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LIABILITY FOR TRUST DEBTS

A MULTI-PERSPECTIVE ANALYSIS

BY

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A thesis submitted for the degree of
Master of Laws
at the University of Otago, Dunedin,
New Zealand

3rd October 1988
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I **INTRODUCTION**

The recognition and development of the trust has been attributed by Maitland as being "the greatest and most distinctive achievement performed by Englishman in the field of jurisprudence."¹ "It has all the generality, all the elasticity of contract."²

For historical reasons the recognition and development of the trust has been the province of the Court of Chancery; the Courts of Common Law took no cognisance of the trust. The trustee was regarded, and continues to be regarded as the legal owner of the trust property. The essence of the trust is an equitable obligation in the trustee to deal with property legally owned by him for the benefit of others - the cestui(s) que trust.

Irrespective of his obligations to the cestui(s) que trust, the trustee is the principal through whom, either personally or his agents, all contracts are made or tortious acts committed. Although a trustee may have incurred a liability for the benefit of the cestui(s) que trust there is no contractual nexus between the cestui(s) que trust and the creditor on which to transfer legal liability. The trustee is therefore personally liable for trust debts.

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2. Ibid. at 322
The issue of ultimate responsibility for trust debts is the subject of this paper.

1. **A Right of Indemnity**

The Court of Chancery solved the issue of ultimate responsibility for trust debts by conferring on the trustee a right of indemnity against the trust fund. Although the trustee remained personally liable for the trust debts, the trust fund bore responsibility for their discharge. As Danckwerts J. noted:

"[P]ersons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain; they are entitled to be paid back all that they have had to pay out."\(^3\)

Notwithstanding the final sentence of this extract, the trustee's right of indemnity does not extend to all liabilities incurred by the trustee. As we shall see in part II of this paper the right of indemnity is only available for those liabilities which have been "properly incurred".\(^4\) If a liability is improperly incurred no right of indemnity has historically been recognised in respect of it.

3. *re Grimthorpe* [1958] Ch 615 at 623 (ChD)

4. *Re Beddoe, Downes v. Cottam* [1893] 1 Ch 547 (CA); *Stott v. Milne* (1884) 25 Ch D 710 (CA)
A liability is improperly incurred if the trustee lacked authorisation to incur it, or if s/he incurred it in breach of the duty of prudent management.

Even if a liability is properly incurred a trustee may still be denied a full right of indemnity. Such a result occurs if the trustee is otherwise in default to the trust. In this situation the right of indemnity is reduced by the extent of the monetary value of the default.

In addition to the right of indemnity against the trust fund the trustee may have in certain situations a right of indemnity against the cestui(s) que trust.

2. **Other Approaches**

The trustee's right of indemnity is not a device which enables the courts to supply a unified solution to determine the issue of ultimate responsibility for trust debts. It is misleading to think otherwise. The trustee's right of indemnity merely enables the courts to apportion final responsibility for trust debts between the trustee on the one hand and the trust fund and/or the cestui(s) que trust on the other.

As a device to determine ultimate responsibility for trust debts, the trustee's right of indemnity does not enable the courts to consider a creditor's claim to recovery. By virtue of the trustee's principal status the trustee is personally liable for the discharge of the debt. The trustee's personal liability has been the creditor's traditional safeguard of payment.
The conjunction of the trustee's personal liability with a right of indemnity for all properly incurred liabilities is only one solution to the issue of ultimate responsibility for trust debts. As we shall see an examination of case law (both Commonwealth and American) and legal literature reveal a number of different approaches to resolve the problems associated with determining this issue.

The impetus for the development of the alternative approaches to determining the issue of ultimate responsibility for trust debts can be attributed to three principal factors; viz:-

(i) commercial and trading pressures;
(ii) changes in public perception of the trustee's role; and
(iii) the development of theories of unjust enrichment.

These factors have received little recognition in the application of the trustee's right of indemnity. Indeed it may be said that if a court concentrates solely on the trustee's right of indemnity it will lose sight of the significance of these developments. A consequence of this is that the trustee's right of indemnity is no longer a suitable device, at least on its own, for determining ultimate responsibility for trust debts.

The significance of these factors has been reflected in various way by the alternative approaches. Some of these approaches advance new rationales for the trust. From these rationales the trustee becomes an agent or a manager. Liability for trust debts is simply transferred to the trust fund and/or the cestui(s) que trust. Adoption of theories of unjust enrichment is an other method which has been
utilised to reflect these factors.

3. **The Multi-Perspective Analysis**

In varying degrees of success the alternative approaches have addressed the problems associated with determining ultimate responsibility for trust debts. It is believed, however, that they do so at the expense of a coherent theory.

It is the thesis of this paper that the issue of ultimate responsibility for trust debts can only be satisfactorily resolved by considering it from a number of different perspectives. These perspectives are:-

(i) The actions and expectations of the trustee;
(ii) The actions and expectation of the creditor;
(iii) The authorisation conferred by the trust deed;
(iv) The actions of the cestui(s) que trust; and
(v) The resulting benefit (if any) on the trust fund.

This is the multi-perspective analysis.

We shall consider in turn the trustee's right of indemnity, some of the alternative approaches and the multi-perspective analysis. Before we do so, however, we shall examine the influence which commercial and trading pressures, changes in public perception of the trustee's role and the development of theories of unjust enrichment have exerted on the issue of ultimate responsibility for trust debts.

This examination provides necessary background. Indeed a knowledge
of theories of unjust enrichment is essential for a proper understanding of both the operation of the multi-perspective analysis and a number of advantages which its employment would result in. Our examination of the development of theories of unjust enrichment therefore constitutes a large component of this preliminary part.
II COMMERCIAL AND TRADING PRESSURES

1. Introduction

The origins of the trust can be traced to the widespread employment of the device of the "use" in the 15th and 16th centuries and the Statute of Uses 1535. As Pettit notes "[t]he device of the use was adopted for various purposes. It enabled a land owner, for example, to evade some of the feudal dues which fell on the person seized of land; to dispose of his land by his will; to evade Mortmain statutes; and more effectively to settle his land."\(^5\)

The transfer of property and avoidance of taxation remain major factors in the employment of the express trust. The elasticity of the trust, however, has encouraged a growth in the nature and variety of situations in which the trust is employed. This has in turn placed pressure on the trustee's right of indemnity as a device to assist the courts determine ultimate responsibility for trust debts.

As we shall see, the trust has been used as a means to impede and frustrate the claims of creditors. What devices the courts have to counter this development have become increasingly strained and ineffective. While not limited to it this development can be attributed to the business or trading trust (the "trading trust"). The trading trust therefore warrants a brief examination.

2. **The Trading Trust**

A. **Introduction**

Of all the forms of express trusts illustrating this elasticity none has been more effective than the trading trust. The use of the trading trust as an instrument of commerce is not new. It offers a recognised alternative to the partnership and limited liability company. In New Zealand, however, it has received little attention by the business community.

Notwithstanding the apparent novelty of using a trust as an alternative to other modes of conducting a business, there is a long history of such use originating in England and the "Bubble Act" of 1720.

Prior to the enactment of general incorporation statutes the joint stock company was the only readily available means of organising collective commercial activity. In the early nineteenth century a number of these previously loosely associated groups of individuals executed trust deeds to govern their affairs. Two of the earliest and most famous examples are the trust deeds executed by the members of the London Stock Exchange in 1802 and the members of


7. 6 Geo. 1, c.18 (UK)
"Lloyd's" of London in 1811.

The promising start of the trading trust in England, however, was frustrated in the latter part of the nineteenth century. The failure of a number of investment trusts organised on similar lines and the advent of general incorporation statutes contributed to a decline in its popularity.

B. American Popularity

The greatest development and utilisation of the trading trust occurred in the United States of America. The trading trust was employed to such an extent in the State of Massachusetts that some attribute it as originating there and refer to it as the "Massachusetts Trust".

The popularity of the trading trust in Massachusetts arose from that State's refusal to permit the privilege of incorporation to be extended to those individuals who wished to form incorporated companies to deal in, and develop land.

A special feature of the trading trust is its ability to be organised along corporate lines. While the trustee remains the legal owner of the trust fund his role is viewed as analogous to that of a company director. The cestuis que trust may in turn be regarded as shareholders. The flexibility of the trust has enabled the creation

of quasi-corporate entities.

In the even more sophisticated trading trusts the trustees have had to periodically stand for election by the cestuis que trust. The interest of the cestuis que trust also became readily negotiable with the issue of transferable certificates.

At the outset the use of the trading trust in Massachusetts can be attributed to an inability to use the corporate entity. The trading trust was employed out of necessity; not out of preference. From the employment of the trading trust in Massachusetts however, came a realisation that the trust possessed a number of advantages over the partnership and limited liability company. Between the beginning of the last quarter of the nineteenth century and the first quarter of this century the trading trust enjoyed considerable popularity.

