Garrow and Kelly

Law of Trusts and Trustees

8TH EDITION

Chris Kelly and Greg Kelly

with Colette Mackenzie and Kimberly Lawrence

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PREFACE TO THE FIRST EDITION

This volume deals with the law of trusts and the equitable doctrines of election, performance, satisfaction, conversion and marshalling, and includes a chapter on receivers. The law of wills, settlements and administration is being dealt with in a separate volume.

The aim has been to set out the principles of the law of trusts as clearly and briefly as possible, with the quotation of appropriate authorities, without making any attempt to quote or enumerate all, or even a large number of, the cases in respect of any point. Those who wish to refer to further cases will find full lists in the larger works on trusts and in *Halsbury's Laws of England*. New Zealand cases have been quoted where illustrating any principle under discussion, but here also no attempt has been made to account for every case in the Reports.

One difficulty encountered by the writer of a work on any branch of the law, when the preparation and printing, as in this instance, have been extended over a considerable period of time, is the change that may be made in the law on a given subject-matter after that subject-matter has been dealt with and the sheets printed off. A striking illustration is afforded by the recent decision of the House of Lords in *Bourne v Keane*, by which the law that has prevailed for over three centuries with regard to bequests for masses has been reversed. The statements of the law as to bequests for masses, as set out on pp 9 and 26, must now be read subject to the decision in this case. See post, p 297.

It is hoped that a New Zealand work on the law of trusts will be of assistance not only to the legal profession generally and to students of law and accountancy but also to all who undertake the onerous duties and responsibilities attaching to the office of trustee.

Jas M E Garrow
Wellington, August, 1919

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1.4 Fundamental to the understanding of the concept of a trust is the distinction between "legal ownership" on the one hand and "beneficial" or "equitable" rights or interests on the other. One of the most useful concepts devised by the English legal system is that property rights can be split in such a way that:

(a) one person, or several people, may own the property or asset — they hold the legal title; but

(b) another person, or other people, have the right to the use or benefit of the asset — they have the beneficial interest or beneficial rights.

1.5 Because in early times the English courts of common law dealt only with the legal ownership, the Chancery Court developed the doctrines of equity to deal with beneficial or equitable rights and interests[6] and this led to the creation of the modern law of trusts.[7] As Lord Diplock explained:[8]

> On the creation of a trust in the strict sense as it was developed by equity the full ownership of the trust property was split into two constituent elements, which became vested in different persons: the "legal ownership" in the trustee, and what came to be called the "beneficial ownership" in the cestui que trust.

1.6 More recently the position has been summarised by Fogarty J as follows:[9]

> It is sometimes thought by advisers, often not legally qualified, that the creation of a trust is an exercise of private ordering in the complete control of the parties. It is not. Every trust is actually a relationship. A trust is not an entity… Trust is a word used to sum a relationship where equity will compel a person holding the legal interest in a property to use it for the benefit of someone else… Equity will only recognise fiduciary obligations where there is a substantial divergence between rights over assets of the persons holding the legal title and the different persons who equity recognises have rights over these assets, against the interests of the holders of legal title. There is a very old principle of equity that where the equitable and legal estates in fact unite in the same person the separate estates of legal or equitable are not recognised.

1.7 The historical origins of trusts also help to explain how trust law works. Trust law began as a means to prevent fraud and misleading conduct. Equity is concerned with matters of conscience. If T has received property on an understanding that the property must be used only for the benefit of B, it would be dishonest to use the property for the benefit of anyone other than B. The law of trusts developed as a set of duties imposed on those who hold assets on trust. From this has evolved the wider concept of a trust as a fiduciary relationship — a relationship between trustees and beneficiaries in which good faith is of fundamental importance.[10]

---

6 The maxims and doctrines of equity are outside the scope of this book. Equity supplements the common law to avoid injustice. Equity is concerned with fairness and being evenhanded. FW Maitland *Equity* (2nd ed, revised by John Brunyate, Cambridge University Press, 1936) at 19.

7 It seems possible the concept of a trust may have earlier origins in the Islamic *waqf* (a form of charitable trust): Michael Gousmett "Origins of the Trust" [2017] NZLJ 107; see also John A Makdisi "The Islamic Origins of the Common Law" 77 North Carolina Law Review 1635.

8 *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1975] 2 All ER 537 at 541. (Note that in modern legal language, the word "beneficiary" has replaced the quasi-French term cestui que trust.)

9 *Harrison v Harrison* HC Auckland CIV-2008-404-1270, 18 September 2008.

