Lehane's Equity*, [4-240]–[4-265].
59. *Meagher, Gummow and Lehane's Equity*, [6-050]–[6-055]. The substance of that analysis was applied in *Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd* (2015) 319 ALR 151 at [104]–[105].

provided by cases dealing with resumption of land[60] and stamp duty.[61] And *Oughtred v Inland Revenue Commissioners*[62] decided that, even conceding the doctrine as to constructive trust, the vendor retained after contract and up to conveyance a sufficient beneficial interest for the conveyance to be treated as 'a conveyance or transfer on sale' within the meaning of the stamp duty legislation under consideration.

List not Closed

[13-09] Plainly, the list of constructive trusts is not closed. Slade J said so in terms in *English v Dedham Vale Properties Ltd*.[63] The decision of Rath J in *Le Compte v Public Trustee*[64] provides a debatable addition. It was there held that as against the executors of the deceased donor there was no equity to resist the claim of the donee under a gift which otherwise would fail because the subject property was not owned by the donor at the date of the purported gift. Rath J extended a line of United States cases[65] holding that if the donor dies believing he or she has made an effective gift to a donee who is the natural object of his or her bounty, his or her estate is not permitted to profit by the circumstance that the earlier purported gift was ineffective, even though the donor could not have been compelled in his or her lifetime to complete the gift. In the case before Rath J, the donee was not the natural object of the donor's bounty, but his Honour held that 'the doctrine of constructive trust' was applicable. The use of the constructive trust in matrimonial and other disputes between cohabitees, long championed by Lord Denning, is a more celebrated example of an attempt to add to the categories of constructive trust.[66] In *Cunningham v Harrison*,[67] Lord Denning MR took a further tack; it was said that a plaintiff should hold on trust for his wife damages awarded to him for personal injuries but calculated by reference to the care to be bestowed upon him by her. In *Griffiths v Kerkemeyer*,[68] Stephen and Mason JJ held that such a trust did not exist in Australian law. In contrast, the House of Lords preferred the views of Lord Denning so that the injured plaintiff who recovers damages under this head would hold them on trust for the 'voluntary carer'.[69]

The Court of Appeal of England and Wales has reasoned to the following effect. A transferee of the legal title to property under a disposition made in breach of trust, or the successor in title to that transferee, does not have the beneficial title to property, which remains held on the original trusts, unless either the transferee, or a successor in title, was a bona fide purchaser for value without notice. The trustee acting in breach of trust can transfer the legal title, but cannot vest the beneficial interest in property in a bona fide purchaser for value without notice: the trustee does not own that title and is not acting in a way which enables the trustee, under the trust, to overreach the beneficiary's equitable interest. Despite that inability, the availability of a bona fide purchaser defence means that a transaction in favour of a bona fide purchaser for value without notice is as effective as it would be if the trustee could vest the beneficial title in the purchaser. Thereafter the purchaser can deal with the asset free from any prior claim of the beneficiaries.[70] However, a person who at the time of receipt of trust property is a bona fide purchaser for value without notice of the beneficiaries' equitable interests is not immune from a claim by or on behalf of the beneficiaries once the transaction under which notice had been given had been set aside or rescinded. The equitable title of the beneficiaries

60. *McMahon v The Sydney City Council* (1940) 40 SR (NSW) 427; 57 WN (NSW) 142.
61. *KLDE Pty Ltd v Commissioner of Stamp Duties (Qld)* (1984) 155 CLR 288; 56 ALR 337.
62. [1960] AC 206; [1959] 3 All ER 623; see *Meagher, Gummow and Lehane's Equity*, [7-145]–[7-195].
63. [1978] 1 All ER 382 at 398; [1978] 1 WLR 93 at 110.
64. [1983] 2 NSWLR 109.
65. Described in Scott and Fratcher, *The Law of Trusts*, 4th ed, §466.2 as 'divided'.
66. See [13-44]–[13-54].
67. [1973] QB 942; [1973] 3 All ER 464.
68. (1977) 139 CLR 161 at 177, 193–4; 15 ALR 387 at 400, 413; *Kars v Kars* (1996) 187 CLR 354 at 371–2; 141 ALR 37 at 48–9; *CSR Ltd v Eddy* (2005) 226 CLR 1; 222 ALR 1 at [43], [58].
69. *Hunt v Severs* [1994] 2 AC 350 at 363; [1994] 2 All ER 385 at 394.
70. *Independent Trustee Services Ltd v G P Noble Trustees Ltd* [2013] Ch 91; [2012] 3 All ER 210 at [106].

continues to subsist and is no longer capable of being defeated by the bona fide purchaser defence, any more than it would be if the property were again in the hands of the person guilty of the original breach of trust.[71] The language of constructive trusts was not used, but the person who has lost the bona fide purchase defence might be described as a constructive trustee pending reconveyance.

Remedial Character of Constructive Trust

Remedial and Institutional Constructive Trusts Defined

[13-10] There is considerable resistance in England to going beyond 'institutional constructive trusts', which arise by operation of law as from the date of the circumstances giving rise to them, to 'remedial constructive trusts', which are remedies 'giving rise to an enforceable equitable obligation: the extent to which [they operate] retrospectively to the prejudice of third parties lies in the discretion of the court'.[72] That apart, English and Australian judges have spoken of the constructive trust in terms suggesting that it is simply remedial in character.[73] It is true that there is about various constructive trusts a remedial character. Particularly is this so where the trust arises not so much from breach of antecedent duty under an established relationship, as from a particular, perhaps isolated, act which at once founds the duty and the breach. Thus, in *Black v Freedman*, O'Connor J held that 'where money has been stolen it is trust money in the hands of the thief and he cannot divest it of that character'.[74] In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, Lord Browne-Wilkinson said: 'when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity.'[75] Likewise, in *Rasmanis v Jurewitsch*,[76] it was held that

71. *Independent Trustee Services Ltd v G P Noble Trustees Ltd* [2013] Ch 91; [2012] 3 All ER 210 at [60], [96], [113], [126].
72. *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714–15; [1996] 2 All ER 961 at 997. See also *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 478–80; [1989] 3 All ER 14 at 56–8; *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74 at 104; [1994] 2 All ER 806 at 826–7; *Re Polly Peck International plc (in admin) (No 2)* [1998] 3 All ER 812 at 823–6, 832.
73. *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382 at 398; [1978] 1 WLR 93 at 110; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 124; 55 ALR 417 at 474–5.
74. (1910) 12 CLR 105 at 110; 17 ALR 541 at 543; *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426; 18 ALR 542; *Spedding v Spedding* (1913) 30 WN (NSW) 81; *Australian Postal Corp v Lutak* (1991) 21 NSWLR 584 at 589; *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 565–6, 572; [1992] 4 All ER 512 at 522, 527–8; *Zobory v Federal Commissioner of Taxation* (1995) 64 FCR 86 at 89; 129 ALR 484 at 487; *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 185 ALR 1 at [299]–[301]; *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75 at [111]; *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at [93]; *Toksoz v Westpac Banking Corporation* (2012) 289 ALR at [5], [11]; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22 at [255]; *Ierino v Gutta* (2012) 43 WAR 372 at [20]; *Sze Tu v Lowe* (2014) 89 NSWLR 317 at [141]–[149]; *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81 at [36]–[39]. Usually this type of trust is seen as constructive: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716; [1996] 2 All ER 961 at 998. But it has been argued that it should be seen as a resulting trust: *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75 at [111]–[116]. It has been said that there is a difficulty in identifying a trust of any kind, on the ground that the thief supposedly acquires no title in what is stolen: *Shalson v Russo* [2005] Ch 281 at [110]. But the thief does have possessory legal title capable of being held on trust: *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81 at [37]. In *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429 at [40]–[42], White J treated the trust of stolen property as institutional, and reached the same conclusion in relation to property acquired by fraud where there was a complete failure of consideration. The latter step is criticised in *Meagher, Gummow and Lehane's Equity*, [14-010]. The trust of stolen property was also characterised as institutional in *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at [163]; *Sze Tu v Lowe* (2014) 89 NSWLR 317 at [147]. For the impact of the indefeasibility provisions of the Torrens legislation (for example, s 42 of the Real Property Act 1900 (NSW)) on the rights of the true owner, see *Sze Tu v Lowe* (2014) 89 NSWLR 317 at [215]ff.
75. [1996] AC 669 at 716; [1996] 2 All ER 961 at 998. This was followed in *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156; [2012] 3 All ER 425 at [127]–[129], [275].
76. (1969) 70 SR (NSW) 407; 90 WN (Pt 2) (NSW) 154. See also Scott and Fratcher, *The Law of Trusts*, 4th ed, Vol 5, §493.2; Palmer, *The Law of Restitution*, [20.13].

the interest by survivorship otherwise taken by one joint tenant on murdering the other was in equity held on trust for the estate of the victim. Further, the objective of a constructive trust is often remedial in that it seeks to bring to an end a situation where the defendant unconscionably refused to hand over property or effect restitution for some equitable delinquency, rather than institutional by being concerned with the investment and administration of property held, for a time that may be bounded only by the perpetuity period, on behalf of beneficiaries pursuant to an express trust. In England, the constructive trust has been seen as something which can be imposed 'de novo as a foundation for the grant of equitable relief by way of account or otherwise'.[77] Finally, in some instances the term 'constructive trust' is used in respect of persons whose liability is purely personal and not proprietary in character. For example, as noted in [13-02], a defendant who instigates, or participates, with the requisite degree of knowledge in a breach by trustees of an express trust has long been treated as personally liable as a constructive trustee for the loss of the trust estate, although the defendant has received no trust property and made no profit personally to which a trust might attach.

Are there Remedial Constructive Trusts?

[13-11] But it does not follow that a constructive trust is necessarily 'remedial' in the sense that it first has existence and effect only upon the court making its decree. Even in the United States, where the term 'constructive trust' is more loosely used than has been the case in England and Australia, the better view is that the decree recognises and enforces the trust, but does not create it; the trust arises immediately the circumstances exist in respect of which equity would construe a trust.[78] Thus, in *Rasmanis v Jurewitsch*, the court did not suggest that in the interim before the decree there was in the murderer a beneficial estate as to the whole of the property, and O'Connor J in *Black v Freedman* meant that the thief became a trustee forthwith. These authorities are consistent with the proposition that there does not need to have been a curial declaration or order before equity will recognise the prior existence of a constructive trust. That this is so, and that the trust attaches upon the acquisition of the relevant property, has now been affirmed by the Privy Council in *Attorney-General for Hong Kong v Reid*.[79] Nevertheless, in *Muschinski v Dodds*,[80] Deane J, with whom Mason J agreed, said that the constructive trust was 'predominantly remedial' and an 'in personam remedy attaching to property' and continued:

> In particular, where competing common law or equitable claims are or may be involved a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgment or formal court order or from some other specified date.