The popularity of the trading trust can be attributed to a belief among American businessmen that the limited liability company was subject to oppressive taxation and regulatory statutes. Revealing insights into the then beliefs of the American business community are provided by the following extracts:

"Soon after the civil war, the spirit of antagonism to the corporation began to manifest itself. Unscrupulous individuals had used the corporation as a shield, and it also had been made the instrumentality through which transactions had been carried on, which were questionable and clearly against public welfare. ... [Against this trend] was the growing determination to eradicate the abuse by practically killing the instrumentality. ... Year by year we have seen statutes passed, not only by Congress but by the legislatures of the several states, each one imposing some additional duty or burden upon the corporations. The very common requirements in the statutes of most of the states, compelling every foreign corporation to file a copy of its charter in every state in which it desires to do
business, and to become subject to the laws of that state, and to pay taxes upon the percentage of its capital engaged in that state, while perfectly proper from the standpoint of the state, became extremely burdensome to business interests endeavouring to carry on enterprises of an extended character over a large territory.9

"In this country, we have a government at war with business, not merely taxing and regulating but enforcing its own ideas as to how business should be organized. These ideas are mostly mere theory and are diametrically opposed to the tendency in business organization that springs from experience."10

The most famous trading trust in American history has been the Standard Oil Trust.11 This trust was created in 1882 with the object of uniting the management of 51 companies in which John D. Rockefeller and his associates had controlling interests.

To provide a centralised management for these companies with, it was argued, increased administrative efficiency and co-ordination of business activities, Rockefeller and his associates transferred all

9. Powell, Passing of the Corporation in Business (1918) 2 Minn L R 401 at 403

10. Crotty, The Superiority of the Developed Trust Relation over The Statute Law Corporation (1922) 15 Law & Bank 205 at 206. Quoting from The Sturday Evening Post May 9th 1914

11. For a concise discussion of the history of this Trust see Flannigan, Business Trusts - Past and Present (1984) 6 E & TQ 375 at 380-382
their shares to trustees. By virtue of their shareholding the trustees controlled these companies and could manage them as if they were one entity. Notwithstanding the control exercised by the trustees the companies preserved their ostensible independence.

The use of the trust in this situation, however, was viewed by many as a device to defeat competition and in the State v Standard Oil Company it was held that the object of the Standard Oil Trust was the creation of a monopoly in restraint of trade, contrary to public policy. As a result of this decision the Standard Oil Trust was incorporated as a company in 1899.

C. Advantages

The advantages of the trading trust over the incorporated company were claimed to include:

"1. The doing of business upon the common law right of contract with freedom from all statutory exceptions that may be imposed upon corporations, both foreign and domestic, as merely artificial persons.

2. The right of trustees to apply to courts for direction in the execution of their powers, whereby their acts are given legal authority in advance of their commission.

3. The protection of cestui que trustent in their dealings with trustees, their right to accountings and full information, without the right, however, of securing information for improper purposes.

4. The protection of creditors in 'following' the 'trust fund' and their right against trustees individually in cases of fraud.

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12. 30 NE 279 (1892)
5. The freedom with which the terms of a trust instrument may be framed for the conduct of a particular business and according to the lawful preference of its equitable owners.

6. Latitude in amendment of provisions of management, as experience may show is desirable.

7. The winding up of a business expeditiously and without resort to proceedings at law, with their consequent burden of delay and expense, under express provisions of the trust instrument, upon any termination of the trust.\textsuperscript{13}

D. Hostility

While the growth of the trading trust in the United States of America "just before and after the turn of the century was nothing short of spectacular"\textsuperscript{14} its popularity was not universal. A number of the American state jurisdictions were "extremely hostile to the Business [trading] trust".\textsuperscript{15}

This hostility arose from the attempts of trading trusts to protect

\textsuperscript{13}John H. Sears, \textit{Trust Estates As Business Companies Counselors} Publishing Co, St. Louis Mo (1912) at 17

\textsuperscript{14}Flannigan, \textit{Business Trusts - Past and Present} supra at 380; Wiggus, \textit{Corporations and Express Trusts} (1914-15) 13 Mich L Rev 205 at 207 states that in 1912 trading trusts owning Boston real estate collectively held assets valued at Two Hundred and Fifty million American dollars.

\textsuperscript{15}Flannigan \textit{Beneficiary Liability in Business Trusts} (1964) 6 E & TQ 279 at 287
the trustees and cestui(s) que trust from unlimited personal liability. Limited liability was viewed by many businessmen as an integral component of business and as such sought it from the trading trust. We shall consider these attempts in part III of this paper.

Other sectors of the community, however, viewed limited liability as a privilege extended by the legislature in return for the imposition of requirements designed to provide protection to creditors against abuse. It was feared by some that the unchecked development of the trading trust would undermine this protection.16

In some states17 the courts considered that by purporting to confer limited liability on the cestui(s) que trust the trading trust was usurping corporate privileges and was therefore illegal.

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16. Ibid. at 287; See also Magruder, The Position of Shareholders in Business Trusts (1923) 23 Colum L Rev 423

17. For instance Washington. See State ex rel Colvin v. Paine 243 P. 2; 247 P. 476; 46 ALR 165 (1926). In reaching this result, reliance was placed on a constitutional provision that the term "corporation", was to be construed to include all associations and joint stock companies having any powers or privileges of a corporation not possessed by individuals or partnerships. Trading trusts are now valid in Washington provided certain conditions are satisfied.
Courts in other states\textsuperscript{18} adopted an intermediary approach. In these states the significant alteration to the trustee's liability was to make the cestuis que trust liable to third parties as if they had formed a partnership or a joint stock company.

Although the trading trust was recognised as a legitimate method by which to operate a business it was held that it failed to confer limited liability on the cestui(s) que trust. The personal unlimited liability of the cestui(s) que trust was justified on grounds of public policy; the protection of creditors.

A further argument employed against the recognition of limited liability for the cestuis que trust was their receipt of the profits. It was considered that the mere receipt of the profits was sufficient to raise liability as partners.\textsuperscript{19}

\textbf{E. Decline in Popularity}

A tangible advantage enjoyed by the trading trust in America was an immunity from corporate taxation. It is noteworthy that with the removal of this immunity in the mid 1930's\textsuperscript{20} and the introduction of controls on the use of the trading trust there was a decline in its

\textsuperscript{18} For instance Texas. See Thompson v. Schmitt 115 Tex 53; 274 S W 554

\textsuperscript{19} cf Cox v. Hickman (1860) 8 HL Cas 268; 11 ER 431 (HL)

\textsuperscript{20} Morrissey v. Commissioner 296 US 344 (1935)
popularity.

Taxation advantages have nevertheless seen the adoption and popularisation of the trading trust in Australia.

F. Implications for the Trustee's Right of Indemnity

The development of the trading trust has placed pressure on the trustee's right of indemnity as a judicial device to solve the issue of ultimate responsibility for trust debts.

This pressure has arisen for a number of reasons. First, although most trusts involve the trustee in incurring debts, this is a special feature of the trading trust; the trustee is constantly incurring debts.

The development of the trading trust has also seen the removal of the creditor's right of recovery against the trustee. This has been another reason for the pressure. As a device to assist the courts determine responsibility for trust debts the trustee's right of indemnity is premised on the creditor having a right of recovery against the trustee.

The removal of the creditor's right against the trustee has been achieved by simply excluding the trustee's liability. The creditor agrees not to look to the trustee personally for recovery of the debt. The exclusion of the trustee's personal responsibility for trust debts will be considered in part III of this paper.

Another method by which the claims of creditors have been defeated
is more novel. This is by the employment of what has been characterised as "a man of dry ice" as the trustee. The "man of dry ice" is a limited liability company having nominal share capital - for instance $2.00. Its epithet is derived from its propensity to "evaporate into thin air when creditors put the heat on it. Sue for damages and there is a puff of white smoke. The creditors are left with nothing but burnt fingers and an empty company shell".21 Although the creditor's right of recourse against the trustee remains by virtue of the trustee's impecuniosity it is worthless.

Although the methods are different none can doubt that the significance of the development of the trading trust has been to restrict the creditor to whatever rights the trustee has had to be indemnified. In some trading trusts the settlor has attempted to go further in attempts to frustrate the claims of creditors by purporting to remove the trustee's right of indemnity entirely.

Another device to defeat creditors has been the establishment of trading trusts with little if any capital. This practice has not only required the trustee to pursue other avenues to acquire working capital which in turn increases the level of indebtedness, but has also deprived the trustee of a source of funds from which to discharge liabilities to creditors.

21. Dr Y. Grbich, Can Liabilities For $2 Nominee Trustee Companies be Recovered from the Trust Fund and Beneficiaries (1979) A Paper presented at the Monash University "Problems of Administering $2 Nominee Trustee Companies" at p 5.1
The courts have been unable to adapt the trustee's right of indemnity to counter these devices and thereby provide a measure of protection to the creditors.

Another factor which has lead to the questioning of the suitability of the trustee's right of indemnity as a judicial device for determining ultimate responsibility for trust debts is a change in the public perception of the role of the trustee. This factor shall now be considered.
III Public Perception of the Role of the Trustee

Notwithstanding the passage of time and the fusion of the courts of Common Law and Chancery the trustee continues to be the legal owner of the trust fund. The essence of the trust remains an equitable obligation in the trustee to deal with property owned by him for the benefit of the cestui(s) que trust.