10 The word "fiduciary" comes from the Latin *fides* which means faith.

Trusts Act 2019

1.8 By the mid-19th century in England[11] trusts had become common, especially among the wealthy. There was concern, however, that the principles of equity were no longer adequate. For example, holding trustees strictly to account meant there was some difficulty in finding suitable people who would act as trustee. The UK Parliament intervened with legislative reform such as the original predecessor to what is now s 131 of the Trusts Act 2019 (NZ).

1.9 Trust law came to Aotearoa/New Zealand along with the rest of the English legal system. English legislative reform was largely copied in this country. Until recently the latest iteration of this legislation was the Trustee Act 1956 which was closely modelled on English legislation earlier in the 20th century. The Trusts Act 2019 has the merit of being a more distinctively local development. It is the product of years of work by our Law Commission and parliamentary process.

1.10 The Trusts Act 2019, which came into force on 30 January 2021, made significant changes to trust law in this country. Its provisions are discussed in more detail in later chapters. It is sufficient in this introductory chapter to mention some of the more important ones:

(a) The characteristics of express trusts, and how they are created, are now set out in statutory form.[12]

(b) The duties imposed on trustees by law are now set out clearly in the legislation. Previously these had been developed on a case-by-case basis and the only comprehensive statement of these duties was in legal texts — and the terms varied from text to text.

(c) It is now stated explicitly which duties are mandatory and which are default duties that apply unless the terms of the trust say otherwise.

(d) Trustees' obligations to retain specified trust information and to give information to beneficiaries — and the factors to be considered in the exercise of trustees' discretion — are set out in the Act.[13]

(e) Trustees now have all the powers of an absolute owner of property[14] and these powers do not need to be set out in detail as part of the terms of the trust as was previously the practice.

---

11 We would now say England *and* Wales but in the 19th century Wales was not considered a separate country. It would not be correct to refer to this trustee legislation as UK law. Scotland has always had its own unique legal system. Scots law recognises trusts but it does so on a somewhat different basis to English law. Northern Ireland also has its own legal system (derived from the pre-1922 Irish legal system) which is similar to the English one.

12 Trusts Act 2019, ss 12–15.

13 Trusts Act 2019, ss 45–55. Previously the courts imposed similar but less explicit obligations. These were set out in a more detailed list (similar to the list in s 53) by the Supreme Court in *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

14 Trusts Act 2019, s 56.

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(f) The requirement for two individual trustees (following a retirement or removal of trustee)[15] has not been carried forward in the new Act.[16]

(g) There are now specific provisions which enable alternative dispute resolution (for example, mediation or arbitration).[17]

(h) The Family Court now has some (albeit limited) jurisdiction under the Act.[18]

(i) The Perpetuities Act 1964 is repealed and the rule against perpetuities abolished. Instead, most trusts have a maximum duration of 125 years.[19]

(j) The age of majority for trust purposes is now 18 — previously it was 20.[20]

Examples showing how trusts are created

1.11 It is usually easier to give examples rather than an exhaustive definition. The following examples may help explain what a trust is.

1.12 A leaves a will in favour of those of his children who survive him and reach the age of 18. None of them have reached the age of 18 when A dies. Although the will does not say so, since by law the children cannot yet give a valid discharge for the money, the executor of the will holds each child's share on trust until the child reaches the age of 18. The executor has discretion to use each child's share for his or her welfare.[21]

1.13 B has a daughter who has an intellectual disability. B transfers all her shares in DotCom Ltd to the trustees of a trust created by Trust Deed. The deed gives the trustees the discretion to use some or all of the dividends for the benefit of B's daughter. Any dividends that are not needed for those purposes are to be reinvested. If they think fit they may sell some of the shares and use the capital. On the daughter's death, the shares (or other investments held at that time) plus any dividends not paid out prior to the daughter's death are to be divided equally among B's other children. In this case:

- B is the settlor;
- The trustees are those named in the deed and anyone appointed in their place from time to time;
- B's daughter is a beneficiary (in this case a discretionary beneficiary);
- B's other children are the remainder beneficiaries or capital beneficiaries (formerly called "remaindermen");
- The shares in DotCom Ltd (and any other investments from time to time) are the "corpus"; and

15 Trustee Act 1956, ss 43 and 45 (now repealed).

16 It seems the term "individual" was intended to indicate a living human person, see *Jasmine Trustees Ltd v Wells & Hind* [2007] EWHC 38 (Ch), but see *CDT12 Ltd v Millar* [2019] NZHC 606 and *Oldfield v Oldfield* [2019] NZHC 492.

17 Trusts Act 2019, ss 142–148.

18 Trusts Act 2019, s 141.

19 Trusts Act 2019, s 16. There are exceptions such as charitable trusts.

20 Trusts Act 2019, s 20.

21 Trusts Act 2019, ss 62–66. The word "welfare" is given a very wide meaning by s 9 of the Act.

- These shares and investments plus reinvested dividends or other retained income comprise the capital (or "trust fund").