Such a declaration, speaking of ownership at the date of judgment, appears to have been made in *Baumgartner v Baumgartner*.[81] It should be noted that both of these cases arose out of a series of dealings between the parties over a period of time and, unlike *Reid*'s case, were outside any recognised category of fiduciary relationship such as trust or agency. The 'remedy' of constructive trust was a regime imposed to disentangle the property of the parties when their relationship had ended.

The imposition of a 'remedial' constructive trust with effect from a specified time may have adverse effects for the legitimate claims and interests of third parties who have dealt with the parties during the currency of their relationships, but who are not joined and who have lacked notice of the litigation. In *Re Osborn*,[82] Pincus J declared the transfer of certain property

77. *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 479; [1989] 3 All ER 14 at 57.
78. Scott and Fratcher, *The Law of Trusts*, 4th ed, Vol 5, §462.4.
79. [1994] 1 AC 324 at 331; [1994] 1 All ER 1 at 4–5.
80. (1985) 160 CLR 583 at 615; 62 ALR 429 at 451.
81. (1987) 164 CLR 137; 76 ALR 75.
82. (1989) 25 FCR 547 at 553–4; 91 ALR 135 at 142.

to be void against the trustee of the property of the transferor who was not bankrupt. This declaration was made pursuant to s 120 of the Bankruptcy Act 1966 (Cth). His Honour rejected a submission for the bankrupt's wife that the court declare a constructive trust of the property in her favour and with effect before the transfer so as to deny the full entitlement under the bankruptcy law of her husband's creditors and require an evaluation on loose criteria concerned with the matrimonial history and business affairs of the spouses of the extent of the beneficial interest under the constructive trust. However, *Re Osborn* was not followed in *Parsons v McBain* on the ground that a 'common intention constructive trust' can be recognised independently and in advance of any court order, and there was no good reason not to do so.[83]

In any development of the remedial constructive trust of the kind espoused in the Australian cases, care is required to avoid undercutting the principles of pari passu distributions which underlie the insolvency law,[84] and the proprietary rights of secured creditors.[85] Further, in such a case it will be important to consider whether the interests of the claimant are adequately protected by some other, non-proprietary remedy which does not attach to particular assets.[86] A constructive trust will not be imposed automatically upon money lent in circumstances involving a breach of fiduciary duty where the loan has not been avoided.[87]

In England, a more absolute approach has been asserted: the plaintiff 'cannot short circuit an unrescinded contract simply by alleging a constructive trust'.[88]

In England, Lord Scott of Foscote has said that where representations about future property interests have been made and relied on, proprietary estoppel should be the relevant remedy when the representation on which the claimant has acted is unconditional, and that cases where the representations were of future benefits, and subject to qualification on account of unforeseen future events, reflect the principles of remedial constructive trusts.[89] He gave examples of both the former[90] and the latter[91] categories. Examples of the 'unforeseen future events' to which Lord Scott referred include the possibility that a farmer who makes representations about what will happen to his farm on his death may alter its size by sale or purchase and the possibility that the vicissitudes of life may cause the representor to part with the farm in order to fund medical care. This is yet another instance falsifying the universality of the proposition: 'English law does not know the remedial constructive trust.' Indeed, in England, the whole '"common intention" constructive trust' as a solution to property disputes between cohabiting couples may be a further instance: for the assessment of the common intention takes place only after the relationship has ended and in the light of all that has happened.[92]

83. (2001) 109 FCR 120; 192 ALR 772.
84. *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 379; 65 ALR 193 at 198; *Re Stephenson Nominees* (1987) 16 FCR 536 at 555; 76 ALR 485 at 505; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 507–10; 102 ALR 681 at 698–700; *Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd* (1994) 49 FCR 334 at 358–9; 121 ALR 626 at 649–50; *Re Polly Peck International plc (in admin) (No 2)* [1998] 3 All ER 812 at 823–6, 831; *Sorna Pty Ltd v Flint* (2000) 21 WAR 563 at [13]; A J Oakley, 'Proprietary Claims and Their Priority in Insolvency' (1995) 54 *CLJ* 377 at 401.
85. *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 103–5; [1994] 2 All ER 806 at 826–7.
86. *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 379; 65 ALR 193 at 198; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 508; 102 ALR 681 at 698; *Giumelli v Giumelli* (1999) 196 CLR 101; 161 ALR 473 at [10].
87. *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 387–90; 65 ALR 193 at 204–6; *Lonrho plc v Fayed (No 2)* [1991] 4 All ER 961 at 971–2; [1992] 1 WLR 1 at 11–12; *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198 at [178]–[192], [206].
88. *Guinness plc v Saunders* [1990] 2 AC 663 at 698; [1990] 1 All ER 652 at 665; *Re Ciro Citterio Menswear plc (in admin)* [2002] 2 All ER 717; [2002] 1 WLR 2217 at [33]–[34].
89. *Thorner v Major* [2009] 3 All ER 945 at 955; [2009] 1 WLR 776 at 785.
90. *Ramsden v Dyson* (1866) LR 1 HL 129; *Crabb v Arun District Council* [1976] Ch 179; [1975] 3 All ER 865.
91. *Gissing v Gissing* [1971] AC 886 at 905; [1970] 2 All ER 780 at 790; *Re Basham (decd)* [1987] 1 All ER 405 at 410; [1986] 1 WLR 1498 at 1503; *Gillett v Holt* [2001] Ch 210; [2000] 2 All ER 289.
92. See [13-54].

The position may be summed up as follows. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[93] Lord Browne-Wilkinson said that English law has 'for the most part only recognised an institutional constructive trust' and that whether the remedial constructive trust should be adopted was a matter for the future. In contrast, the Supreme Court of the United Kingdom said in *FHR European Ventures LLP v Mankarious*[94] that 'the Australian courts recognise the remedial constructive trust'. Certainly English judges have often denied the existence of or recognised only limited scope in remedial constructive trusts.[95] The English cases see the institutional constructive trust as arising automatically at the moment of the wrong. They see the remedial constructive trust as discretionary and imposed only at the time of the court's order with retroactive effect.

In Australia, some constructive trusts have the following features. First, they are only to be applied as the last resort. A plaintiff seeking a remedial constructive trust may have to exclude the possibility that there is some other effective remedy which is non-proprietary — that is, which does not attach to specific assets.[96] Thus in that sense, in Australia constructive trusts are discretionary and exceptional. It does not necessarily follow from the fact that a remedy is used only as an exceptional last resort that it does not or should not exist.[97]

Secondly, from the discretionary character of Australian constructive trusts flow particular outcomes as to timing. Lord Browne-Wilkinson has said:[98] 'Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which gave rise to it: the function of the court is merely to declare that such a trust has arisen in the past.' Sometimes this is true of remedial constructive trusts in Australia, but not always. As stated earlier, O'Connor J said: 'where money has been stolen it is trust money in the hands of the thief and he cannot divest it of that character'.[99] And where one joint tenant murdered another, the former's interest arising by way of survivorship was held in trust for the estate of the victim.[100] As also stated earlier, in neither case did the court suggest that the trust character only arose when the court's order was made. In *Muschinski v Dodds*,[101] Deane J said (Mason J concurring) that 'there does not need to have been a curial declaration or order before equity will recognise the prior existence of a constructive trust'. But Deane J then said: 'Where competing common law or equitable claims are or may be involved a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgment or formal court order or from some other specified date.' This assists

93. [1996] AC 669 at 714; [1996] 2 All ER 961 at 997.
94. [2014] 4 All ER 79 at [45].
95. For example, *Re Sharpe* [1980] 1 All ER 198 at 203; [1980] 1 WLR 219 at 225; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 479; [1989] 3 All ER 14 at 57; *Halifax Building Society v Thomas* [1996] Ch 217 at 229; [1995] 4 All ER 673 at 682; *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812 at 823; *Sinclair Investments (UK) Ltd v Versailles Trade Finance plc* [2012] Ch 453; [2011] 4 All ER 335 at [37]. For arguments in favour of that position, see Lord Neuberger, 'Remedial Constructive Trust — Fact or Fiction', Lecture delivered on 10 August 2014 to the Banking Services and Finance Law Association Conference, New Zealand: <https://www.supremecourt.UK/docs/speech-140810.pdf>. See also M Bryan, 'What Exactly is a Remedial Constructive Trust?' in J McKenna and H Jeffcoat (eds), *Queensland Legal Year Book 2013*, p 313.
96. *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 379; 65 ALR 193 at 198; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 507–10; 102 ALR 681 at 698–700; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566; 157 ALR 414 at [40]–[43]; *Giumelli v Giumelli* (1999) 196 CLR 101; 161 ALR 473 at [10], [49]–[50]; *Katingal Pty Ltd v Amor* (1999) 162 ALR 287; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209 at [200]; *Huen v Official Receiver* (2008) 248 ALR 1 at [78]; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; 266 ALR 462 at [126], [128]–[129].
97. An illustration of the complex factors which can go to the discretion is *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22 at [672]–[681].
98. *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714; [1996] 2 All ER 968 at 997.
99. *Black v S Freedman & Co* (1910) 12 CLR 105 at 110; 17 ALR 541 at 543.
100. *Rasmanis v Jurewitsch* (1969) 70 SR (NSW) 407.
101. (1985) 160 CLR 583 at 615; 62 ALR 429 at 451.

in the protection of innocent third parties whose claims compete with the constructive trust, like the general creditors.