This view of the trust, however, is increasingly at variance with public perception and expectation. This is another factor which has lead to the questioning of the suitability of the trustee's right of indemnity as a judicial device for determining ultimate responsibility for trust debts.

1. Trustee as a Manager

Formerly the trustee was regarded as the repository of supreme trust and confidence. Trustees are increasingly being chosen, however, because of the professional skill which they profess to have to manage the trust fund in the most advantegious manner. Against this background the trustee may be viewed as an administrator or manager of the trust fund. The use of a limited liability company as trustee highlights this change in the perception of the role of the trustee.

The change in the public perception of the role of the trustee, as reflected upon judicially, is most apparent with trusts in the commercial context. Nevertheless by virtue of the increased use of professional trustees the change has become apparent in all uses of the trust.
The change in the popular perception of the trustee has also received implied recognition through the development of different standards of prudent management expected of the trustee.

Although the standard of care required of a trustee has historically been the same for all trustees, the courts have indicated that they will not be as lenient with paid professional trustees. Initially this occurred through the courts reluctance to use their remedial powers under the relevant Trustee Act to relieve the trustee from personal liability arising from a breach of trust.22

There have also been recent judicial suggestions that professional trustee companies should also be subject to a higher standard of care than an unpaid trustee.23 This distinction has now received legislative recognition.24


While this change in public perception is not new it is increasingly attracting attention. New rationales for the trust have been advanced to reflect this change.

2. Alternative Trust Rationales

The development of alternative rationales for the trust has in turn suggested alternative approaches for determining ultimate responsibility for trust debts.

One such rationale is to confer legal personality on the trust fund. Pursuant to this rationale the trust fund would become distinct from the trustee and the cestui(s) que trust. Both the trustee and the cestui(s) que trust are divested of their present respective interests in the trust fund.

By conferring legal personality on the trust fund the situation becomes analogous to that of an incorporated company. Instead of being regarded as the owner of the trust fund the trustee could become an agent thereof. The cestuis que trust could in turn become regarded as owners of the trust fund.

As the principal, the trust fund would become responsible for authorised debts incurred by the trustee. On agency principles the responsibility of the trust fund would not be restricted to those debts which the trustee had authority to incur. The responsibility of the trust fund would extend to those debts incurred by the trustee within his ostensible authority.

To continue the analogy with the incorporated company the operation
of the ultra vires doctrine would depend on the extent of per-
sonality conferred on the trust fund.

Other rationales for the trust suggest that the present interests of 
the trustee and the cestui(s) que trust in the trust fund can be 
 alters. The cestui(s) que trust could become, for instance, the 
legal owner of the trust fund while the trustee manages it in the 
capacity of an agent.

In this situation the responsibility (if any) of the cestui(s) que 
trust for the debts incurred by the trustee/agent would depend on 
the nature of the relationship. If the trustee/agent is an agent 
the responsibility of the cestui(s) que trust is similar to that 
when the trust fund becomes the principal. As the principal the 
responsibility of the cestui(s) que trust for trust debts would ex-
tend to those debts incurred by the trustee within his ostensible 
authority.

When the trustee/agent 'manages' the trust fund there may be no 
direct agency relationship. The trustee/agent may have full control 
over the trust fund as if s/he was its owner. In this situation the 
trustee/agent may be solely responsible for all debts incurred by 
him. The granting of control over the trust fund may be viewed as 
analogous to the grant of a profit a pendre or the lease of land or 
chattels. By granting a profit a pendre or a lease the owner does 
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not thereby make himself personally responsible for debts incurred by the grantee or leasee in enjoying that property.

The other alternative on the theme of altering the present interests in the trust fund is to divest the cestuis que trust of their present equitable interest in the trust fund. Pursuant to this rationale the trustee's present fiduciary obligations could be replaced by a personal duty to manage the trust fund for the benefit of the cestui(s) que trust.

An analogous situation is the winding up of a deceased's estate. Beneficiaries of a will have no specific interest in the property comprising the residue until such time as the residue has been ascertained in the due course of administration.26

Notwithstanding the beneficiaries lack of an interest in the residue, the administrator or executor still owes enforceable duties to them to administer the estate properly.27 With the specific exception of debts incurred by the deceased, the responsibility of an administrator/executor for debts is similar to that of a trustee.


27. Ibid. See generally paragraphs 1542-1548 for a discussion of the liability of an Executor on a Devastavit

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3. **Recognition of Change in Alternative Approaches**

Without embarking on such an extensive review of the trust, some courts have resorted to and utilised some of these trust rationales to justify the imposition of ultimate responsibility on the trust fund and/or the cestui(s) que trust in situations in which no right of indemnity has historically been conferred on the trustee. One context in which this has occurred is when the trustee is insolvent and in default to the trust.

As we shall see some American courts have been prepared in this situation to recognise in the creditor a direct claim against the trust fund.\(^2\) This in turn suggests that the trust fund is regarded as the principal.

THE DEVELOPMENT OF
THEORIES OF UNJUST
ENRICHMENT

1. Introduction

The development of theories of unjust enrichment is a third factor which has received little recognition in the operation of the trustee's right of indemnity. We shall now consider the development of these theories and the significance thereof to the courts in determining ultimate responsibility for trust debts.

As we shall see the courts have incorporated general notions of unjust enrichment in the trustee's right of indemnity. Nevertheless the courts have not developed the general notions of unjust enrichment to reflect advances in the theories.

As a device to determine ultimate responsibility for trust debts, the trustee's right of indemnity does not directly enable the court to consider whether the trust fund has been benefited by the trustee's actions. It is immaterial whether the trust fund has been increased in value or has been saved a necessary expense by the actions of the trustee. The responsibility of the trust fund and/or the cestui(s) que trust for a debt depends on whether it was 'properly incurred'.

The development of theories of unjust enrichment has provided a new framework against which claims of trustees and creditors that the
trust fund and/or the cestui(s) que trust should bear ultimate responsibility for a debt can be determined.

Indeed when considered against theories of unjust enrichment, the trustee's right of indemnity produces inequitable results. Irrespective of the trustee's authorisation to incur a debt, to the extent that the trust fund has been increased in value or has been saved a necessary expense, it may be appropriate for the trust fund and/or the cestui(s) que trust to bear responsibility for that debt.

English courts, however, have declined to recognise any general right of recovery based on the receipt of a benefit. Despite this historical reluctance it is argued that a principle of unjust enrichment is discernible and should be employed by the courts in determining ultimate responsibility for trust debts.

Indeed such a principle has received recognition in the United States of America. Paragraph 1 of the American Law Institute Restatement of Restitution states that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other". It is not surprising then that a number of the alternative approaches which have been advanced by American courts to determine ultimate responsibility for trust debts have employed principles of unjust enrichment.

The receipt of a benefit by the trust fund is one of the factors which pursuant to the multi-perspective analysis is drawn to the courts' attention. A knowledge of some of the theories of unjust enrichment is therefore necessary.

We shall first examine the reasons for the reluctance by English courts to recognise a right of recovery arising from the receipt of a benefit. This examination will lead into a consideration of the theories of unjust enrichment advanced by Goff and Jones,30 and Birks.31

2. The Recognition of The Receipt of a Benefit

The recognition of a "benefit" is somewhat of a paradox at English law. It would appear to occur independently of whether in the popular sense a quantifiable benefit has been received or not. A benefit will often be deemed to have been received in situations in which no quantifiable benefit has been bestowed. Alternatively in situations in which a quantifiable benefit has been received the law will often fail to recognise it.

One of the reasons for this is the operation of a principle of


English law that benefits, in the sense of goods or services supplied, are not to be imposed onto the recipients thereof. The decision of the English Court of Appeal in Falcke v. Scottish Imperial Insurance Company\(^{32}\) is regarded by many as establishing this principle.

A. Falcke v. Scottish Imperial Insurance Company

Falcke had lent a sum of money to Emanuel on the security of a life policy of which Emanuel was the legal assignee. Emanuel later believed that he had reacquired Falcke's interest in the insurance policy. In this belief and with the object of keeping the policy alive Emanuel paid an overdue premium. In the absence of the premiums payment the policy would have lapsed. The policy was later sold by Falcke's personal representatives to enforce the security and Emanuel claimed that he had a lien on the proceeds of the sale for the amount of the premium so paid.

The members of the Court of Appeal were unanimous in rejecting Emanuel's claim. In the words of Cotton L.J.:- "[i]t would be strange indeed if a mortgagor expending money on the mortgaged property could establish a charge in respect of that expenditure in priority to the mortgagee."\(^{33}\)

The facts of this case suggest that this extract from the judgment

\(^{32}\) (1886) 34 Ch D 234 (CA)

\(^{33}\) Ibid. at 243
of Cotton L.J. encapsulates the ratio decidendi. On a wider interpretation the ratio decidendi could extend to a denial that the actions of a stranger can justify the creation of a lien over another's property.