1.14 John and Mary decide to buy a home together. John puts in $20,000 and Mary contributes $40,000. The rest of the purchase price is financed by a mortgage. Because John has a bad credit history, the house is registered in Mary's name and she obtains the mortgage. Years later, John moves to another town and Mary decides to sell the house. Although they never said so specifically, Mary holds the title to the property as trustee. She must account to John for his share of the sale proceeds.[22]

1.15 In his will, James gives $100,000 to the Council of Victoria University of Wellington "to provide an annual scholarship to encourage the study of the law of trusts". The University Council is thus constituted as trustee of the funds.

1.16 Erewhon Garden Centre Ltd has a gift voucher scheme. Customers buy these vouchers as presents for friends and family. The recipients may use the vouchers to buy plants or other items at the garden centre. The directors of the company are concerned that in the event of a takeover or insolvency of the company, the new owner or liquidator may not be obliged to honour these vouchers in full. They want to be able to reassure their customers. So they arrange that, until each voucher is redeemed, the money received on sale of the voucher will be held in a separate bank account called the "Gift Voucher Trust Account". The company becomes trustee of the funds and must account to the beneficiaries of the trust (that is, the holders of the vouchers).[23]

1.17 A ship's captain dies while on a voyage. The senior officer takes charge of the ship and also of the captain's money which he trades with, making a substantial profit. He is a trustee of the money and of the profits and must account to the executor named in the captain's will.[24]

1.18 Phillip is married to Elizabeth. On his death Phillip's will creates a trust, and a house property he owns is to be held in that trust. The house has been rented out until now and this is to continue. The rent (after allowing for expenses) is to go to Elizabeth and when she dies the house will pass to their five children. In this case:

- Elizabeth is the "life tenant" or income beneficiary;
- The children are the remainder beneficiaries or capital beneficiaries;
- Elizabeth has no right to the capital, so when she dies the trust comes to an end and the house property will be transferred to the children (unless any of them is still under the age of 18[25] or does not have full mental competence).

1.19 This example may be contrasted with those in paras 1.14 and 1.16, where the beneficiaries have an absolute interest and could demand their entitlement at any time.

22 This type of situation will now usually come under the aegis of the Property (Relationships) Act 1976. However, cases where the relationship is such that the Act does not apply will still fall to be dealt with under the rules of equity.

23 Compare with *Re Kayford Ltd* [1975] 1 All ER 604.

24 *Brown v Litton* (1711) 1 PW 140.

25 The will could specify a higher age but 18 is the standard age under the Trusts Act 2019, s 20.

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What do these examples illustrate?

1.20 These examples show that trusts can arise in several ways:

- By "express conveyance" where property is transferred to the trustees for the specific purpose of the trust. By accepting the property, the trustees have undertaken to carry out the duties of trustees. The examples in paras 1.12, 1.13 and 1.15 are illustrations of this;
- By "express declaration" where the person who has control of the property states that the property is held on trust for certain people or purposes. The example in para 1.16 is an illustration of this;
- By "implication", where no trust is declared or even hinted at but this must be implied as a matter of necessity. The example in para 1.14 is one such situation; and
- By "construction", where the circumstances are such that the court, in accordance with the principles of equity, imposes a trust although the person in whom the property is vested at the time had neither expressly nor impliedly undertaken any trust at all. The example in para 1.17 is based on an early case which led to the concept of constructive trust.

1.21 In other words, the duties of a trustee may be directly acknowledged by the trustee, or be accepted by implication, or may be imposed by the court on the trustee whether the trustee wants this or not. This last category of trusts imposed as a matter of equity ("constructive trusts") is part of the area of law known as "restitution". Restitution in all its various forms is outside the scope of this book. Constructive trust principles are outlined in Chapter 15.

1.22 The examples in paras 1.12–1.18 also illustrate the essential nature of a trust as a relationship between trustee and beneficiary (the point made in the quotation from Fogarty J in para 1.6).

1.23 The conceptual foundation of trusts has been subject to debate. One view is that trusts have a contractual basis.[26] This view is controversial. Debates about this and the proprietary and obligational theories are outside the scope of this book and have been reviewed elsewhere.[27]

Is a trust an entity?

1.24 Non-lawyers often assume a trust is similar to a company and is therefore registered and incorporated in a similar fashion. This, of course, is not true. Apart from charitable

26 John H Langbein "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale LJ 625, but see para 1.45 below.

27 See Jessica Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) NZ Law Review 541; Charles Rickett "The Classification of Trusts" (1999) 18 NZULR 305.

trust boards and Māori trust boards there is no provision for registration or incorporation of trusts in New Zealand.[28] What is the nature of a trust then? Is it a recognised entity?