Thirdly, an account of profits, rather than a declaration of a constructive trust over part of a business, may be ordered if the latter would 'thrust the parties into a continuing business relationship where it was clear that there was no confidence or comity between them'.[102] The same applies where a constructive trust might involve an innocent third party being in an unwanted relationship with the plaintiff.[103]

Fourthly, constructive trusts will not be ordered where this would be disproportionate to the defendant's degree of wrongdoing or the extent to which the benefit derived was attributable to the wrongdoing.[104]

Fifthly, the form of any constructive trust or other equitable remedy ordered can vary. In *Boardman v Phipps*,[105] the remedies granted by Wilberforce J included a constructive trust over 5/18 of the shares acquired by Boardman (solicitor) and Tom Phipps (a beneficiary) and an order for an account of profits derived from the transaction. In the Supreme Court of Canada, there has been debate, with the majority favouring and the minority opposing a constructive trust on the facts of *Lac Minerals Ltd v International Corona Resources Ltd*.[106]

In Australia, too, the cases exhibit diversity in the relief granted. There are certainly additional instances in Australian law of what appear to be institutional constructive trusts, creating new proprietary interests at the moment of breach. Thus *Furs Ltd v Tomkies*[107] concerned a managing director who procured the sale of part of his employer's business to a new company for £4000 and £1000 worth of shares in that new company. The company asked for a declaration that the shares belonged to it and an order that they be transferred to it. These orders assume the existence of a constructive trust. The company also asked for an order that the defendant pay over the £4000. The High Court of Australia (Rich, Dixon and Evatt JJ) made those orders. They said:[108] 'An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company.' A similar apparently non-discretionary quality appears in *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd*,[109] where it was said that 'any property acquired, or profit made, by [the defendant] in breach of [the rule in *Keech v Sandford*] is held by him in trust for his cestui que trust'. These cases seem to treat the imposition of a constructive trust as being automatic. They were favourably referred to by Mason J in the *Hospital Products* case.[110] But, as will be seen, Mason J's judgment also favours less rigid remedial approaches. One earlier example of that lack of rigidity is *Consul Development Pty Ltd v DPC Estates Pty Ltd*,[111] in which Gibbs J said: 'The question whether the *remedy* which the person to whom the duty is owed *may* obtain against the person who has violated a duty is proprietary or personal may sometimes be one of some difficulty. In some cases the fiduciary has been declared a trustee of the property which he has gained by his breach; in others he has been called upon to account for his profits and sometimes the distinction between the two *remedies* has not, it appears, been kept clearly in mind.'

An extreme form of constructive trust was ordered by Kearney J in *Timber Engineering Co Pty Ltd v Anderson*.[112] His Honour held that two employees of a business operated by TECO had sold products in competition with that business in breach of fiduciary duty because their

102. *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 554 (and 564); 128 ALR 201 at 206 (and 213).
103. *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22 at [510].
104. *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22 at [510].
105. [1967] 2 AC 46; [1966] 3 All ER 721. See [13-21] for the facts.
106. [1989] 2 SCR 574.
107. (1936) 54 CLR 583.
108. (1936) 54 CLR 583 at 592.
109. (1958) 100 CLR 342 at 350.
110. (1984) 156 CLR 41 at 107–10; 55 ALR 417 at 462–4.
111. (1975) 132 CLR 373 at 395; 5 ALR 231 at 249 (emphasis added).
112. [1980] 2 NSWLR 488.

personal interests conflicted with that duty. The two employees conducted their competing business principally through a company called 'Mallory Trading'. The judge held that the relief available was not limited to an account of the profits which the employees had made. It extended to a constructive trust over the successful business which the employees had set up as a result of their breaches. This approach was taken by Kearney J on two grounds. He put the first thus:[113]

> Every opportunity which Mallory Trading has received is directly traceable to resources and benefits provided by TECO, even to the extent of time and efforts expended by Anderson and Toy for which TECO was paying. Every advance made by Mallory Trading was also due to the advantages of the tangible and intangible resources and facilities provided from TECO. In truth, the business of Mallory Trading was carved out of the business of TECO, and thus ought to be treated as being … held on trust for TECO.

He also based the constructive trust on a second theory:[114]

> The substance and worth of Mallory Trading were rooted in fraud and were nourished and sustained in fraud of TECO. For Mallory Trading to maintain that it is beneficially entitled to the produce of such deceit, so as to deny TECO any benefit therein, would, in my opinion, constitute fraud calling for the imposition of a constructive trust in favour of TECO.

The defendant argued that Kearney J should grant only one remedy — an account of profits limited to profits made on orders to Mallory Trading from customers who once were TECO customers. He referred to a discussion by Upjohn J in *Re Jarvis (dec'd)*.[115] In that case, counsel for the defendant submitted to Upjohn J that the remedy should be limited to the benefits actually flowing to the defendant executrix-trustee of a tobacconist business which she had run for her own benefit, not that of the beneficiaries. Counsel for the plaintiff submitted that it would be impossible to separate those benefits out, and the defendant should be made accountable for the whole business. Subject to a laches point, Upjohn J accepted the latter argument because the success of the tobacconist business depended much more on its origins in the business bequeathed than on the independent activity of the defendant. That latter approach was adopted by Kearney J as well. He favoured granting a constructive trust over the defendant's business, and granting an equitable lien over the shares of companies which carried it on.

The reasoning of Upjohn J in *Re Jarvis* and Kearney J in the *Timber Engineering* case does not seem compatible with the notion of an institutional constructive trust arising automatically. Instead it rests on a close examination of the particular circumstances and on matters which are in some sense discretionary, or at least matters of judgment. In particular, *Re Jarvis* casts doubt on whether constructive trusts in England are in truth institutional only. In the *Hospital Products* case, Mason J approved Upjohn J's reasoning. He said:[116]

> In *In re Jarvis*, Upjohn J observed, correctly in my opinion, that it is not possible to say that one approach is universally to be preferred to the other, for each case depends on its own facts and the form of inquiry which ought to be directed must vary according to the circumstances. In each case the form of inquiry to be directed is that which will reflect as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty.

The *Hospital Products* case illustrates how the remedy varies depending on the nature of the duty broken, the extent of the breach and the need to achieve justice and avoid injustice in the particular circumstances. It also illustrates how different minds can react to identical facts. The case concerned the misconduct of an American distributor who was appointed Australian distributor of an American principal's products. The American principal claimed a declaration that the distributor's assets were held on constructive trust. The trial judge, McLelland J, found

113. [1980] 2 NSWLR 488 at 496 (17).
114. [1980] 2 NSWLR 488 at 497 (17).
115. [1958] 2 All ER 336 at 340–1; [1958] 1 WLR 815 at 820.
116. *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 110; 55 ALR 417 at 464.

that a fiduciary duty existed, but ordered only an account of profits made by the distributor in getting a head start in the Australian market in breach of duty. The New South Wales Court of Appeal reacted very sharply to the distributor's undoubtedly shameful perfidy. The court declared a constructive trust over the whole of the distributor's assets. A majority of the High Court held that there was no fiduciary duty and left the principal to a claim for breach of contract. However, Mason J, though finding a fiduciary duty narrower than the Court of Appeal's, like McLelland J, would have ordered only an account of profits. He did not consider it necessary to impose a constructive trust because that would extend far beyond the profits made in breach of duty and would fail to make any allowance for the contribution in time, effort and finance made by the distributor.[117] Deane J, who unlike McLelland J and Mason J did not find any fiduciary duty, would nonetheless have ordered a constructive trust obliging the distributor to account for profits made in breach of contract. Since constructive trusts are normally conceived of as arising in the exclusive jurisdiction of equity, not the auxiliary, this was revolutionary thinking.[118]

Another English authority which recognises the power to grant a constructive trust of a remedial character, but only after examining various factors which point in different directions, is *Ocular Sciences Ltd v Aspect Vision Care Ltd*. It concerned abuse of confidential information. There Laddie J said:[119]

> In determining whether to grant a proprietary remedy, the court should consider whether it is the appropriate remedy in the circumstances of the case. In considering this, the court must bear in mind the possible effects of imposing a constructive trust. Not only will the plaintiff obtain priority over general creditors, he may recover profits made by the defendant, limitation periods may be different and the plaintiff may be able to obtain compound interest.

He then discussed the detailed analysis in the *Lac Minerals* case.[120] He continued:[121]

> What the plaintiffs are asking for is the imposition of a constructive trust over a part of the defendants' business and assets. Unlike *Lac Minerals*, there is no question here of the defendants having diverted their business or assets, or any part of them, from the plaintiffs. Furthermore even if it is said that part of the defendants' business and assets have been contaminated by breaches of confidence, that contamination is small and technically inconsequential. In my view it would be quite wrong to impose a constructive trust over such a minor fraction. It was not clear to me how a constructive trust imposed on such a fraction would work. Who would decide what repairs or modifications should be carried out to equipment, who should pay for them, who should decide what to do with obsolete equipment and if AVCL was to be floated on the stock exchange, who would decide at what price and on what terms? I can see attractions in a suitable case of imposing a constructive trust over a complete discrete item of property but imposing such a trust over a part only raises additional problems.

Another inquiry relevant to the distinction between institutional and remedial constructive trusts is whether it is open to a court to refuse to declare a constructive trust on grounds like laches, unclean hands, hardship, the plaintiff's failure to do equity, or unconscionable conduct. If so, the constructive trust is more likely to be a remedy than an institution. A claim to enforce a beneficial interest under an express trust is not usually seen as defeasible for these reasons. It seems likelier that a claim for a constructive trust is defeasible on those grounds. Laches defeated the claimant in *Re Jarvis (dec'd)*.[122] In *Chan v Zacharia*,[123] Deane J said it may still be arguable in the High Court of Australia that 'the liability to account for a personal benefit

117. (1984) 156 CLR 41 at 114; 55 ALR 417 at 467.
118. (1984) 156 CLR 41 at 114; 55 ALR 417 at 467.
119. [1997] RPC 289 at 414–15.
120. *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574.
121. [1997] RPC 289 at 416.
122. [1958] 2 All ER 336; [1958] 1 WLR 915. See also *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 335; [1994] 1 All ER 1 at 8 (assuming that a claim for a constructive trust over a bribe can be defeated by delay).
123. (1984) 154 CLR 178 at 204–5; 53 ALR 417 at 438.

CHAPTER 20

Powers of a Trustee

Introduction

[20-01] The general nature of the powers has already been considered.[1] It is now the time to consider various particular powers of trustees, always bearing in mind, in relation to the exercise of any such particular power, the general principles previously discussed. Trustees, in the execution of their trusts, have all the powers which are conferred upon them:

(a) by the trust instrument;

(b) by statute; and

(c) by the court.