Birks, however, would restrict the ratio decidendi:—"Falcke is at the most authority to the effect that an intervention to serve the intervener's own interest, in circumstances in which the benefit of the intervention is necessarily shared by another, does not give rise to restitution."34

Whatever its ratio decidendi, Falcke v. Scottish Imperial Insurance Company35 has become famous for the following observation of Bowen L.J.:—

"The general principle is, beyond all question, that work or labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor even,36 if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced on people behind their backs any more than you can confer a benefit upon a man against his will."37

34. Birks, An Introduction to the Law of Restitution supra at 195

35. (1886) 34 Ch D 234 (CA)

36. See Goff and Jones, The Law of Restitution supra at 337 footnote 49 on the significance of the positioning of the comma.

37. Falcke v. Scottish Imperial Insurance Company (1886) 34 Ch D 234 at 248 (CA)
Inherent in this observation is two denials. First a denial "that the common law grants to a stranger any lien upon the property of another which he has preserved".\(^3^8\)

The second denial is "that intervention on land to preserve another's property, if such intervention stands alone, gives the stranger any right to reimbursement or remuneration for his services".\(^3^9\)

We shall refer to the second denial contained within this observation and the policy arguments underlying it as the **Falcke** principle.

Although obiter dictum, the second denial has been frequently reiterated and accepted as authoritative. As Lord MacNaughten commented "[t]here is no principle of [English] law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it."\(^4^0\) A view recently reiterated by Lord Diplock. "[A] mere stranger cannot compel an owner of goods to pay for a benefit bestowed on him against his will ..."\(^4^1\)

\(^3^8\) Goff and Jones, *The Law of Restitution* supra at 337-339

\(^3^9\) Idem.

\(^4^0\) *Ruabon Steamship Company Limited* v. *London Assurance* [1900] AC 6 at 15 (HL)

\(^4^1\) *China Pacific S.A.* v. *Food Corporation of India* [1981] 3 All ER 688 at 695 (HL)
B. Arguments Against Liability

It has been suggested that the principal reason for the non-recognition by English law of a general right of recovery arising from the receipt of a benefit is the preservation of the recipient's freedom of choice. Arguments in support of this fall into a number of overlapping but nevertheless distinct groups.

The first argument has been succinctly described by Birks as one of "subjective devaluation". The basis of this argument is that the actions of the other party has not in fact conferred a benefit on the recipient.

"[Subjective devaluation] is an argument based on the premiss that benefits in kind have value to a particular individual only so far as he chooses to give them value. What matters is his choice. The fact that there is a market in the good which is in question, or in other words that other people habitually choose to have it and thus create a demand for it is irrelevant to the case of any one particular individual. He claims the right to dissent from that demand."44


44. Idem.
This argument is particularly effective when the conferred "benefit" comprises goods or services. The problem with the receipt of services is graphically shown in the famous observation of Pollock C.B.:

"Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself."45

In this example although the recipient has clean shoes, is it a benefit to him? Arguably the recipient has only received a quantifiable benefit if s/he wanted to have the shoes cleaned and was going to employ someone to clean them.

Assuming that the recipient has received a quantifiable benefit, the second argument against liability focuses on the justice of imposing an obligation on the recipient to pay for it. Notwithstanding that the recipient may have received a benefit, it is argued that as s/he did not request it, s/he should not have to account for it.

Linked with this argument which is based on the recipient's lack of choice is an argument against allowing the conferor of the benefit to recover for a benefit which s/he knew the recipient "neither solicits nor desires".46 This is the argument of officiousness -

45. Taylor v. Laird (1856) 25 L J Ex 329 at 332 (Exq)

46. Goff and Jones, The Law of Restitution supra at 42
the meddling and interfering by the conferor of the benefit in the affairs of the recipient.

With this knowledge of the arguments underlying the operation of the Falcke principle we can now undertake an introduction to theories of unjust enrichment.

3. **An Introduction to Theories of Unjust Enrichment**

As acknowledged by Bowen L.J. the Falcke principle is not all embracing; it is only a "general principle." It is submitted that theories of unjust enrichment place the Falcke principle in a wider context.

As noted before English courts have historically declined to recognise any general right of recovery arising from the receipt of a benefit. Nevertheless English courts have developed remedies which embody general notions of unjust enrichment. The existence of these remedies was noted by Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Limited.*

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience.

47. Falcke v. *Scottish Imperial Insurance Company* (1886) 34 Ch D 234 at 248 (CA)

48. [1943] AC 32 at 61 (HL)
that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.  

Others argue that the quasi-contractual remedies are anomalies, based on ancient authority embedded in the law and do not provide examples of the application of theories of unjust enrichment.

A. The Development of the Quasi-Contractual Remedies

Ascertaining the underlying principle for the quasi-contractual remedies is complicated by their evolution from the action of assumpsit. This action was originally similar to what would be loosely described in the twentieth century as a tortious action. It was available, for example, in situations in which the defendant had failed to properly perform work which he had undertaken to do.  

49. Ibid. at 61

50. Sinclair v. Brougham [1914] AC 398 at 452 per Lord Sumner (HL); Re Cleadon Trust, Ltd [1938] 4 All ER 518 at 535 per Scott L.J. (CA); Morgan v. Ashcroft [1938] 1 KB 49 at 74 per Scott L.J. (CA).

51. For a discussion on the history of the action of assumpsit see Ames, The History of Assumpsit (1888) 2 Harv L R 1 & 53

52. Originally the undertaking had to be express. The action was however gradually extended to include the activities of members of the "common callings" (i.e. innkeepers, ferrymen, smiths and carriers) without the need to prove an express undertaking to do the
Gradually the action of assumpsit became "contractual" enforcing the non-performance of agreements between parties. Indebitatus assumpsit (as the action became known in respect of these "contractual" developments) originally would not lie to recover money promised to the plaintiff by the defendant in exchange for the plaintiff's act.

To successfully recover the money the plaintiff would have to prove a second express promise by the defendant to pay the debt. In Slade's Case\(^5\) however, it was held that this second promise was unnecessary. The promise to pay the debt was implied within the first promise to pay for the plaintiff's act.

In subsequent developments indebitatus assumpsit was employed in situations in which although there was no express promise it was possible to imply a promise. From this development indebitatus assumpsit evolved to provide a remedy in situations in which although it was not possible to imply a promise, the court would impose one.

These last two extensions must be kept distinct. In the first, the circumstances of the case justified the recognition of a contract. In the latter no contract could be inferred from the parties actions. Through the use of a fiction the law imputed the promise and work properly.

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53. 4 Co Rep 92b at 94b; 76 ER 1074 at 1077
therefore constituted the contract. The quasi-contractual remedies overlap these two developments.

B. The Influence of Lord Mansfield

Although the "promise" pertaining to a quasi-contractual remedy was in some situations a fiction, it was necessary, and remains necessary to plead the promise. Notwithstanding the necessity to plead the promise Lord Mansfield recognised that the promise was a mere fiction. In Moses v. Macferlan\textsuperscript{54} he said:

"If the defendant be under an obligation, from the ties of natural justice to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as if it were upon a contract ("quasi ex contractu" as the Roman Law expresses it)."\textsuperscript{55}

"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which ex aequo et bono, the defendant ought to refund."\textsuperscript{56}

As Friedmann notes Lord Mansfield's attempt to reform the law of quasi-contract was important in a number of respects.\textsuperscript{57} Lord

\textsuperscript{54.} (1760) 2 Burr 1005; 97 ER 676

\textsuperscript{55.} Ibid. at 1008; 678

\textsuperscript{56.} Ibid. at 1012; 630

\textsuperscript{57.} Friedmann, The Principle of Unjust Enrichment In English Law. (1938) 16 Can Bar Rev 243 at 366
Mansfield highlighted the fictional nature of the promise. He also provided a jurisprudential basis for the recognition of the remedy. "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." 

A criticism which has been leveled against Lord Mansfield is that of vagueness. This criticism became formalised during the second decade of this century. The author of this criticism was Hamilton L.J.; or Lord Sumner as he became on his elevation to the House of Lords.

"Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'."

"There is now no ground left for suggesting as a recognizable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer." 

To some extent this criticism was justified. What is meant by the "ties of natural justice and equity" and the principle of "aequum et bonum" does need clarification. Clarification was provided, however, by Lord Mansfield.

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58. Moses v. Macferlan (1760) 2 Burr 1005 at 1013; 97 ER 676 at 681

59. Baylis v. Bishop of London [1913] 1 Ch 127 at 140 per Hamilton L.J. (CA)

60. Sinclair v. Brougham [1914] AC 398 at 456 per Lord Sumner (HL)
"[The action for money had and received] lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to the laws made for the protection of persons under those circumstances.

In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."61

Whether justified, similar criticism has continued against the theories of unjust enrichment. Proponents of these theories, however, argue that their theories do not depend on the application of nebulous concepts of benefit and justice.

As recognised by Goff and Jones, and Birks in their respective works on restitutionary remedies, the principle of unjust enrichment "presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit."62

The criteria of benefit and unjust retention of that benefit reflects and counters both the argument of subjective devaluation and the issue of voluntariness underlying the Falcke principle.