1.25 The answer depends on what is meant by the word "entity". Traditionally, the law has been more concerned with specifying those who are deemed to have the rights and duties of a person (sometimes referred to as "personality"). Generally, only those recognised as persons can sue, be sued, own property, and so on. A living human being is obviously a person. However, companies and incorporated societies are also treated as persons because they have been incorporated. An unincorporated group of people (for example, a sports club) is not a person in that sense — it is a group of people who may, for example, hold personal property in accordance with the contract entered into by the members on joining the group (often expressed in a written constitution).

1.26 A trust is in a similar position. The trustees hold the trust property in their own names since the trust is not a person and the trust itself cannot own property.[29] In a Privy Council decision, Lord Hodge summarised "some well-established principles of English trust law" as follows:[30]

> (i) A trust is not a legal person. Its assets are vested in trustees, who are the only entities capable of assuming legal rights and liabilities in relation to the trust. In particular, they are not agents for the beneficiaries, since their duty is to act independently.
>
> (ii) English law does not look further than the legal person (natural or corporate) having the relevant rights and liabilities …
>
> (iii) The legal personality of a trustee is unitary. Although a trustee has duties specific to his status as such, when it comes to the consequences English law does not distinguish between his personal and his fiduciary capacity. It follows that the trustee assumes those liabilities personally and without limit, thus engaging not only the trust assets but his personal estate.

1.27 Some confusion can arise because the tax system treats each trust as a separate taxpayer.[31] However, the correct legal categorisation is that a trust is a "fiduciary relationship" — not an entity in its own right.[32] In other words the trustees hold property in their own names but subject to the rights of the beneficiaries (usually called beneficial interests) and the law requires that the trust property must be kept separate from the trustee's own property.

1.28 An interesting example is *Dick v Commissioner of Inland Revenue*.[33] The sole trustee of a charitable trust obtained (in the name of the Vocation Education Foundation) a licence

28 The Charitable Trusts Act 1957 permits trust boards established for charitable purposes to register and thus incorporate. However, this is not compulsory and many charitable trusts operate without incorporation.

29 Reference to the existence of the trust on public registers is not permitted under a number of statutes (for example, s 153 of the Land Transfer Act 2017; ss 42 and 43(4) of the Life Insurance Act 1908; s 92 of the Companies Act 1993).

30 *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7 at [59]; in relation to the third point in the quotation, see also *Mawhinney v CIR* [2014] NZHC 2070.

31 The Income Tax Act 2007 treats trusts as entities for tax purposes — see s HC2. However, this tax treatment should not mislead anyone into thinking further legal status is thereby conferred. Unincorporated groups (societies, clubs, etc) can also be treated as taxpayers.

32 See para 1.6 above.

33 *Dick v Commissioner of Inland Revenue* [1999] 2 NZLR 756 per Randerson J.

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as a society under the Gaming and Lotteries Act 1977, but later disputed liability for gaming duty. At issue was the definition of "society" in the 1977 Act, which included the words: "Any corporation sole, association of persons (whether incorporated or not), or a local or affiliated branch". While that definition is sufficient to encompass unincorporated clubs and societies, it was not considered wide enough to include the trustee of this trust. Thus, it was held: "An unincorporated trust is not a separate legal entity" and "While in the present case the licence was issued to the foundation, it has no separate status and the trustee or trustees for the time being are the only true representatives of the trust having separate legal standing".[34]

1.29 This might appear to be a quaint historical anomaly, but it does have important practical consequences. As Anderson J explained when considering the liability of trustees for income tax:[35]

> In imposing personal liability the tax statutes do no more than recognise the general principle that liabilities incurred by a trustee in relation to a trust are always the personal liabilities of the trustee. This is an aspect of the nature of a trust, which is not a person but an equitable obligation to deal with property for the benefit of beneficiaries. A creditor has a personal right to sue a trustee and to get judgment and make the trustee bankrupt.

1.30 This point is sometimes summed up in the saying that there is no such thing as an insolvent trust, only insolvent trustees. A trust, being a fiduciary relationship, cannot be declared bankrupt even if the liabilities owing from the trust fund vastly exceed the assets of the trust — the trustees are liable personally to pay the liabilities but may be able to claim reimbursement from the trust fund.[36]

Essential elements of trusts

1.31 From what has been outlined so far, it should be clear that there are four essential requirements for a valid trust:

(1) There must be a *trustee*, who is the nominal owner of the trust property. However, a trust will not lapse or fail simply because no trustee has been appointed, nor because there is no trustee living, or willing or able to act. It is a maxim of equity that no trust will be allowed to fail for want of a trustee. So, if it happens that no trustee has been appointed (or a trustee was duly appointed but later dies or refuses or is unable to act) then the court will appoint someone to fill that office.[37] The requirements for legal capacity to be a trustee are generally the same as the requirements for legal capacity to hold property, but there are exceptions.[38]

34 *Dick v Commissioner of Inland Revenue* [1999] 2 NZLR 756 at 759. His Honour also quoted the definition from Keeton and Sheridan, which appears in para 1.70.