The powers which may be conferred by the court under its inherent jurisdiction and in exercise of its statutory jurisdiction have already been dealt with.[2] In New South Wales, powers of sale and lease may also be conferred on trustees of settled estates under the Conveyancing and Law of Property Act 1898, but the jurisdiction under that Act in the cases where there are trustees of the settled estates, may now be regarded as obsolete in view of the wider powers conferred by the Trustee Act 1925. However, it should be remembered that the Conveyancing and Law of Property Act 1898 is still the governing Act where there are legal estates settled upon persons in succession. Corresponding legislation in Victoria and South Australia is found in the Settled Land Act 1958 (Vic) and the Settled Estates Act 1880 (SA). Such legal settled estates are not within the scope of this book. In Queensland and Western Australia, the settled land legislation has been repealed by their respective Trustee Acts and settled estates must now be dealt with under those statutes.[3]

Before dealing with the particular powers of trustees, it is convenient to recall that previous doubts as to the vesting in the surviving trustees or trustee of the powers conferred by a trust instrument on a number of co-trustees have been removed in all jurisdictions[4] by express provision that where a power (or trust) is given to or vested in, two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power (or trust), the same may be exercised or performed by the survivor or survivors of them for the time being.

1. See Chapter 16.
2. See Chapter 17.
3. Qld s 6; WA ss 30 and 109.
4. NSW s 57(1); ACT s 57(1); Qld s 16(1); Vic s 22(1); SA s 32(1); WA s 45(1); Tas s 25(1); NT s 23(1).

Powers in Relation to the Trust Property

Power of Sale

Rule

[20-02] A trustee has no power to sell the trust property except under an authority expressly or impliedly conferred by the trust instrument or under the authority of some statute, or under the order of the court. The primary duty of the trustee is to preserve the trust property in specie for the benefit of the beneficiaries.[5]

Implied power of sale

[20-03] However, it is not always necessary that the duty or power of sale should be expressly stated in the trust instrument. It frequently happens that the nature of the dispositions made by the testator or settlor, either together with or independently of the nature of the trust property, result in the implication of a power of sale. Where there is contained in a will a bequest of residuary personal estate settled upon persons in succession, the trustee, unless a contrary intention otherwise appears from the will, has an implied power to sell such part of the personal estate as does not consist of authorised securities, and to invest the proceeds in authorised securities. This is the rule in *Howe v Lord Dartmouth*.[6] It is otherwise, of course, if the personalty is the subject of a specific gift.

Difficulty occurs in determining whether a trust to 'divide' or to 'distribute' the trust property implies a power to sell it for the purpose of such division or distribution. It has been held[7] that an ultimate direction in the instrument to divide the trust property among individuals or a class does not, of itself, imply a power to sell for convenience of division. A trust to divide real estate was held in *Grant v Grant*[8] to confer an implied power of sale, but in that case, the nature of the property and the number of shares into which it was to be divided, led to the implication that a sale was intended. *Mower v Orr*[9] is the same type of case. There, the testator directed his executors to get his property together and to divide it 'into 20 aliquot shares for his grandchildren' with a further direction to invest infants' shares. This was held to imply a power of sale. On the other hand, it was suggested by the High Court of Australia in *Alston v Equity Trustees, Executors and Agency Ltd*[10] that a direction to distribute always confers a power of sale although, upon the facts of that case, as there was a specific reference in the will to division of 'proceeds' even though the word 'sale' was not mentioned, there was no necessity for the application of so wide a principle. In a subsequent case, *Pagels v MacDonald*,[11] the High Court of Australia seems to have assumed that a direction to distribute does always confer a power of sale.

A power of sale, it seems, may be implied in respect of personal estate by a power to vary investments.[12]

Statutory power of sale

New South Wales and the Australian Capital Territory

[20-04] Although the legislation confers various powers upon trustees in relation to sales, and confers a power to postpone sale,[13] it does not confer any general power of sale upon trustees. However, in one instance it does confer a power of sale by the following provision:

5. *Want v Stallibrass* (1873) LR 8 Exch 175; *Re Head's Trustees and Macdonald* (1890) 45 Ch D 310.
6. (1802) 7 Ves 137; 32 ER 56. See [19-02]–[19-14].
7. *Cornick v Pearce* (1848) 7 Hare 477; 68 ER 197; *Re Wintle* [1896] 2 Ch 711; *Re McInnes* [1925] VLR 496.
8. (1914) 14 SR (NSW) 271; 31 WN (NSW) 103.
9. (1849) 7 Hare 473; 68 ER 195; *Re Bennett* (1912) 12 SR (NSW) 695; 29 WN (NSW) 203; *Re Austin's Settlement* [1960] VR 532; note 34 ALJ 150; *Re Tyrie (dec'd)* [1970] VR 264.
10. (1912) 14 CLR 341.
11. (1936) 54 CLR 519. See also *Stokes v Churchill* [1994] NSW ConvR ¶55–694 at 59,969–70.
12. *Re Pratt's Will Trusts* [1943] Ch 326; [1943] 2 All ER 375.
13. Section 27B.

38. (1) Where a trustee is authorised by the instrument, if any, creating the trust or by law to pay or apply capital money for any purpose or in any manner, the trustee shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession held upon the same trusts as the capital money.

(1A) Where a trustee holds land in respect of which moneys are due and payable for rates or taxes or in respect of which the trustee is under a statutory obligation to expend moneys and the trustee has no moneys subject to the same trusts as such land wherewith to pay such rates or taxes or discharge such statutory obligation the trustee shall have and shall be deemed always to have had power to raise the money required to make such payment or discharge such obligation by sale or mortgage of the whole or part of such land or by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession held upon the same trusts as such land.

(2) This section shall not apply to a trustee of property held for charitable purposes.

Another instance in the legislation is found in s 33 whereby trustee mortgagees, who hold property discharged from a mortgagor's rights of redemption, hold the property on trust for sale with power to postpone sale. Executors and administrators have certain special powers of sale conferred by s 153 of the Conveyancing Act 1919 (NSW) as follows:[14]

153. (1) Subject as hereinafter mentioned executors and administrators may without the consent of any person or the order of a court:

(a) sell or mortgage the real estate of the deceased person for purposes of administration,
(b) sell the real estate of the deceased person as to which the deceased person died intestate for purposes of distribution or division amongst the persons entitled,
(c) lease the real estate of the deceased person in possession for any term not exceeding three years.

(2) Any conditions may be imposed on the exercise of any such power of sale, mortgage, or lease by an administrator, and either generally or in the case of a particular sale, mortgage, or lease, by rules of court, or by the court in the grant of administration (if any) or by other order.

(2A) No conditions imposed on the exercise by an executor of any such power of sale, mortgage, or lease shall operate after the commencement of the *Conveyancing (Amendment) Act 1930*.

(2B) The court shall cause to be embodied in or endorsed on every certificate of the grant of administration a copy or record of any such conditions imposed by the order of the court.

(2C) No purchaser nor the Registrar-General, Crown Solicitor, or other person registering or certifying title under any sale, mortgage, or lease under this section shall be affected by any such conditions imposed by order of which the purchaser, Registrar-General, Crown Solicitor or person has not actual notice unless a copy or record of the order is registered.

(3) No purchaser, nor the Registrar-General, Crown Solicitor, or other person registering or certifying title under any sale, mortgage, or lease under this section, shall be bound to inquire whether the powers abovementioned or any of them are being or have been exercised for the purposes abovementioned, and the receipt of the executor or administrator shall be sufficient discharge, and shall exonerate the persons paying the same from any responsibility for the application of the moneys expressed to have been so received.

(4) Some or one only of several executors or administrators shall be entitled to exercise such powers with the leave of the court and not otherwise, and the court may make such orders as it thinks fit for the purpose of carrying out any such sale, mortgage, or lease.

By s 152, 'purposes of administration' is defined to include the payment in due course of administration of the debts, funeral and testamentary expenses, duties and commission, and the costs, charges and expenses of the executor or administrator, and any costs which may be ordered to be paid out of the estate.

14. Cf *Re Chaplin and Staffordshire Potteries Waterworks Co Ltd's Contract* [1922] 2 Ch 824; *Pagels v Macdonald* (1936) 54 CLR 519; [1936] ALR 224; *Burke v Dawes* (1938) 59 CLR 1; [1938] ALR 135.

By the same Act, s 157A, where land is acquired by resumption (under the Land Acquisition (Just Terms Compensation) Act 1991, or any other Act authorising the compulsory acquisition of land) from a trustee or personal representative, the trustee or personal representative or his or her successor in office is entitled to sell and convey the land resumed, and to agree upon and receive compensation money in respect of the resumption.

By s 66C of the Conveyancing Act 1919, a trust is implied for sale of land purchased by trustees where the trust instrument contains a power to invest money in the purchase of land and the trustees have purchased the land under that power. If trustees purchase land with trust moneys when they have no power to do so under the trust instrument, they have power to resell the land so purchased provided all the beneficiaries are sui juris and absolutely entitled and desirous of taking the land in specie.[15]

Other jurisdictions

[20-05] Western Australia (s 43) and Queensland (s 45) are similar to s 38 of New South Wales. However, Western Australia and Queensland have gone much further than New South Wales, by giving to trustees a general power to sell the trust property: s 27(1)(a) and s 32(1)(a) respectively. Tasmania lacks both a general power and an equivalent to the New South Wales s 38. South Australia has, in s 28B, followed the New South Wales provision.

In Victoria, s 20 follows the New South Wales s 38. Section 44(1) of the Administration and Probate Act 1958 (Vic) provides:

44. (1) In dealing with the real and personal estate of the deceased his personal representatives shall for purposes of administration have —
(a) the same powers and discretions including power to raise money by mortgage with or without power of sale or charge (whether or not by deposit of documents) as a personal representative had before the first day of January One thousand eight hundred and seventy-three with respect to personal estate vested in him; and
(b) all the powers discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale; and
(c) all the powers conferred by statute on trustees for sale and so that every contract entered into by a personal representative shall be binding on and be enforceable against and by the personal representative for the time being of the deceased, and may be carried into effect or be varied or rescinded by him and in the case of a contract entered into by a predecessor as if it had been entered into by himself.