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61. Moses v. Macferlan (1760) 2 Burr 1005 at 1012; 97 ER 678 at 681

We shall now consider the devices which are available to show the receipt of a benefit.

4. **Devices to Establish the Receipt of a Benefit**

A. **Introduction**

As noted by Goff and Jones "[t]he object of a restitutionary claim is to restore to the plaintiff the benefit which the defendant has unjustly gained at his expense. In restitution it is not material that the plaintiff has suffered a loss if the defendant has gained no benefit."\(^{63}\)

In ascertaining whether a recipient has received a benefit the courts have drawn a distinction between the receipt of money and the receipt of goods or services. Because of its unique characteristic as legal currency, the mere receipt of money is regarded as always constituting a benefit to the recipient. As Goff J. noted in B.P. Exploration Co. (Libya) Ltd v. Hunt (No. 2)\(^{64}\):

"Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited .... The same cannot be said of other benefits, such as goods or services. By their nature, services cannot be restored; nor in many cases can goods be restored, for example where they have been consumed or transferred to another. Furthermore the identity and value of the resulting benefit to the recipient may be debatable."\(^{65}\)

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63. Goff and Jones, *The Law of Restitution* supra at 16

64. [1982] 1 All ER 925 (QBD)

65. Ibid. at 937
The action for money had and received therefore does not allow any argument premised upon 'subjective devaluation'.

Although money is involved, the argument of subjective devaluation may nevertheless be raised in some situations. The action of money paid is available when money is paid to a third party. Money may, for instance, be paid to one of the defendant's creditors with the intent of discharging one of his debts. Even if the debt is thereby discharged it may not 'benefit' the defendant. This will occur, 66.

66. It will be recalled that the basis of this argument is that the actions of the other party has not conferred a benefit on the recipient.

67. The situation in respect of the purported payment of another's debt is complicated by the general principle of English law that mere payment on account of a debt by a third party does not discharge the debt. On the traditional theory payment on account of a debt by a third party only discharges the debt in those situations in which the payer was required to make the payment pursuant to a secondary liability, for instance a guarantee. In all other situations the debt is only discharged if the debtor adopts the payment.

The purported payment of another's debt may constitute a benefit to the debtor only if his debt is discharged. In those situations in which a debt can be discharged without the debtor's adoption of the payment the debtor may nevertheless dispute the debt or otherwise raise an argument of subjective devaluation. For an overview of this topic see Birks and Beatson, Unrequested Payment of Another's
for instance, if the defendant disputed the debt.

B. **Evidence of a Request for or Free Acceptance of the Benefit**

To circumvent the persuasiveness of the argument of subjective devaluation evidence of the recipient's concurrence in the receipt of the benefit has historically been a prerequisite. Such evidence has been provided through the medium of a request.

It was unnecessary, however, to show an express request. The request could be implied from the defendant's free acceptance of the goods or services. 'Free acceptance' occurs when the defendant accepts the goods or services at a time when s/he had an opportunity to reject them and with the knowledge that they were to be paid for.68

Whether the request be actual or implied it defeats any argument based on subjective devaluation. In both situations, obtaining or retaining the goods or services is the free choice of the defendant. The defendant is therefore precluded from arguing that s/he did not receive a benefit.

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*Debt* (1976) 92 L Q R 188

68. Goff and Jones, *The Law of Restitution* supra at 19; Birks, *An Introduction To The Law Of Restitution* supra at 265
C. Evidence of Incontrovertible Benefit

Notwithstanding that the recipient has not requested or freely accepted the goods or the services, it has been argued that if s/he has been incontrovertibly benefited the argument of subjective devaluation should be irrelevant.

The basis of the plaintiff's claim in this situation is that no reasonable person would say that the defendant has not been enriched by his actions.

As Jones argues "[a] plaintiff may be able to show that a defendant has been incontrovertibly benefited from the receipt of the [goods or] services and that the facts compel a conclusion that the defendant should make restitution. The equities of the plaintiff's claim may be more compelling than the defendant's plea: 'I did not ask you to do what you did; and I did not have the opportunity of rejecting [goods or] services which I am in no position to return.'" As conceded by Jones, the situations in which this will occur "must be exceptional".

69. Or in the situation of the discharge of a debt by virtue of non-voluntarily incurred secondary liability, its discharge.

70. Jones, Restitutionary Claims for Services Rendered (1977) 93 L.Q. R 273 at 275

71. Idem.
'Incontrovertible benefit' occurs when the recipient has been saved an expense which s/he would otherwise have necessarily incurred or has made an immediate and realisable financial gain.\textsuperscript{72}

Although there would appear to be no cases expressly applying the incontrovertible benefit principle, a number of cases can best be explained on this ground.

i. 'Factual' Incontrovertible Benefit

The principal case which suggests that evidence of an incontrovertible benefit is sufficient to establish the receipt of a benefit is \textit{Craven-Ellis v. Canons, Limited}.\textsuperscript{73}

The defendant company was involved in the development of a building estate. Pursuant to a purported resolution of its directors, the plaintiff, a qualified valuer and real estate agent, was appointed its managing director. Nevertheless this resolution and therefore the plaintiff's appointment was invalid for two reasons.

The first ground of invalidity was that contrary to the articles of association the "directors" had failed to take up their qualification shares. Notwithstanding their purported appointment to the Board, the directors were therefore unqualified to act as such.

\textsuperscript{72} Goff and Jones, \textit{The Law of Restitution} supra at 19; Birks, \textit{An Introduction to The Law of Restitution} supra at 117

\textsuperscript{73} [1936] 2 KB 403 (CA)
The second reason for the invalidity of the plaintiff's appointment was that a candidate for the position of managing director had to be a director of the Company. The plaintiff did not satisfy this criterion.

In the belief that the appointment was valid, however, the plaintiff rendered professional services to the Company. The question before the Court of Appeal was whether the plaintiff could recover for these services.

The Court held that the plaintiff was entitled to recover on the basis of a quantum meruit. In delivering the principal judgment Greer L.J. said:

"The defendants seem to me to be in a dilemma. If the contract was an effective contract by the company, they would be bound to pay the remuneration provided for in the contract. If, on the other hand, the contract was a nullity and not binding either on the plaintiff or the defendants, there would be nothing to prevent the inference which the law draws from the performance by the plaintiff of services to the company, and the company's acceptance of such services, which, if they had not been performed by the plaintiff, they would have had to get some other agent to carry out." 74

The interesting aspect of this decision and which has since raised some controversy is the basis upon which the criterion of benefit was satisfied. Although Greer L.J. referred to the company's ac-

74. *Craven-Ellis v. Canons, Limited* [1936] 2 KB 403 at p 412 (CA). Greene L.J. agreed with these observations while Talbot J. concurred.
ceptance of the plaintiff's services it was impossible for the Com-
pany to accept them. The Company had no Board of Directors.

To cure this apparent defect it has been argued that "[t]he accept-
ance must have been by the whole body of shareholders... . It is
well established that the assent or acquiescence or ratification of
the whole body of shareholders on a matter inter vires the company
is equivalent to the assent or acquiescence or ratification of the
company."75

While this argument does provide a justification for the decision,
there is, it is respectfully suggested, no factual support for it in
the judgments. Indeed no reference was made at all in the judgments
to the shareholders.

It will be recalled that Greer L.J. noted that if these services had
not been performed by the plaintiff, the defendant would have had to
employ someone else. A more satisfactory explanation for this deci-
sion therefore is that the Company was incontrovertibly benefited by
the plaintiff's services. This explanation is strengthened by an
earlier passage in the judgment of Greer L.J.. His Lordship said:-

"In my judgment, the obligation to pay reasonable
remuneration for the work done when there is no binding
contract between the parties is imposed by a rule of
law, and not by an inference of fact arising from the
acceptance of services or goods. It is one of the
cases referred to in books on contracts as obligations
arising quasi ex contractu ... "76

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75. Denning, Quantum Meruit: The Case of Craven-Ellis v. Canons Ltd.
(1939) 55 L Q R 54 at 54
Although there was no conclusive evidence that the defendant would have employed someone to perform these services, Birks refers to this decision as an example of factual necessary expenditure. He argues that no reasonable man would deny that it was likely that the defendant would have obtained services of this nature.  

"[A] factual necessity does not have to be absolute. That is to say, a plaintiff can claim to have anticipated inevitable expenditure even though it cannot be said to be 100 per cent certain that the defendant would have incurred the expenditure anyhow or would if he had been able to give his mind to it. ... So when one says that a given expenditure was factually necessary or inevitable for the defendant, one excludes unrealistic or fanciful possibilities of his doing without it."  

ii. 'Legal' Incontrovertible Benefit

In addition to factual necessary expenditure there is what Birks describes as legal necessary expenditure. In this situation in the absence of the plaintiff's intervention the defendant would have been legally bound to make the expenditure. The defendant is therefore incontrovertibly benefited by the plaintiff's actions.