35 *AMP General Insurance Ltd v Macalister Todd Phillips Bodkins* [2006] NZSC 105, [2007] 1 NZLR 485 at [42].

36 Trusts Act 2019, s 81.

37 *Attorney-General v Downing* (1767) Wilm 1, 97 ER 1; *Mallott v Wilson* (1903) 2 Ch 494. Chapter 16 deals with appointment of new trustees and advisory trustees. Also s 159 of the Trusts Act 2019 allows a life tenant to be given the powers of trustee if there is no trustee.

38 Capacity is dealt with in Chapter 3.

(2) There must be *property* of a nature capable of being settled on a trust. This would exclude all property that by law cannot be transferred or given away.[39] The property may be real or personal. The legal title to the property is usually, but not necessarily, vested in the trustee. There may be a valid trust in respect of a purely equitable interest; for example, an interest as purchaser under an agreement for sale and purchase of land may be held on trust, or an interest created by another trust may in turn be held on trust.

(3) There must be *a beneficiary or beneficiaries*. A trustee may also be one of the beneficiaries, but cannot be the sole beneficiary, that is, a person cannot hold property on trust for himself or herself alone.[40] This is because there would then be no separation of the nominal from the real ownership of the property.[41] A beneficiary, who is of full age and is absolutely entitled to the property, can call on the trustees to transfer the property to that beneficiary and thus put an end to the trust.[42]

(4) There must be *an obligation on the trustee* to deal with the trust property for the benefit of the beneficiaries. This obligation is purely an equitable one, which means:

- it is enforceable only in a court which has equitable jurisdiction;[43]
- it gives rise to defences applicable only to equitable rights; and
- purely equitable remedies are available.

1.32 These follow from the fact that the whole doctrine of trusts was developed outside of and independently of the English common law courts. Usually, the obligation is to perform the express directions of the trust instrument or declaration, but the trustee may have discretion as to the manner in which, and the extent to which, the property is to be applied for the beneficiary.[44]

39 See Chapter 3.

40 *Re Cook, Beck v Grant* [1948] 1 All ER 231; *Goodright v Wells* (1781) 2 Doug KB 771 at 778 per Lord Mansfield; *Selby v Alston* (1797) 3 Ves 339; *Re Heberley* [1971] NZLR 325 at 333, 346. The same principle would apply where the legal estate is vested in two or more people who take precisely the same extent of interest in the equitable estate: *In re Selous, Thomson v Selous* [1901] 1 Ch 921.

41 However, a person may be the legal owner of property and at the same time the equitable owner of a smaller estate or interest in the same property, where the smaller estate or interest does not in equity merge in the larger estate: *Robinson v Cuming* (1739) 1 Atk 473; *Brydges v Brydges* (1793) 3 Ves 120 at 126, 127 per Arden MR.

42 *Saunders v Vautier* (1841) 4 Beav 115, Cr & Ph 240; *Re Marshall, Marshall v Marshall* [1914] 1 Ch 192, [1911–1913] All ER Rep 671. See, however, paras 13.38–13.63 under the heading *Anomalous cases*, for example, trusts for the maintenance of buildings, tombstones and animals.

43 In New Zealand this is part of the inherent jurisdiction of the High Court; s 34 of the District Courts Act 1949 now gives the District Courts the same equitable jurisdiction as the High Court, but the District Courts do not have the powers given to the High Court by the Trusts Act 2019 — see *Morris v Templeton* [2000] NZCA 126, (2000) 14 PRNZ 397.

44 As to the nature of the right of the beneficiary against the trustee, see *Favourke v Steinkopff* [1922] 1 Ch 174; *Baker v Archer-Shee* [1927] AC 844; *Stannus v Commissioner of Stamp Duties* [1947] NZLR 1, [1946] GLR 448.

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1.33 This obligation imposed on the trustee is sometimes referred to as the "irreducible core" content of a trust. Thus, it has been said:[45]

> … there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.