This provision is of course limited to 'the purposes of administration'.

Section 38(1) of the Administration and Probate Act 1958 (Vic) provides as follows:

38. (1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives —
(a) as to the real estate (including chattels real) upon trust to sell the same; and
(b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money —

with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, think proper, and so that any [reversionary] interest shall not be sold until it falls into possession, unless the personal representatives see special reason for sale, and so also that, unless required for purposes of administration owing to want of other assets, personal chattels shall not be sold except for special reason.

Section 40 of the Property Law Act 1958 (Vic) makes the provisions of that Act (ss 31–39) relating to trustees for sale of land applicable to personal representatives holding on trust for sale, but without prejudice to their rights and powers for purposes of administration.

15. *Re Patten and Edmonton Union Poor Guardians* (1883) 52 LJ Ch 787; *Power v Banks* [1901] 2 Ch 487 at 496; *Re Jenkins and Randall & Co's Contract* [1903] 2 Ch 362; *Re City of Sydney Real Estate Co Ltd* (1928) 29 SR (NSW) 80; 46 WN (NSW) 67.

'Personal representative' is defined as meaning the executor (original or by representation) or the administrator for the time being of a deceased person.[16]

Duration of power

New South Wales

[20-06] The Trustee Act 1925, by ss 27 and 27C, introduced considerable amendment to the law governing the duration of a power of sale and the effect of the rule against perpetuities. In order to understand the effect of these amendments it is necessary to consider the law as it previously stood.

Where property was given to trustees upon trust for sale at a future time or with an unlimited power of sale, the power or trust for sale might be void as infringing the rule against perpetuities, as in *Re Wood*,[17] where a testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel-pits were exhausted and then to sell the gravel-pits and divide the proceeds among his children then living. Both the trust for sale and the trust for division of the proceeds were held to be void for remoteness.[18]

Although the trust for sale might be void, it did not follow that the gift of the proceeds was necessarily void. The trust for sale might be void as being too remote and yet the intended beneficiaries might obtain their gifts.[19] In *Re Daveron*,[20] there was a devise of a freehold to trustees, subject to an unexpired lease, which had 40 years to run, upon trust to pay the rent during the currency of the lease to certain named persons, and 'upon expiration of the lease' upon trust for sale and division among other named persons ascertainable within the limits of the rule against perpetuities. Although the trust for sale was void, the beneficiaries were held entitled to the intended gifts since, in equity, they could take the property as realty.

Where there was simply a general power without limit, the power had to be determined in its duration by the nature of the limitations in the trust instrument and, of course, had to be exercised within the limits imposed by the rule against perpetuities; and only while the purposes of the settlement or will remained unexhausted.[21] Since the rule against perpetuities applied to powers of sale, a power of sale unlimited in point of time was in danger of being void under the rules. If the testator or settlor showed no clear intention that the power should be exercised outside the time allowed by the rule, the court presumed an intention that the power should only be exercisable until the time when all beneficiaries were sui juris and absolutely entitled in possession or at the latest within a reasonable time thereafter, allowed for realisation of the property.[22] If the instrument were read as showing such an intention, the rule was infringed. However, if such an intention could not be presumed, as it clearly could not be in *Re Daveron*,[23] then the power of sale was void.

Although this presumption was convenient in preventing powers of sale being void as offending the rule against perpetuities, it caused considerable conveyancing difficulties.[24] Where the beneficiaries were sui juris and absolutely entitled, the purchaser had to inquire

16. Administration and Probate Act 1958 (Vic) s 5; Trustee Act 1958 (Vic) s 3; Property Law Act 1958 (Vic) s 18.
17. [1894] 3 Ch 381.
18. See also *Hale v Pew* (1858) 25 Beav 335; 53 ER 665; *Re Davies and Kent's Contract* [1910] 2 Ch 35; *Re Bewick* [1911] 1 Ch 116; *Davis v Samuel* (1926) 28 SR (NSW) 1; 44 WN (NSW) 100.
19. *Re Daveron* [1893] 3 Ch 421; *Goodier v Edmunds* [1893] 3 Ch 455; *Re Appleby* [1903] 1 Ch 565.
20. [1893] 3 Ch 421.
21. *Lantsbery v Collier* (1856) 2 K & J 709; 69 ER 967; *Re Lord Sudeley and Baines and Co* [1894] 1 Ch 334; *Re W & R Holmes and Cosmopolitan Press Ltd's Contract* [1944] Ch 53; [1943] 2 All ER 716. For the situation where there is a power of appointment, see *Neill v Public Trustee* [1977] 1 NSWLR 290; [1978] 2 NSWLR 65.
22. *Re Quigley* (1908) 8 SR (NSW) 124; *Re W & R Holmes and Cosmopolitan Press Ltd's Contract* [1944] Ch 53; [1943] 2 All ER 716.
23. [1893] 3 Ch 421. Cf *Re Raphael* (1903) 3 SR (NSW) 196; 20 WN (NSW) 84.
24. See *Re Davidson* (1879) 11 Ch D 341.

whether they had elected to take the property in specie.[25] Further, there was the possibility that the power had determined by application of the presumption of intention. Section 27 of the Trustee Act 1925 (NSW) (as amended by s 2 of the Trustee (Amendment) Act 1929 (NSW)) now provides:

> 27. (1) Where the instrument creating a trust or power to sell property does not expressly limit the duration of the trust or power, the trustee may, if so requested in writing by any beneficiary, sell the property under the authority conferred by this section and shall be deemed to be a trustee for sale accordingly, notwithstanding any lapse of time or that all the beneficiaries are absolutely entitled to the property in fee simple or full ownership in possession and are free of any incapacity, but in all other respects the authority conferred by this section shall be subject to any restrictions to which the power or trust created by the instrument is subject.
>
> (2) Nothing in this section shall affect any trust or power to sell which is for the time being in existence under the instrument creating the trust or power.
>
> (3) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power and shall have effect subject to the terms of that instrument and to the provisions therein contained.

In 1929, there was also introduced s 27C, which was taken from the Trustee Act 1925 (UK), and which may be regarded as being by way of further assurance to purchasers in New South Wales:

> 27C. (1) A trust for sale shall, so far as regards the safety and protection of any purchaser, be deemed to subsist notwithstanding any lapse of time until the property is conveyed to or under the direction of the persons interested in the proceeds of sale, and in the case of land until the conveyance is duly registered.
>
> (2) Nothing in this section shall prevent any court from making an order restraining a sale.

Section 27 of the Trustee Act 1925 (NSW) did not, however, solve all the difficulties. If the trust instrument, as in *Re Daveron*,[26] showed a clear intention that the power should or need[27] not be exercised within the time allowed by the rule against perpetuities, the power of sale would still be void. By s 11 of the Perpetuities Act 1984 (NSW),[28] the rule against perpetuities does not invalidate an 'administrative power' in relation to trust property during the subsistence of a beneficial interest in the trust property. The definition of 'administrative power' includes a power of sale.

Other jurisdictions

[20-07] Section 27 of the Trustee Act 1925 (NSW) and s 11 of the Perpetuities Act 1984 (NSW) have their counterparts in the Australian Capital Territory,[29] Victoria,[30] Western Australia,[31] Queensland,[32] Tasmania[33] and the Northern Territory,[34] but not in South Australia.

Postponement of sale

New South Wales

[20-08] It was common to insert in wills or settlements, which created a trust for sale, a power to postpone the sale. Now, however, the power to postpone sale is implied in a trust for sale, unless a contrary intention appears. Section 27B of the Trustee Act 1925 provides:

25. See *Re Cotton's Trustees* (1882) 19 Ch D 624; [1881–5] All ER Rep 926; *Re Tweedie and Miles* (1884) 27 Ch D 315.
26. [1893] 3 Ch 421.
27. *Re Allott* [1924] 2 Ch 498; [1924] All ER Rep 810; *Davis v Samuel* (1926) 28 SR (NSW) 1; 44 WN (NSW) 100.
28. Replacing Trustee Act 1925 (NSW) s 27A: see *Harris v King* (1936) 56 CLR 177; [1937] ALR 78.
29. Trustee Act 1925 s 27; Perpetuities and Accumulations Act 1985 s 12.
30. Trustee Act 1958 (Vic) s 14; Perpetuities and Accumulations Act 1968 (Vic) s 14.
31. Trustees Act 1962 (WA) ss 28 and 29.
32. Property Law Act 1974 (Qld) s 220.
33. Perpetuities and Accumulations Act 1992 (Tas) s 14.
34. Law of Property Act (NT) s 193.

27B. (1) A power to postpone sale shall be implied in every trust for sale, unless a contrary intention appears.

(2) Where there is a power to postpone sale, then (subject to any express direction to the contrary in the instrument, if any, creating the trust for sale) the trustee for sale shall not be liable in any way for postponing the sale, in the exercise of the trustee's discretion, for any indefinite period; nor shall a purchaser be concerned in any case with any directions respecting the postponement of sale.

(3) The provisions of subsections (1) and (2) apply to trusts created either before or after the commencement of this Act.

(4) Where a disposition or settlement coming into operation after the commencement of the *Trustee (Amendment) Act 1929* contains a trust either to retain or sell any property, the same shall be construed as a trust to sell the property with power to postpone the sale.

With this power to postpone sale must now be read the provisions of s 66D of the Conveyancing Act 1919 as to the powers of management conferred on trustees for sale during such postponement and as to the disposition of income during such postponement:

66D. (1) Subject to any direction to the contrary in the disposition on trust for sale, trustees for sale shall, in relation to land during postponement of sale, have the powers of management conferred by s 151C during a minority, but without the restriction relating to waste and the cutting of timber.

(2) Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs properly payable out of income, insurance, and other outgoings, shall be paid or applied in like manner as the income of investments representing the purchase money would be payable or applicable if a sale has been made and the proceeds had been duly invested.

(3) Where the net proceeds of sale have under the trusts affecting the same become absolutely vested in possession in two or more persons as joint tenants or tenants in common, the trustees for sale may, with the consent of the persons, if any, of the age of eighteen years or upwards, not being annuitants, interested in possession in the net rents and profits of the land until sale:

(a) partition the land remaining unsold or any part thereof, and
(b) provide (by way of mortgage or otherwise) for the payment of any equality money,

and, upon such partition being arranged, the trustees for sale shall give effect thereto by conveying the land so partitioned in severalty (subject or not to any mortgage created for raising equality money) to the persons entitled under the partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given.