A case cited by Birks as illustrating a legally necessary expenditure is *Exall v. Partridge.*  

76. Craven-Ellis v. Canons, Limited [1936] 2 KB 403 at 412 (CA)  

77. Birks, *An Introduction To The Law Of Restitution* supra at 117-120  

78. Ibid. at 120
the plaintiff's carriage, while on the defendant's leasehold premises, had been distrained by the landlord. To recover his carriage the plaintiff was required to pay the defendant's rental arrears. After paying the arrears and recovering his carriage, the plaintiff then successfully obtained reimbursement from the defendant.

Although this case is principally cited in respect of the issue of voluntariness, it also illustrates an example of incontrovertible benefit. The defendant could not argue that he had not received a benefit from the discharge of the rental arrears. The defendant's obligation in respect of the rental arrears had been discharged.

iii. Conversion into Money

At the time of their receipt, goods or services may not constitute a quantifiable benefit. They may subsequently become so, however, if converted into money. If the recipient of a benefit converts it into money s/he can no longer resort to an argument of subjective devaluation.

79. (1799) 3 Esp 8; 170 ER 520 (KB)

80. Although Exall was not personally liable for the rent, his payment of it was not officious. To release his carriage Exell was legally compelled to discharge the arrears of rent. In this situation the original debt was discharged by Exall's payment. See Goff and Jones, The Law of Restitution supra ch 14
Although conceding that there may be practical difficulties if the benefit is not relatively quickly converted into money, Birks argues that this test is employed in the context of tortious actions for damages arising from an act of conversion.81 In this situation "[t]he law is that you can recover only the pre-improvement value, except in the case in which I was more than a merely technical wrongdoer because I knew that I had no right to deal with the res in question. When you recover the pre-improvement value I take the benefit of my input."82

With this knowledge of the devices available to establish the receipt of a benefit we shall now explore the theories of unjust enrichment advanced by Goff and Jones83 and Birks.84

81. Birks, An Introduction To The Law Of Restitution supra at 121-124; See also Jones, Restitutionary Claims For Services Rendered supra

82. Birks, An Introduction To The Law Of Restitution supra at 121

83. Goff and Jones, The Law of Restitution supra

84. Birks, An Introduction to The Law of Restitution supra
5. **Two Theories of Unjust Enrichment**

As recognised by Goff and Jones\(^8\) and Birks\(^9\) in their respective works on restitutionary remedies, the principle of unjust enrichment requires not only the receipt of a benefit. The receipt of a benefit is only one of the three conditions which must be satisfied to justify recovery. The benefit must be conferred at the expense of the plaintiff. It must also be unjust for the recipient to retain the benefit.\(^8\)

It is this last requirement - that the retention of the benefit must be unjust, on which the theory of unjust enrichment advanced by Goff and Jones differs from the theory advanced by Birks.

In essence Goff and Jones argue that on demonstrating that the defendant has been enriched at his expense, a plaintiff establishes a prima facie claim for relief.\(^8\) It is the receipt of a benefit at the expense of the plaintiff which Goff and Jones believes makes the retention of that benefit unjust.

\(^8\) Goff and Jones, *The Law of Restitution* supra

\(^8\) Birks, *An Introduction to The Law of Restitution* supra

\(^8\) Goff and Jones, *The Law of Restitution* supra at 16; Birks, *An Introduction to The Law of Restitution* supra at 9-22

\(^8\) Goff and Jones, *The Law of Restitution* supra at 16 and 29
By contrast Birks argues that the plaintiff's state of mind when conferring the benefit determines whether the retention of the benefit is unjust. By contrast Birks argues that the plaintiff's state of mind when conferring the benefit determines whether the retention of the benefit is unjust. We shall now consider these two theories in more detail.

A. The Theory Advanced by Goff and Jones

i. A Generalised Right to Restitution

Goff and Jones acknowledge that no unifying principle for restitutionary remedies has been recognised by English law. "The law has developed pragmatically". From the forms of action, however, Goff and Jones argue that restitutionary remedies have developed to such an extent that it is now "possible to identify substantive categories, such as mistake, compulsion and necessity, in which the various restitutionary claims fall." From this Goff and Jones further argue that "[t]he next step may well be for the law to recognise that these categories are not merely united by the principle of unjust enrichment but are illustrations of a generalised right to restitution..." While "English Courts have hesitated to take this last step" Goff and

89. Birks, An Introduction to The Law of Restitution supra at 99-103

90. Goff and Jones, The Law of Restitution supra at 29

91. Idem.

92. Idem.
Jones feel no such hesitation.

They argue that the limits to such a generalised right of restitution can already be identified from the substantive categories in which restitutionary remedies are presently recognised. These limits are:-

"(1) the plaintiff [i.e. the conferor of the benefit] conferred the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he owed to the defendant;

(2) the plaintiff submitted to, or compromised, the defendant's honest claim;

(3) the plaintiff conferred the benefit while performing an obligation which he owed to a third party or otherwise while acting voluntarily in his own self interest;

(4) the plaintiff acted officiously in conferring the benefit;

(5) the defendant cannot be restored to his original position or is a bona fide purchaser; and

(6) public policy precludes restitution."94

Pursuant to the generalised right to restitution propounded by Goff and Jones the plaintiff establishes a prima facie claim for restitution if s/he demonstrates that the defendant has been enriched at her or his expense. Nevertheless the plaintiff's prima facie claim to relief is denied if her or his actions come within one of the

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93. Idem.

94. Goff and Jones, The Law of Restitution supra at 30
In the context of a trust the preconditions that the plaintiff did not act officiously or confer the benefit while performing an obligation which s/he owed to a third party are the most relevant. The operation of these preconditions shall therefore be examined.

ii. Recovery Denied if the Plaintiff Acted Officiously\textsuperscript{95}

It will be recalled that officiousness connotes the meddling and interfering by the conferor of the benefit in the affairs of the recipient. In such situations the conferor of the benefit "knew that the defendant neither solicit[ed] or desired\textsuperscript{96} the benefit so conferred.

A trustee is deemed to know the terms of his trust. While the general right to restitution as propounded by Goff and Jones may be viewed as a method by which the courts can determine ultimate responsibility for trust debts its operation may be unduly restricted by a strict application of this 'limit' to relief. Such an application of this limit by the courts would restrict the right of the trustee to recover from the trust fund and/or the cestui(s) que trust for trust debts paid by her or him to those situations in which s/he had authorisation to incur the liability.

\textsuperscript{95} Ibid at 42-44

\textsuperscript{96} Ibid at 42
The adoption of such a strict approach, however, would be inconsistent with case law. It is believed that the argument of 'officiousness' may be negated when the trustee has received some 'encouragement' \(^97\) from the cestui(s) que trust to incur the liability.

As we shall see in our examination of the multi-perspective analysis the existence of encouragement by the cestui(s) que trust is one of the factors which the court's attention is directed to in determining whether the trust fund and/or the cestui(s) que trust should bear ultimate responsibility for a trust debt.

The multi-perspective analysis is important in this context for enabling the courts to recognise that the existence of encouragement in conjunction with the conferment of an incontrovertible benefit may, to the extent of the benefit so conferred, justify transferring responsibility for the liability from the trustee to the trust fund.

We shall now consider some of the cases which suggest that the existence of encouragement in conjunction with the receipt of an incontrovertible benefit may justify the application of a restitutionary remedy. The importance of this line of authority to restitutionary doctrine and the operation of the multi-perspective analysis warrants a detailed examination.

\(^97\) In the sense that although there was no valid request, the recipient of the benefit either directly or through its agents, encouraged the plaintiff to confer the benefit.
One of the cases which suggest this is Craven-Ellis v. Canons Limited.\(^98\) From our earlier discussion of this case it will be recalled that in the belief that his appointment as managing director of the defendant was valid the plaintiff performed services which the defendant would have had to obtain.

As we have seen this case has been cited as an example of factual incontrovertible benefit. In this case there is also the existence of encouragement. Although the plaintiff's appointment was invalid the Board's actions provide evidence of 'encouragement'.

Further support for a right of recovery based on the conferment of an incontrovertible benefit after encouragement from the recipient is contained within the judgment, albeit a dissenting judgment, of Sir Wilfred Greene M.R. in Re Cleadon Trust, Ltd.\(^99\)

The appellant and another were the sole directors of Cleadon Trust Ltd and two subsidiaries thereof. The subsidiary companies had entered into contracts for the erection of a number of flats and Cleadon Trust Ltd had guaranteed their financial obligations. When the payments became due, however, neither the subsidiaries nor Cleadon Trust Ltd had sufficient funds to meet them. In these circumstances the appellant advanced the necessary funds. All three companies subsequently went into liquidation and the appellant

\(^98\). [1936] 2 KB 403 (CA)

\(^99\). (1938) 4 All ER 518 (CA)
sought to prove in the winding up of Cleadon Trust Ltd.