1.34 The language necessary to create a trust will be discussed in full later, but in brief: simply using magic words such as "trust" or "in trust" does not necessarily mean a trust has been created — nor are such words always necessary in order to create a trust.[46] What is important is that there has been a disposition of property to the trustee, so that the trustee is the legal owner.[47]

1.35 A trust cannot be revoked by the person who constituted it unless there is an express power of revocation.[48]

Distinguishing trusts from other legal concepts

1.36 The features that distinguish a trust from other legal institutions are:

- There is a trustee nominally holding property;
- The trustee is subject to an equitable obligation to hold that property for the benefit of a beneficiary;[49]
- The beneficiary may take action to enforce that obligation; and
- Unless there is a specific power of revocation, the beneficiary cannot be deprived of that benefit by any purported revocation of the trust by the person who originally provided the property and created the obligation.

1.37 It is helpful to compare other legal concepts with trusts.

Agency

1.38 A trust implies something more than the relationship of principal and agent:[50]

> It is to be noticed that there is no trust or confidence of the land in the agent … It is not a case of "trust or confidence" of land … The man was simply what is called a conduit pipe and nothing more, a mere agent, who never had an interest in the lands and consequently could not have any "trust or confidence" of them.

45 *Armitage v Nurse* [1997] 2 All ER 705 at 713, [1998] Ch 241 at 253 per Millet LJ; see also *Spread Trustee Co v Hutcheson* [2011] UKPC 13.

46 *Kinloch v Secretary of State for India* (1882) 7 App Cas 619 at 625; *Cochrane v Moore* (1890) 25 QBD 57 (CA); *Te Teira v Te Roera Tareha* [1902] AC 56 at 72.

47 See *Begg v CIR* [2009] NZCA 160; *Webb v Webb* [2020] UKPC 22.

48 See para 10.2. Such a power of revocation is rare in New Zealand. It is more common in some countries but may cause other difficulties — see *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank Trust Co (Cayman) Ltd* [2011] UKPC 17.

49 Or beneficiaries or for purposes recognised by law.

50 *Cave v McKenzie* [1877] 46 LJ Ch 564 at 567 per Lord Jessel MR; *Aotea District Māori Land Board v Commissioner of Taxes* [1927] NZLR 817, [1927] GLR 464.

1.39 The trustee is not the agent of the settlor or the beneficiaries and is not subject to their control — except of course in the sense that the trustee may be restrained from committing a breach of trust, or may be required to make good a breach already committed. Also there is not necessarily any prior agreement between the trustee and the beneficiaries.

1.40 Sometimes, however, an agent may become a constructive trustee for the principal.[51]

Bailments

1.41 A trust has some superficial resemblance to certain types of bailment (for example, a deposit of chattels for safe custody).[52] However, a trust may be distinguished from a bailment as a trustee is always the nominal owner of the trust property whereas a bailee, although in possession of the property, does not become the owner of it. As a consequence, a sale by a trustee to someone who purchases in good faith for value will confer good title on that purchaser. By contrast, an unauthorised dealing by a bailee (subject to certain exceptions) would not affect the bailor's title.[53]

Gratuitous service (negligent misstatement)

1.42 An analogy has been drawn between trusts and cases where actions lie for the improper performance of gratuitous service not relating to property.[54] For instance, in *Hedley Byrne & Co v Heller & Partners* a bank was asked for a credit reference for Easipower Ltd. When Easipower was later placed into liquidation, Hedley Byrne (which had relied on the credit reference) claimed for consequential loss.[55]

1.43 These cases arise because the defendant accepts a duty of care but carries it out negligently. There is thus a strong analogy with cases where a trustee has negligently performed duties imposed under a trust. The distinguishing feature, however, is that a trustee holds property and the duties arise in connection with the beneficial interests in that property.

51 See Chapter 15.

52 "Under modern law, a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor)" — Bailment *Laws of New Zealand* (online, LexisNexis) at [1].

53 Bailment *Laws of New Zealand* (online, LexisNexis) at [149].

54 See, for example, *De la Bere v Pearson* [1908] 1 KB 280, [1904–7] All ER Rep 755; *Elsee v Gatward* (1793) 5 TR 142; *Skelton v L&NW Railway* (1867) LR 2 CP 631; *Foulkes v Metropolitan Railway Co* (1880) 5 CPD 157.

55 *Hedley Byrne & Co v Heller & Partners* [1964] AC 465, [1963] 2 All ER 575. Liability was refused but only because the bank in its reply had disclaimed any duty of care. This and other cases in which *Hedley Byrne* has been followed are properly the province of the law of torts rather than trusts. See, for example, *Trevor Ivory v Anderson* [1992] 2 NZLR 517, which emphasises the need to show that the defendant assumed personal responsibility for the statement.

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Powers

1.52 Trusts must also be distinguished from mere powers of appointment. Trusts are imperative (that is, a trust must be carried out) but a power is discretionary.[69] Strictly speaking, powers of appointment fall within the general law relating to property, rather than the law of trusts. However, powers of appointment are so inextricably linked with trusts that some consideration of the relationship between the two is appropriate.