(4) (a) If a share in the net proceeds belongs to a person under mental disability, the consent of the person charged by law with the management and care of the property of the person under mental disability or, if there is no person so charged, of the court, shall be sufficient to protect the trustees for sale.

(b) If a share in the net proceeds is affected by an incumbrance, the trustees for sale may either give effect thereto or provide for the discharge thereof by means of the property allotted in respect of such share, as they may consider expedient.

(5) If a share in the net proceeds is absolutely vested in a minor, or in a person who cannot be found or ascertained, or as to whom it is uncertain whether the person is living or dead, the trustees for sale may act on behalf of the minor or person, and retain land or other property to represent the minor or person's share.

Section 151C of the Conveyancing Act 1919, which is thus incorporated in s 66D by reference, is as follows:

151C. (1) If and as long as any person who is entitled to a beneficial interest in possession affecting land is a minor, the trustees appointed for this purpose by the settlement, or if there are none so appointed, then the trustees of the settlement, unless the settlement or the order of the court whereby they or their predecessors in office were appointed to be such trustees expressly provides

to the contrary, or if there are none, then any persons appointed as trustees for this purpose by the court on the application of a guardian or next friend of the minor may enter into and continue in possession of the land on behalf of the minor, and in every such case the subsequent provisions of this section shall apply.

(2) The trustees shall manage or superintend the management of the land, with full power:

(a) to fell timber from time to time in the usual course for sale, or for repairs or otherwise, and
(b) to erect, alter, pull down, rebuild, and repair houses, and other buildings, dams, fences, and other erections, and
(c) to continue the working of mines, minerals, and quarries which have usually been worked, and
(d) to drain or otherwise improve the land or any part thereof, and
(e) to insure against any insurable risk, and
(f) to grant leases for any term not exceeding three years, and
(g) to make allowances to and arrangements with tenants and others, and
(h) to determine tenancies, and to accept surrenders of leases and tenancies, and
(i) generally to deal with the land in a proper and due course of management,

but so that, where the minor is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the minor would, if of the age of eighteen years or upwards, cut the same.

(3) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber, pay the expenses (including any commission to which they are entitled) incurred in the management or in the exercise of any power conferred by this section or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum and the interest of any principal sum charged on the land.

(4) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, under which the interest of the minor arises, and has effect subject to the terms of that instrument and to the provisions therein contained.

This power of management only exists when there is a binding trust for sale and does not exist when there is a power of sale only.

Other jurisdictions

[20-09] Section 27B of the New South Wales Trustee Act 1925 has been adopted in the Australian Capital Territory (s 27B), Victoria (s 13), Western Australia (s 27) and Queensland (s 32), but has provoked no response in Tasmania, South Australia or the Northern Territory.

Exercise of power

New South Wales and the Australian Capital Territory

[20-10] By s 26 of the legislation, the trustee for sale, which by the definition in s 5 includes a trustee having power of sale,[35] may exercise the powers set out as follows:

26. (1) A trustee for sale may:
(a) sell all or any part of the trust property,
(b) sever and sell fixtures apart from the balance of the property,
(c) grant and sell any easement right or privilege of any kind over or in relation to the property,
(d) do anything that a mortgagee may do under subsection (1) of section 110 of the *Conveyancing Act 1919* to the like extent as if the powers conferred by that subsection on a mortgagee in relation to the mortgaged property or any part thereof were in terms conferred by this subsection on the trustee in relation to the trust property or any part thereof,

35. But see, as to the consequences of this definition, the judgment of Hardie J in *C W Enterprises Pty Ltd v Shaw* [1967] 1 NSWR 379; (1966) 85 WN (Pt 1) (NSW) 58.

(e) join with any other person in doing anything under any of the preceding paragraphs of this subsection,

(f) pay or apply capital money subject to the trust for any of the purposes mentioned in this subsection.

(2) The sale may be subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, and may be:

(a) either subject to prior charges or not,

(b) either together or in lots, in subdivision or otherwise,

(c) by public auction or by private contract.

(3) The trustee may vary any contract for sale, buy in at any auction, rescind any contract for sale and re-sell, without being answerable for any loss.

(4) If the trustee joins with any other person in selling, the purchase money shall be apportioned in or before the contract of sale, and a separate receipt shall be given by the trustee for the apportioned share.

(4A) A contravention of subsection (4) of this section shall not invalidate or be deemed to have invalidated any instrument intended to affect or evidence the title to any land.

(5) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

...

[20-11] Apart from the foregoing statutory provisions and subject to any directions in the instrument of trust, trustees having a power of sale could not join in selling other property along with trust property except where the total purchase money could be apportioned accurately and the sale was for the benefit of the trust estate. Such a transaction was one that required to be justified by reason of the resulting advantage to the trust.[36] Formerly, it was doubtful whether, even in a proper case for a joint sale, the apportionment should necessarily appear in the contract of sale or whether it was sufficient if the apportionment was made before the completion of the transaction.

Apart from statute, trustees can exercise their power of sale only in accordance with the provisions of the trust instrument. If they enter into a contract of sale where they have no authority to sell or under circumstances under which they cannot sell, they cannot give a purchaser a good title. If, for example, a power of sale is to arise upon the death of a tenant for life, the trustees cannot sell prior to the termination of the life tenant's estate.[37] Where all the beneficiaries, including the tenant for life, concur in a binding manner, the trustees can give a good title.[38]

Where trustees have a power of sale, this does not authorise them to enter into a contract to sell at a future time at a price fixed at the present time without regard to the value of the property at the future time.[39] 'The ground on which the grant of an option to purchase at some

36. See *Rede v Oakes* (1864) 4 De GJ & Sm 505 at 513; 46 ER 1015 at 1018; *Re Cooper & Allen's Sale* (1876) 4 Ch D 802 at 815. The stringency of the old law as to the liability of trustees who bought in at a sale is well illustrated by *Ex parte Lewis* (1819) 1 Gl & J 69. In this case, real estate of a bankrupt was put up for sale by auction in two lots on different days. Both lots were bought in by the bankrupt's assignee without the authority of the creditors. The property was subsequently resold, one of the lots bringing a higher price and the other a lower price than the buying-in prices. On the whole there was a balance in favour of the estate. The assignee was held personally liable for the loss on the lot sold at the lower price without being allowed the benefit of the gain on the other lot.
37. *Carlyon v Truscott* (1875) LR 20 Eq 348; *Re Bryant and Barningham's Contract* (1890) 44 Ch D 218. In *Dolbel v Loudoun* [1920] NZLR 131, trustees were directed to carry on a brickfield for 21 years after the death of the survivor of certain persons and then to sell, and the court held they had no power to sell before that time.
38. As in *Re Baker and Selmon's Contract* [1907] 1 Ch 238. But a title cannot be forced on an unwilling purchaser in a case where the beneficiaries simply concur subsequently to the premature sale: *Re Bryant and Barningham's Contract* (1890) 44 Ch D 218.
39. *Clay v Rufford* (1852) 5 De G & Sm 768; 64 ER 1337; *Oceanic Steam Navigation Co v Sutherberry* (1880) 16 Ch D 236; *Re Stephenson's Settled Estates* (1906) 6 SR (NSW) 420. In the latter case it was also decided that

time in the future is treated as improper on the part of the trustees is that it precludes them in advance from exercising their judgment according to the circumstances as they exist at the time of the sale.'[40] But the giving by a trustee of an option to purchase the trust estate is not bad in every case, as where an option is given for such time as would enable a purchaser to conclude that it would be profitable to acquire the property, and to arrange finances. Thus trustees, who were careful not to tie up the trust property for long periods, though from time to time they extended the options and received consideration for the giving of them, have been held not to have departed from their duty as trustees.[41] Similarly, for trustees to agree to sell at a price to be fixed by someone else would be such a delegation of their powers as would amount to a breach of trust.[42]

[20-12] A power of sale does not prima facie imply a general power of leasing.[43] But in *Re Judd's Contract*,[44] trustees of leasehold property disposed of one lease in lots by way of underlease and this was held a valid exercise of a trust for sale. Now, in the case of a trust for sale, the trustee has the power of management conferred by s 66D of the Conveyancing Act 1919 (NSW) and of leasing conferred by s 36 of the Trustee Act 1925 (NSW). Nor does a power of sale imply a power to mortgage,[45] though such a power to mortgage may be implied if the purpose of the sale is in order to raise a particular charge.[46]

It is a breach of trust to disregard the directions given in the trust instrument and to sell in a manner or under circumstances not authorised by the settlor or to sell in such a manner as not to obtain the best price for the property; and in such cases the trustees will be held liable for any loss sustained by the trust estate.[47] Thus trustees should ordinarily invite competition and, even though they do so, they should fix a reserve price after properly informing themselves of the value of the property through a competent valuer.[48] However, if they perform these duties, the trustees are not responsible if the beneficiaries seek to impeach the sale as improvident.[49] The duty of a trustee to obtain the best price is one which overrides any questions of commercial morality. Therefore, where trustees had negotiated with A to sell at one price and had virtually arrived at the stage of signing a contract when they were offered a higher price by B, it was held that they could not proceed to sign the contract without at least investigating the other offer.[50] But where trustees put a property up to auction with a reserve price of $16,000 and the bidding did not go beyond $12,000, it was held that they were justified in concluding a contract for the