Initially these advances had been made by arrangement with the managing director of Cleadon Trust Ltd. After he had vacated this office, the advances were made by arrangement with the Company secretary. Although a resolution was passed by the directors confirming these advances it was held to be invalid.\textsuperscript{100}

The situation was further complicated by the appellant making most of the payments direct to the third party. It will be recalled that except in the situation of a secondary obligation, a payment on account of another's debt does not discharge the debt. For the debt to be discharged the payment must be adopted by the debtor. Because Cleadon Trust Ltd was in "a state of legal paralysis"\textsuperscript{101} arising from the lack of a quorum of directors, the appellant's payments were not ratified.\textsuperscript{102} In this situation the debts remained legally

\textsuperscript{100}. Pursuant to its Articles of Association two directors were necessary to establish a quorum and no director could vote in respect of any contract or arrangement of which he was an interested party. Unfortunately as the appellant was an interested party it was held that there had been no quorum when the resolution had been purportedly made. The resolution was therefore a nullity.

\textsuperscript{101}. Friedmann, \textit{Unjust Enrichment: Re Cleadon Trust} (1939) M L R 315 at 316

\textsuperscript{102}. It has been suggested however that "the liquidator's own decision to treat the obligation as extinguished ... amounted to a free
undischarged.

Notwithstanding the legal requirements associated with a discharge of a debt, it appears that the creditors regarded their debts as discharged and the appellant never sought to recover from them. There was no dispute that Cleadon Trust Ltd had benefited by the appellant's actions.

Greene M.R. considered that the decision of *Sinclair v. Brougham*, the borrowing in excess of authority cases, and the ultra vires borrowing cases belong to the same 'family'. They "illustrate the method by which equity in certain circumstances will assist a person who has no right at law but is able to show that money belonging to himself has gone to swell the assets of the person, or for whose benefit, he has paid it."  


103. The assets of Cleadon Trust Ltd included debentures granted by the subsideries. Even if the subsideries had made the payments it would have been at the expense of Cleadon Trust Ltd recovering on the debentures. Similarly if Cleadon Trust Ltd had made the payments its other assets would have been diminished.

104. [1914] AC 398 (HL)

105. *Re Cleadon Trust, Ltd* [1938] 4 All ER 518 at 527 (HL)
Although the facts of Re Cleadon Trust, Ltd\textsuperscript{106} did not bring it within the principle of the ultra vires borrowing cases\textsuperscript{107} or the decision of Sinclair v. Brougham,\textsuperscript{108} the Master of the Rolls considered that the case before him came within the principle expounded in the borrowing in excess of authority cases.

The significance of this line of authority warrants a brief divergence to examine it more closely. The first recognition of a right of recovery in this situation occurred in respect of loans made to married woman to pay for necessities. Until last century married woman lacked authority to borrow money, or incur debts. Nevertheless as the agent of her husband, the married woman could pledge his credit for the purchase of necessities.

Notwithstanding this power to pledge her husband's credit if the married woman purchased necessities and then borrowed money to pay

\textsuperscript{106} supra

\textsuperscript{107} In the ultra vires borrowing cases, by virtue of the operation of the doctrine of ultra vires, this remedy can only be available in those situations in which the borrowing was used to discharge a valid debt. Only a reduction in the borrower's liabilities will enable the lender to assert a pro tanto validation of the loan. See Re Cork and Youghal Railway (1869) L R 4 Ch App 748 (CA Ch)

\textsuperscript{108} [1914] AC 398 (HL). Unlike Cleadon Trust Ltd, in that case the recipient Society purportedly received the money.
for them, the common law did not recognise that the lender had any right of recovery against the husband.\textsuperscript{109}

To the extent that the proceeds of the loan had been employed in paying for the necessities, however, equity subrogated to the lender the right of the supplier of the necessities to sue the husband.

This equitable remedy was recognised in \textit{Jenner v. Morris},\textsuperscript{110} the Lord Chancellor, Lord Campbell saying:

"... Courts of law will not recognize any privity between the husband and a person who has supplied his wife with money to purchase necessaries, or pays the tradespeople who have furnished them. Nevertheless, it has been laid down from ancient times that a court of equity will allow the party who has advanced the money which is proved to have been actually employed in paying for necessities furnished to the deserted wife to stand in the shoes of the tradespeople who furnished the necessaries, and to have a remedy for the amount against the husband."\textsuperscript{111}

\textsuperscript{109} The common law was unable in this situation to give a remedy because "according to the necessary form of action for the recovery of the money, the court of law cannot look behind the advance and enter into the application of the money" which may, therefore, have been applied in some other way than in the purchase of necessities. Goff and Jones, \textit{The Law of Restitution} supra at 556 quoting \textit{Jenner v. Morris} (1861) 3 DeG F & J 45; 30 L J Ch 361

\textsuperscript{110} (1861) 3 DeG F & J 45; 30 L J Ch 361

\textsuperscript{111} Ibid. at 51-52; 362
Since *Bannatyne v. D. & C. MacIver*\textsuperscript{112} it has also been recognised that a similar remedy applies to unauthorised borrowings by agents. As Romer L.J. noted:-

"Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorised, or ratified, or adopted by the principal, then, though the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal."\textsuperscript{113}

Against this background we can now consider the judgment of Greene M.R.. Unlike the majority of the Court of Appeal, Greene M.R. would have granted recovery.\textsuperscript{114} He did not consider that this remedy was

\textbf{112. [1906] 1 KB 103 (CA)}

\textbf{113. Ibid. at 109}

\textbf{114. The majority considered that the remedy developed in the borrowing in excess of authority cases did not arise from the receipt of a benefit. They arose from the adoption of the loan in discharging properly incurred liabilities by the "debtor" or a person authorised to do so.}

"Let it be assumed that A requests B to advance money to C, A being a person who has no authority from C to make the request (whether because C is a company whose powers are limited in such a way as to make it ultra vires on C's part to make such a request, or whether because A, by professing to act as C's authorised agent to make the request, has in fact no such authority): let it be further assumed that B, in response to the request, in fact places the money under the control of C or C's agents, and C, or an agent authorised by C to pay off C's debts, uses the money or procures the
confined to situations in which the borrowed money had been used by someone in authority to pay debts.

"I cannot see that it makes any difference whether the agent obtains the money himself from the lender or requests the lender to make the payment direct to the principal's creditor. In each case, if the agent had in fact had authority, the principal would have become liable to the lender and, if the lender is entitled to recover in the one case in spite of the absence of authority, I can see no logical reason why he should not be similarly entitled in the other."115

In support of this interpretation of the principle Greene M.R. referred to B. Liggett (Liverpool) Ltd v. Barclays Bank Ltd116 and

money to be used in or towards this charge of C's debt. On these assumed facts a court of equity will treat B as entitled to be recuped by C as sum equal to the amount so used in or towards discharging C's debts...

It is to be observed that the equity cannot operate against C (the company or the principal) merely because C has in fact received a benefit from B's actions in providing the money; that fact alone, as Falcke's case has settled (so far as this court is concerned), would not set up an equity against C. The equity must, it would seem, arise from the fact that C, by himself or by a person authorised to act, in the matter of payment of C's debts, for C, has used the money so as to obtain a benefit for C. The benefit has not been an unsought benefit conferred on C behind his back. It is a benefit which C has obtained for himself by using (either himself or by his agent) B's money as his own. It is his conduct in so using B's money which makes it unconscientious that he should retain the benefit while refusing recognition of B's just claim to recruitment." Re Cleadon Trust, Ltd supra at 322-324 per Clausen LJ..

Goff and Jones, The Law of Restitution supra at 552 note that "the report says A but it is plainly B whose money has been used to benefit C."

115. Re Cleadon Trust Ltd [1938] 4 All ER 518 at 527-528

116. [1928] 1 KB 48 (KBD)
In his capacity as one of the Company directors Liggett signed a number of cheques in favour of Company creditors. The Company's cheques, however, were required to be signed by two directors. Notwithstanding this irregularity the defendant bank honoured the cheques and sought to debit the company's bank account. Wright J. upheld the bank's claim.

Goff and Jones\textsuperscript{118} note that on the basis of the majority's decision in Re Cleadon Trust, Ltd\textsuperscript{119} Wright J. was justified in doing so only if Liggett had authority to pay the debts. Nevertheless "[S]uch authority was never held to exist, and was clearly not regarded as important by Wright J.; indeed it can only be inferred from the fact that Liggett was in reality conducting the company's business at the relevant time."\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{117} Jenner v. Morris.\textsuperscript{117}
\item \textsuperscript{118} Goff and Jones, The Law of Restitution supra
\item \textsuperscript{119} [1938] 4 All ER 518 (CA)
\item \textsuperscript{120} Goff and Jones, The Law of Restitution supra at 554
\end{itemize}
Greene M.R. considered, however, that "[t]he debt entry ... [was] justified, because the bank made the payment to the creditor of the company at the request of a person purporting to act on behalf of the company in spite of the fact that to the knowledge of the bank he had no authority."\textsuperscript{121}

The reference to a lack of authority can be interpreted as meaning a lack of authority to borrow. Alternatively it can be interpreted as a lack of authority to pay the debt. When considering the situation in which a cheque was honoured when the account was in credit, Greene M.R. thought that the bank "... was doing nothing more than using its own money to pay the creditor at the request of an agent of the company who had no authority in that behalf."\textsuperscript{122} By virtue of this passage and the context in which these remarks were made it is considered that he was referring to the latter situation.