1.53 A power of appointment arises when a person is given the right to decide who is to receive certain property. Depending on the exact words of the documents giving the power, the person who has power of appointment may dispose of the whole or part of the property for his or her own benefit or the benefit of others. The power may relate to real or personal property or both.

1.54 For example, if John is given $100,000 on trust to divide among Peter, Paul and Mary, he is obliged to carry out the trust. If he fails to do so the court will see that the money is duly divided. However, if John is given power of appointment to divide the $100,000 among his own children as he thinks fit John then cannot be compelled to exercise the power. If he fails to exercise the power (deliberately or by accident) his children have no claim to the money unless they can prove fraud. In that case the money will pass to whoever is named in the original document as entitled to the fund if the power of appointment is not exercised.

1.55 To further complicate matters, there is a third category: "a power coupled with a trust". That means the person who has the power of appointment is required to carry it out because that is what the originating document requires. To quote Lord Eldon LC:[70]

> Where there is a mere power of disposing and it is not executed, the Court cannot execute it; but wherever a trust is created and the execution of that trust fails by the death of the trustee or by accident, the Court will execute the trust. But there are not only a mere trust and a mere power, but there is also known to the Court a power which the party to whom it is given is intrusted and required to execute; and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed on him does not discharge it, the Court will to a certain extent discharge the duty in his room and place. The principle is that if the power is one which it is the duty of the donee to execute, made his duty by the requisition of the will, put upon him by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and has not discretion whether he will exercise it or not. The Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it.

1.56 Many cases have arisen in this area, so it is important to be quite clear about the three categories:

(1) *Trust*: This is by its nature imperative and mandatory;

(2) *Power*: This is sometimes referred to as a "bare power" or a "mere power" or a "power collateral". It is by its nature facultative — an enabling provision that

69 *Brown v Higgs* (1803) Ves 561: "This Court cannot execute a mere power, but will execute a trust which fails by the death of the trustee or by accident".

70 *Brown v Higgs* (1803) Ves 561.

empowers the donee to exercise certain authorities. It does not, however, impose on the donee a duty to exercise those authorities or discretions — although there is an obligation to consider whether or not they are to be exercised and, if so, how;

(3) *Power coupled with a trust*: This is a combination of the other two. It is alternatively described as a "trust power" or a "discretionary trust". There is sometimes a tendency to describe it simply as a trust, but this can lead to confusion.

1.57 It is often difficult to say whether a document creates a mere power or a power coupled with a trust.[71] The distinction depends on the construction of the instrument. Any indication in the instrument that the donor did not intend the power to be imperative will, of course, be conclusive that the donor did not intend to create a trust. Thus, the presence of a gift over in default of appointment will negate the presence of a trust — even if the gift over proves to be void.[72] This is because the fact that the donor considered it possible the power might not be exercised is not consistent with the imperative nature of a trust. However, a gift of residue is not the same thing as a gift over in this context.[73] On the other hand, the absence of a gift over will not necessarily be conclusive evidence that a trust has been created. However, if there is no gift over and there is evidence of a general intention to benefit a particular class this will raise an inference that there is a trust.[74]

1.58 At one time it was thought that a greater degree of certainty as to objects of a trust was required in the case of a power coupled with a trust (trust power) than was required for a power coupled with a trust (power collateral). That is no longer the law.[75]

1.59 Although the test of validity based on certainty of objects is the same for both these types of power, that does not mean mere powers are always treated in the same way as trust powers.[76] Trustees normally have a fiduciary duty to consider whether and how to exercise a power, but the court will not normally compel its exercise. It will intervene if trustees exceed their power and may do so if they exercise it capriciously. However, in the case of a trust power, if trustees do not exercise it, the court will do so in the manner best calculated to give effect to the settlor's or will-maker's intentions.

71 See Denys Holland "Powers in the nature of trusts" 18 The Solicitor 194; and *In re Gestetner's Settlement, Barnett v Blumka* [1953] Ch 672; *Inland Revenue Commissioners v Broadway Cottages Trust* [1955] Ch 20; *In re Sayer, MacGregor v Sayer* [1957] Ch 423; *In re Hain's Settlement Trusts, Tooth v Hain* [1961] 1 All ER 848, [1961] WLR 440; *Re Gulbenkian's Settlement Trusts* [1970] AC 508, [1968] 3 All ER 785 (HL); *Re Leek* [1968] 1 All ER 793; see also Gordon (1953) LQR 334.

72 *Re Sprague, Miley v Cape* (1880) 43 LT 236; *In re Hain's Settlement Trusts, Tooth v Hain* [1961] 1 All ER 848, [1961] WLR 440.