an executor or administrator, in disposing of the leaseholds of a testator, could grant an underlease. Power to trustees to sell combined with a power to postpone the sale and to lease does not imply a power to grant an option to purchase: *Horne v Horne* (1906) 26 NZLR 1208. In *Turbo Resources Ltd v Paperny* [1982] 2 WWR 372, it was held that such an option was void, and the party seeking to exercise it was denied specific performance.
40. *Rawcliffe v Johnstone* [1921] NZLR 470 at 473.
41. *Meek v Bennie* [1940] NZLR 1. See also *Rousset v Antunovich* [1963] WAR 52, where it was held that a power of sale would authorise the granting of an option to purchase 'where it appeared to be a proper and reasonable method of effecting a prompt sale at the best price'.
42. *Re Wilton's Settled Estates* [1907] 1 Ch 50.
43. *Evans v Jackson* (1836) 8 Sim 217; 59 ER 87.
44. [1906] 1 Ch 684.
45. *Devaynes v Robinson* (1857) 24 Beav 86; 53 ER 289; *Walker v Southall* (1887) 56 LT 882; *Re Pearce* [1936] SASR 137.
46. *Permanent Trustee Co Ltd v Angus* (1917) 17 SR (NSW) 364; 34 WN (NSW) 141.
47. *Oliver v Court* (1820) 8 Price 127 at 165; 146 ER 1152 at 1166–7 (negligence of trustees as to price and as to obtaining payment of purchase money); *Ord v Noel* (1820) 5 Madd 438 at 440; 56 ER 962 at 963 (disadvantageous mode of sale); *Taylor v Tabrum* (1833) 6 Sim 281; 58 ER 599 (neglect of trustees to sell 'as soon as conveniently might be' after the testator's death, and loss caused thereby); *Blacklow v Laws* (1842) 2 Hare 40; 67 ER 17 (sale by trustees before the power of sale had arisen).
48. *Oliver v Court* (1820) 8 Price 127; 146 ER 1152; *Re Cooper & Allen's Sale* (1876) 4 Ch D 802 at 816.
49. *Grove v Search* (1906) 22 TLR 290. See *Underhill and Hayton*, [48.21], p 764.
50. *Buttle v Saunders* [1950] 2 All ER 193; *Re Wyvern Developments Ltd* [1974] 2 All ER 535 at 544; [1974] 1 WLR 1097 at 1106; *Cowan v Scargill* [1985] Ch 270 at 288; [1984] 2 All ER 750 at 761. But see P Luxton, 'Ethical Investment in Hard Times' (1992) 55 *MLR* 587.

sale of the property for $16,000 a few days later, although there was no advertisement that the property was for private sale.[51]

Other jurisdictions

[20-13] Section 13(1) of the Victorian Trustee Act 1958 provides as follows:

> Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together in lots, by public auction or by private contract, subject to any conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

Corresponding legislation exists in South Australia (s 20), Tasmania (s 16) and the Northern Territory (s 14); the same effect obtains in Queensland and Western Australia by virtue of the great scope of the powers of sale in ss 32 and 27 respectively of their Acts. By s 28A of the Western Australian Act, specific provision is made for a trustee who has a power of sale to grant to a person an option to purchase land, provided that the trustee has received advice from an independent valuer to the effect that the purchase price and the fee payable for the option are reasonable.

Depreciatory conditions

New South Wales

[20-14] These are conditions which injuriously affect the title of the vendor and therefore tend to make purchasers less ready to buy and tend to make them bid less for the property. It is an elementary rule in equity that when selling trust property under a power of sale, trustees must obtain the highest possible price and must not do anything that would prejudice the sale or tend unnecessarily to depreciate the value of the property in the eyes of possible purchasers. Hence, the rule against the insertion in conditions of sale of unnecessary depreciatory conditions.[52] Formerly, a purchaser could refuse to complete if the contract contained unnecessarily depreciatory conditions, because that purchaser would be taking with notice of the breach of trust arising from their insertion in the contract.[53]

Now, by virtue of s 30 of the Trustee Act 1925 (NSW) a beneficiary cannot impeach a sale by a trustee on the ground of unnecessarily depreciatory conditions unless the consideration for the sale has been thereby rendered inadequate. If the sale is completed by conveyance, it cannot be impeached as against the purchaser upon the ground of unnecessarily depreciatory conditions unless it appears that the purchaser acted in collusion with the trustees when the contract for sale was made. The purchaser cannot object to the title on the ground of such conditions.

Other jurisdictions

[20-15] All other jurisdictions have legislation corresponding to s 30 of the New South Wales Act.[54]

Sale on terms

Non-monetary consideration

[20-16] Trustees selling under a power of sale or under a trust for sale were previously not authorised, except in special circumstances, to accept any other consideration than the

51. *McMahon v Hermann* (1893) 14 LR (NSW) Eq 77.
52. *Dance v Goldingham* (1873) LR 8 Ch App 902; *Dunn v Flood* (1885) 28 Ch D 586; and see also *Ord v Noel* (1820) 5 Madd 438 at 440; 56 ER 962 at 963.
53. *Dance v Goldingham* (1873) LR 8 Ch App 902.
54. ACT s 30; Qld s 35; Vic s 15; SA s 21; WA s 32; Tas s 17; NT s 15.

payment of money. But if they had a power of investment in the particular class of property that is being dealt with, they might take part of the purchase money in cash and leave the rest on mortgage as an investment. In so doing, they were held to be simply carrying out the directions given by the will.[55]

New South Wales

[20-17] Now s 28 of the Trustee Act 1925 (NSW) gives trustees power to sell on terms and contains detailed provisions relating to such deferred sales. The section provides:

> 28. (1) A trustee for sale may sell land on terms of deferred payment or otherwise.
>
> (2) The terms of deferred payment may provide either for the purchase money being paid by instalments, or for the unpaid purchase money being secured by mortgage.
>
> (3) If the purchase money is to be paid by instalments, the terms upon which the land is sold shall, in addition to such other provisions as the trustee may deem proper, include provisions for giving effect to the following:
>
> (a) that part of the purchase money shall be paid on the execution of the contract of sale,
>
> (b) that the balance of the purchase money shall be payable in instalments, the first not later than three years from the date of the contract of sale and the others at intervals of not more than a year beginning from the date on which the first instalment is payable, and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid. No instalment which is made payable during the first three years from the date of the contract of sale shall be of an amount less than five per centum of the purchase money, and all instalments which are made payable after the third year from the date of the contract of sale shall be equal in amount,
>
> (c) that the whole of the purchase money and interest shall be payable within a period not exceeding ten years from the date of the contract of sale,
>
> (d) that if any instalment or interest or part thereof is in arrear and unpaid for six months or for such less period as may be specified, the whole of the purchase money shall become due and payable.
>
> (4) If the unpaid purchase money is to be secured by mortgage, the terms upon which the land is sold shall, in addition to such other provisions as the trustee may deem proper, include provisions for giving effect to the following:
>
> (a) that part of the purchase money shall be paid on the execution of the contract of sale,
>
> (b) that the unpaid purchase money shall be secured by a registered mortgage of the land sold, with or without the security of any other property, and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid,
>
> (c) that the mortgage shall contain covenants by the mortgagor to pay the principal money secured and the interest thereon, to maintain and protect the property, and to keep all buildings, if any, thereon insured against loss or damage by fire to the full insurable value thereof,
>
> (d) that notwithstanding section 106 of the *Conveyancing Act 1919* the mortgagor shall not have power to make any lease of the property, unless the trustee consents in writing.
>
> (5) Whether the purchase money is to be paid by instalments or the unpaid purchase money is to be secured by mortgage, the trustee shall not be deemed to be lending money within the meaning of section 18 so as to be bound to act in accordance with the provisions of that section, and shall not be liable for any loss which may be incurred by reason only of the security being insufficient at the date of the mortgage.
>
> (6) The part of the purchase money to be paid on the execution of the contract of sale shall not be less than the sum which a person acting with prudence would, if the land were the person's own, have accepted in the circumstances in order to sell the land to the best advantage.

55. See *Webb v Ledsam* (1855) 1 K & J 385 at 387–8; 69 ER 508 at 509–10; *Bruce v Ailesbury* [1892] AC 356; *Re Hotham* [1902] 2 Ch 575. Cf *Drinan v Drinan* (1908) 8 SR (NSW) 109; *Permanent Trustee Co Ltd v Angus* (1917) 17 SR (NSW) 364; 34 WN (NSW) 141.

(7) The trustee shall not be bound to require payment of any greater part of the purchase money before letting the purchaser into possession, or before conveying the land and taking a mortgage back, than a person acting with prudence would, if the land were the person's own, have considered as sufficient, provided that the trustee shall not convey the land and take a mortgage back until at least one-tenth part of the purchase money has been paid.

(8) Notwithstanding that the purchase money is to be paid by instalments, the trustee may at any time after one-tenth of the purchase money has been paid convey the land and take a mortgage back in any case where a person acting with prudence would, if the land were the person's own, have been willing in the circumstances so to do, and in any such case the mortgage shall be in accordance with paragraphs (b) (c) and (d) of subsection (4), and the provisions of subsection (5) shall apply.

(9) Any mortgage under this section may be for any period not exceeding ten years from the date of the contract of sale.

(10) The trustee may, on such terms, if any, as the trustee deems proper, by writing waive or vary any right arising from failure to comply with any term of the contract of sale or of any mortgage under this section within the proper time.

(11) Where the sale is made under the order of the Court, the provisions of this section shall apply, unless the Court shall otherwise direct.

(12) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

In two other respects the Trustee Act 1925 (NSW) gives to trustees powers respecting the mode of sale of property. By s 31 a trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof whether the division is horizontal, vertical or otherwise, and by s 32 a trustee under a trust for or power of sale of land may sell with or without an exception or reservation of mines and minerals and may sell the mines and minerals separately.

Other jurisdictions

[20-18] All jurisdictions, except Tasmania and the Northern Territory, have legislation to the same effect as s 28 of the New South Wales Act.[56] However, there are differences in matters of detail; thus while in New South Wales, the Australian Capital Territory and South Australia the trustee may, in an instalment sale, convey title and take a mortgage back after one-tenth of the purchase money has been paid, in Victoria the fraction is two-fifths; in Western Australia and Queensland, it is one-third.

Power to Lease

Rule

[20-19] Where powers of leasing are given by the trust instrument, the powers will be exercised in accordance with the terms of the instrument; but these powers are, in all jurisdictions but Tasmania and the Northern Territory, supplemented by implied powers given by statute.

New South Wales

[20-20] Trustees having a power of sale are not thereby necessarily given a power to grant leases.[57] However, trustees under a binding trust for sale have the power of leasing conferred by s 66D of the Conveyancing Act 1919 (NSW).[58]

Subject to any restrictions contained in the trust instrument, and to the provisions of any statute, a trustee with power to manage the trust property may do all reasonable and necessary

56. ACT s 28; Qld s 37; Vic s 17; SA s 23A; WA s 34.
57. See [20-12].
58. See [20-20].

acts for the efficient management of the trust property. Thus in the absence of any express or implied restriction in the trust instrument a trustee who has the management of property may lease it for short terms.[59] Prior to s 36 of the Trustee Act 1925 (NSW), a trustee could not safely lease for longer than from year to year.[60] The lease had to be a reasonable one and the onus was upon the trustee and the lessee to show that it was.[61] Trustees could not grant a lease with an option of renewal on payment of a fixed fine.[62] They could not, and still cannot, grant a lease containing an option to purchase.[63] A lease granted for a term in excess of express, implied or statutory power is void in equity.[64]

Limited powers of leasing are now given to trustees under s 36 of the Trustee Act 1925 (NSW). The length of time for which a trustee may grant a lease depends upon whether the trustee has or has not a power of management and upon whether the trustee holds the land upon trust for sale with express power to postpone sale, or upon trust for sale with implied power to postpone sale. It will be recalled that s 27B of the Trustee Act 1925 gives trustees, holding property on trust for or with power of sale, a power to postpone sale. But in s 36 a distinction is drawn between the powers of a trustee to lease when the power to postpone is express and when it is implied. For a trustee, who holds land with power to manage the same or upon trust for sale with express power to postpone sale, may lease the land for any term not exceeding five years (s 36(1)(a)); but where the trustee holds the land without power to manage or upon trust for sale without an express power to postpone sale, the trustee may only lease for a term not exceeding three years: s 36(1)(b).

With this power of leasing should be compared the power of leasing conferred on a trustee for sale by s 66D and s 151C of the Conveyancing Act 1919 (NSW). Under these sections, the trustee for sale has, among his or her powers of management, a power to lease for a term not exceeding three years. The two sets of statutory provisions result in some degree of duplication and, it would seem, some degree of confusion. Although a trustee for sale is given certain powers of management under s 66D, the trustee is not thereby given 'power to manage' under s 36(1)(a) of the Trustee Act 1925 (NSW) because if the trustee were, the trustee could lease for five years, whereas under s 66D and s 151C of the Conveyancing Act 1919 (NSW) the trustee can only lease for three years. Again, it would appear that s 66D, although it expresses no such limitation, does not apply to the power of leasing of a trustee for sale with express power to postpone sale, because, if it did, it would be inconsistent with s 36(1)(a) of the Trustee Act 1925, which gives such a trustee a power to lease for five years. It is necessary therefore, in respect of the power to lease, to read s 66D of the Conveyancing Act 1919 in conjunction with s 36 of the Trustee Act 1925 and, in this respect, to distinguish the powers of management referred to in each section and to extend the power of leasing by trustees for sale with express power to postpone from the period of three years suggested by s 66D to the period of five years provided for in s 36.

The question then arises — what is meant by 'power to manage' in s 36(1)?

At most, a negative answer is given by the statute itself, as s 36(2) provides that a trustee shall not be deemed to hold land with power to manage the same within the meaning of the section by reason only of the fact that it is proper to postpone sale in order to sell to the best advantage and in the meantime to manage the land. The words also cannot be taken to refer to the powers of management under s 66D and s 151C of the Conveyancing Act 1919 (NSW). It would appear that the 'power to manage' in s 36 is an express power to manage conferred on

59. A-G *v Owen* (1805) 10 Ves 555; 32 ER 960; *Bowes v East London Water Works Co* (1820) Jac 324; 37 ER 873; *Naylor v Arnitt* (1830) 1 Russ & Myl 501; 39 ER 193; *Egmont (Earl) v Smith* (1877) 6 Ch D 469.
60. *Re Shaw's Trusts* (1871) LR 12 Eq 124; *Re Byrne* (1902) 19 WN (NSW) 141. Cf *Egmont (Earl) v Smith* (1877) 6 Ch D 469.
61. A-G *v Owen* (1805) 10 Ves 555 at 560; 32 ER 960 at 962.
62. *Re Farnell's Estate* (1886) 33 Ch D 599.
63. See [20-11].
64. *Svenson v Payne* (1945) 71 CLR 531.

the trustee in the instrument creating the trust or one arising by necessary implication. Thus, if trustees of a grazing property, even though they were given no power to sell, were given power to manage the property for the beneficiaries, they could grant a lease of the property for a term not exceeding five years. Conversely, where a trust for sale was created but there was a direction to postpone sale, but no direction for management in the meantime, a power of management was implied.[65]

A lease under s 36 and a lease under power contained in the trust instrument may provide for an increasing rent and may give an option of renewal, provided the total term under the lease and the option does not exceed the term for which the trustee is authorised to lease.[66]

Section 36(4) provides:

> 36. (4) If the land is the subject of a settlement within the meaning of Pt 4 of the *Conveyancing and Law of Property Act 1898*, and there is any other person authorised by the settlement or by that Act to demise the land or any part thereof, this section shall not apply unless that person in writing authorises the trustee to make the lease.

The purpose of this subsection is to preserve the powers of leasing given by the Act mentioned to tenants for life and holders of life interests in land. Such a person, if entitled to the possession or to receive the rents and profits of land, may lease for a term not exceeding 10 years.[67] However, where there are trustees who are not bare trustees, it is the trustees and not the equitable life tenant and holders of similar equitable interests who are entitled to possession and to receive the rents and profits,[68] with the result that s 36(4) does not in the majority of cases curtail the trustee's power of leasing given by s 36. For it is expressly provided by s 36(6) that the section shall not apply to a bare trustee for persons all of whom are entitled in possession and are free of any incapacity. Section 36(3) introduces the limitation upon the duration of a power to lease which was formerly implied in a power of leasing conferred by the trust instrument.[69] Formerly the implication prevented a power of leasing not expressly limited in duration from offending against the rule against perpetuities. Now, however, there is not the same danger of such a power of leasing being void under the rule. This is because of s 11 of the Perpetuities Act 1984 (NSW), which provides that the rule against perpetuities shall not render void any trust or power to lease in any case where the lease directed or authorised is ancillary to the performance of a valid trust: see [20-06].

The type of lease which may be granted under s 36 is provided for in s 36(5).

> 36. (5) Subsections (4), (5), (6), (7), (8), and (10) of section 106 of the *Conveyancing Act 1919* shall apply to any lease under this section:
>
> Provided that if the land includes premises licensed under the *Liquor Act 2007* a bonus or fine may be taken in respect of the lease, and the trustee shall apportion the same over the period of the lease as if it were rent, but no person paying any such bonus or fine shall be concerned to see that any such apportionment is made.

The subsections of s 106 of the Conveyancing Act 1919 referred to in s 36(5) are as follows:

> 106. (4) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.
>
> (5) Every such lease shall be made to take effect in possession not later than three months after its date.
>
> (6) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken or the rent made payable in

65. *Re Broad* [1953] VLR 49; [1953] ALR 128, noted 27 *ALJ* 329.
66. Section 36(3).
67. For the exact persons entitled, see Conveyancing and Law of Property Act 1898 s 68.
68. *Taylor v Taylor* (1875) LR 20 Eq 297.
69. *Re Quigley* (1908) 8 SR (NSW) 124.

> advance except as to the last payment which may be made payable on a day not more than one month before the expiration of the term.
>
> (7) Every such lease shall contain a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days, and the covenants implied by section 84 shall not be excluded therefrom.
>
> (8) Where the land comprised in any such lease is under the provisions of the *Real Property Act 1900*, the lease shall be registered in accordance with the provisions of that Act.
>
> ...
>
> (10) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding if:
>
> (a) in so far as the lease, if granted, would comprise land under the provisions of the *Real Property Act 1900* — a caveat has been lodged pursuant to section 74F of that Act is respect of the contract, and
>
> (b) in so far as the lease, if granted, would comprise land not under the provisions of the *Real Property Act 1900* — the contract has been registered pursuant to Division 1 of Part 23.

Other jurisdictions

[20-21] Section 36 of the New South Wales Act was adopted in the Australian Capital Territory: s 36. It was adopted in South Australia by s 25C of the Trustee Act 1936 (SA), but with the alteration of the maximum terms appearing in s 36(1)(a)(b) to 10 and five years respectively. Tasmania and the Northern Territory have made no statutory provision in this behalf. Western Australia (s 27(1)(d)) empowers trustees to let or sublet any property for any terms not exceeding one year, or from year to year, or for a weekly, monthly or other like tenancy or at will. The Queensland Act (s 32(1)(d)) reproduces the Western Australian provision but goes on to add sharefarming agreements on reasonable terms for any period not exceeding one year and to permit renewal of leases, tenancies and sharefarming agreements. The Queensland and Western Australian Acts also contain provisions in identical form (s 32(1)(e), (f), (3), and s 27(1)(e), (f), (3) respectively). The former are as follows:

> (1) Subject to the provisions of this section, every trustee, in respect of any trust property, may —
>
> (e) grant a lease or sublease of the property for any term not exceeding —
>
> (i) in the case of a building lease — 30 years; or
>
> (ii) in the case of any other lease (including a mining lease) — 21 years;
>
> to take effect in possession within 1 year next after the date of the grant of the lease or sublease at a reasonable rent, with or without a fine, premium or foregift, any of which if taken shall be deemed to be part of and an accretion to the rental, and shall, as between the persons beneficially entitled to the rental, be considered as accruing from day to day and be apportioned over the term of the lease or sub-lease;
>
> (f) at any time during the currency of a lease of the property, reduce the rent or otherwise vary or modify the terms thereof, or accept, or concur or join with any other person in accepting, the surrender of any lease.
>
> (3) In exercising any power of leasing or subleasing conferred by this section or by the instrument (if any) creating the trust, a trustee may —
>
> (a) grant to the lessee or sublessee a right of renewal for 1 or more terms, at a rent to be fixed or made ascertainable in a manner specified in the original lease or the original sublease, but so that the aggregate duration of the original and of the renewal terms shall not exceed the maximum single term that could be granted in the exercise of the power; or
>
> (b) grant a lease with an optional or compulsory purchasing clause; or
>
> (c) grant to the lessee or sublessee a right to claim compensation for improvements made or to be made by the lessee or sublessee in, upon or about the property which is leased or subleased.

[20-22] In Victoria, there is a complex of statutory provisions. It is as follows. Section 35(1) of the Property Law Act 1958 (Vic) confers on trustees for sale, in relation to land, all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act 1958 (Vic). Sections 38 and 44 of the Administration and Probate Act 1958 (Vic) in turn confer