73 *Re Brierley, Brierley v Brierley* (1894) 43 WR 36.

74 *Burrough v Philcox* (1840) 5 Myl & Cr 72; *Re Weekes Settlement* [1897] 1 Ch 289; *Re Llewellyn's Settlement, Official Solicitor v Evans* [1921] 2 Ch 281; *Re Combe, Combe v Combe* [1925] 1 Ch 210, [1925] All ER Rep 159.

75 See Chapter 4, para 4.86.

76 *In re Baden's Deed Trusts, McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228.

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Definitions of a trust

1.60 What all the above examples and the various distinguishing characteristics illustrate is how hard it is to provide a satisfactory definition that covers all aspects of the equitable concept of a trust. Our definition is set out at para 1.1. Some authors do not attempt a definition. On the other hand, many of the definitions that have been formulated are no more than a description of a particular class of trust (usually explicit or declared trusts)[77] or a definition of the nature of the rights vested in the beneficiary.[78]

1.61 The most relevant definition now is the definition of an express trust in ss 12–15 of the Trusts Act 2019. These sections are discussed in Chapter 2. An analysis of previous attempts to define trusts does, however, assist in identifying the salient features of a trust.

1.62 Apart from the fact that most of these definitions appear to assume, erroneously, that a trustee will always be male, a number of the traditional definitions help to draw out some of the more important aspects of the concept of a trust. The following paragraphs consider some of the definitions that have found favour.

Hart

1.63 The following definition was given by W G Hart:[79]

> A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one, and any of whom may enforce the obligation.

1.64 While this is a satisfactory definition of a private trust, it is not wide enough to include two important types of trust:

- *Public or charitable trusts* (see Chapter 12); and
- *Purpose trusts* — trusts that are for non-charitable purposes but are valid in law (these are relatively rare and limited in scope, see Chapter 13).

1.65 There is also the additional objection that Hart makes no reference to the essentially equitable nature of the obligation. He does, however, correctly emphasise that a trust is not an institution or entity, but a bundle of legal obligations.

Maitland

1.66 Maitland was rather more diffident about his attempt to provide a definition:[80]

> Where judges and text-writers fear to tread professors of law have to rush in. I should define a trust in some such way as the following — when a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have those rights in trust for that other or for that purpose and he is called a trustee. It is a wide vague definition, but the best that I can make.

77 For example, see Hart's definition in para 1.63.
78 For example, see Maitland's definition in para 1.66.
79 Hart 15 LQR 301.
80 FW Maitland *Equity* (2nd ed, revised by John Brunyate, Cambridge University Press, 1936).

1.67 This definition omits reference to the very important requirement that the rights must be in respect of property. There are rights that do not affect property, but there can be no trust without trust property. The definition is not wide enough to cover the case where property is held on trust for beneficiaries in succession. It could also apply to powers of appointment, which may or may not be coupled with a trust.

Laws of New Zealand

1.68 Most, if not all, of the above objections are met by a definition to be found in the *Laws of New Zealand*:[81]

> Where a person has property or rights which he or she holds or is bound to exercise for or on behalf of another or others, or for the accomplishment of some particular purpose or purposes, that person is said to hold the property or rights in trust for that other or those others, or for that purpose or those purposes, and is called a trustee. A trust is a purely equitable obligation and is enforceable only in a Court in which equity is administered.

1.69 Two comments may be made about that definition. The first is that it assumes all trustees are either male or female — corporations can also act as trustee. The second point is that the obligation is enforceable only by "that other or those others" (the beneficiaries). Once the settlor has conveyed the trust property to the trustee, the trustee has no further legally enforceable duty to the settlor. The beneficiaries, if all of them are of full age and have full legal capacity and have indefeasibly vested shares, may join with the trustee in putting an end to the trust, despite the objections of the settlor.

Keeton and Sheridan

1.70 The same may be said of another (judicially-approved) definition:[82]

> A trust is the relationship which arises wherever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.

Judicial definitions

1.71 Judges have at times provided more straightforward definitions:

- "[A] trust … is not a person but an equitable obligation to deal with property for the benefit of others" (Anderson J).[83]

81 Trusts *Laws of New Zealand* (online, LexisNexis), Pt 1 at [1].
82 GW Keeton and LA Sheridan *The Law of Trusts* (11th ed, Sweet & Maxwell, London, 1989) at 2 — quoted with approval in *Dick v CIR* [1999] 2 NZLR 756 at 759.
83 *AMP General Insurance Ltd v Macalister Todd Phillips Bodkins* [2006] NZSC 105, [2007] 1 NZLR 485 at [42]; see para 1.29 above.

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