In considering Jenner v. Morris\textsuperscript{123} and the application of this remedy to the situation of borrowing by married women to pay for necessities, Greene M.R. noted that the principle stated by the Lord Chancellor, Lord Campbell\textsuperscript{124} "... refers, not only to the case where

\textsuperscript{121.} Re Cleadon Trust, Ltd [1938] 4 All ER 518 at 528 (CA)

\textsuperscript{122.} Ibid. at 528

\textsuperscript{123.} (1861) 3 DeG F & J 45; 30 L J Ch 361

\textsuperscript{124.} Lord Campbell L.C. had said:-

"... Courts of law will not recognize any privity between the husband and a person who has supplied his wife with money to
the money is actually supplied to the wife, but also to the case where the person providing the money pays the tradespeople direct. The wife had no authority to require such payment, and, although she had authority to provide herself with necessaries, and to pay for them, in the second case mentioned by Lord Campbell, L.C., it was not she that made the payment at all.  

Goff and Jones suggest that the reasoning of Greene M.R. "... fails to reconcile the equitable right with the rule that mere payment to another's creditor will not alone entitle a stranger to repayment by the debtor." In the absence of someone having authority to discharge authorised debts with the proceeds of the unauthorised loan it is argued that the principal has therefore not adopted the benefit of the unauthorised borrowing.

Notwithstanding the legal requirements associated with the discharge of a debt, in both B. Liggett (Liverpool) Ltd v. Barclays Bank purchase necessaries, or pays the tradespeople who have furnished them. Nevertheless, it has been laid down from ancient times that a court of equity will allow the party who has advanced the money which is proved to have been actually employed in paying for necessities furnished to the deserted wife to stand in the shoes of the tradespeople who furnished the necessaries, and to have a remedy for the amount against the husband." Jenner v. Morris supra at 51-52; 362

125. Re Cleadon Trust, Ltd [1938] 4 All ER 518 at 530 (CA)

126. Goff and Jones, The Law of Restitution supra

127. Ibid. at 553-4
Ltd\textsuperscript{128} and Re Cleadon Trust, Ltd\textsuperscript{129} the companies received factual incontrovertible benefits. No reasonable man would dispute that they had received a benefit. Demonstrably their net assets had swollen by being saved repayment of debts. Although these debts may not have been legally discharged, the creditors in respect of them regarded the debts as having been satisfied. There is also no evidence that the companies disputed their debts.

The same reasoning applies to the situation described by Lord Selbourne L.C. in Jenner v. Morris\textsuperscript{130} in which the lender paid the money direct to the tradesmen.

These cases are also similar in that the lender was not acting officiously, but as in Craven-Ellis v. Canons Ltd\textsuperscript{131} at the purported request of the recipient, or an agent thereof.

Notwithstanding that an unauthorised loan has not been "ratified" (in the sense that it was used to discharge a debt or otherwise benefit\textsuperscript{132} the recipient by someone having authority to do so), it

\begin{itemize}
  \item 128. [1928] 1 KB 48 (KBD)
  \item 129. [1938] 4 All ER 518 (CA)
  \item 130. (1861) 3 DeG F & J 45; 30 L J Ch 361
  \item 131. [1938] 2 KB 403 (CA)
  \item 132. To be compatible with the ultra vires doctrine, the traditional rationale for equity's recognition of a remedy in the situation of ultra vires borrowing is the discharge of an authorised debt.
\end{itemize}
is submitted that the judgment of Greene M.R. is correct.\textsuperscript{133} To the extent that the recipient has been incontrovertibly benefited and the lender has not acted officiously but with the encouragement of the 'recipient', a right of recovery should exist.

Further support for this basis of recovery is contained within the judgment of Scarman L.J. in \textit{Owen v. Tate}.\textsuperscript{134}

On the security of property owned by a Miss Lightfoot, the defendants had obtained a loan from a bank. Miss Lightfoot subsequently sought advice and assistance from the plaintiff. Without advising the defendants, the plaintiff deposited money into the bank as a guarantee for the repayment of the loan up to a specified amount.

considering that the rationale depends on the authorised use of the loan, Goff and Jones \textit{The Law of Restitution} supra at 554 argue that in the context of unauthorised borrowing the remedy extends to every situation in which the proceeds have been used in an authorised manner.

\textsuperscript{133} As recognised by Greene M.R. this rationale is not available in the situation of an ultra vires borrowing. In that situation equity's intervention is dependent on the money being used to legally discharge the debt. Only a reduction in the borrowers liabilities will enable the lender to assert a pro tanto validation of the loan without infringing the ultra vires doctrine.

\textsuperscript{134} [1975] 2 All ER 129 (CA)
On receipt of the plaintiff's guarantee the bank released their security over Miss Lightfoot's property. The defendants subsequently became aware of the plaintiff's actions and asked the bank to enforce the guarantee.

Scarman L.J. (with whom the other members of the Court agreed) considered that in resolving such cases the Court should look at all the circumstances and against these determine whether it was "just and reasonable" that a right of reimbursement should arise.

According to Scarman L.J. the way in which the 'benefit' was conferred is a relevant consideration. "If, for instance, the plaintiff has conferred a benefit on the defendant behind his back in circumstances in which the beneficiary has no option but to accept the benefit, it is highly likely that the courts will say that there is no right of indemnity or reimbursement." 

In Owen v. Tate the Court held that it was not just and reasonable in the circumstances to recognise a right of recovery.

135. Ibid. at 132. Support for this was obtained from the judgment of Lord Wright M.R. in Brook's Wharf and Bull Wharf Ltd v. Goodman Brothers [1936] 3 All ER 696 at 707 (CA)

136. Ibid. at 133-134

137. [1975] 2 All ER 129 (CA)
"[T]he plaintiff acted not only behind the backs of the defendants initially, but in the interests of another, and despite their protest."138

We shall re-examine the relevance of this line of authority later in conjunction with our consideration of the operation of the multi-perspective analysis. Nevertheless it is important at this stage to note that in situations in which, because of the encouragement given to the trustee by the cestui(s) que trust, it is just and reasonable for the trustee to incur an unauthorised liability, this line of authority supports the imposition of ultimate responsibility for the discharge of that liability upon the trust fund.

The precondition that the plaintiff did not confer the benefit while performing an obligation which s/he owed to a third party may also deny a restitutionary remedy to the creditor. It will be recalled that this is another limit to the general right to restitution propounded by Goff and Jones.139

iii. Recovery Denied if the Plaintiff was Performing a Contractual Obligation to a Third Party140

The rationale for this limitation is, according to Goff and

138. Ibid. at 135 per Scarman L.J.

139. Goff and Jones, The Law of Restitution supra

140. Goff and Jones, The Law of Restitution supra at 39-42
Jones, 141 "the assumption that it is unwise to cut across contractual boundaries and to redistribute to a stranger, such as the owner 142 the risks which the plaintiff implicitly agreed to bear when he contracted with a third party ... " 143

The decision of the Ontario Court of Appeal in Nicholson v St. Denis 144 provides an example of such a situation. Pursuant to an agreement of sale the co-defendant (Labelle) obtained possession of a property from St. Denis. Notwithstanding Labelle's possession, legal title was not to pass until Labelle had paid the purchase price in the manner provided for in the contract.

Labelle later entered into a contract with Nicholson for the installation of aluminum siding and ledge rock stone on these premises. Nicholson believed that Labelle was the owner of this property and had taken the precaution of making the contract subject to confirmation from Labelle's bankers that Labelle had the financial ability to pay the contract price. St. Denis was also unaware of the existence of Nicholson and Nicholson's contract until that contract had been performed.

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141. Goff and Jones, The Law of Restitution supra

142. For instance the cestui(s) que trust.

143. Goff and Jones, The Law of Restitution supra at 39

144. (1975) 8 OR (2d) 315 (CA (Ont))
Labelle defaulted in his obligations under both contracts. St. Denis then regained possession of the property while Nicholson commenced litigation against both Labelle and St. Denis. Although Nicholson obtained judgment against Labelle, he continued his action, the subject of this appeal, against St. Denis. Nicholson sought to recover from St. Denis the costs of the improvements on the ground that St. Denis had "received the benefit of the said work".145

The trial judge found in favour of Nicholson. He held that "St. Denis had received and retained a benefit 'which is against conscience that he should keep'".146 On appeal, however, this judgment was overturned.

On considering restitutionary relief the Supreme Court of Ontario held "that in almost all of the cases the facts establish that there was a special relationship between the parties... which relationship would have made it unjust for the defendant to retain the benefit conferred on him by the plaintiff..."147

The Court considered that such a relationship did not exist in this

145. Ibid. at 316 per MacKinnon J.A.

146. Ibid. at 317 per MacKinnon J.A.

147. Idem.
"[Nicholson] had no agreement or relationship of any kind with St Denis. Further, the plaintiff had an enforceable contract with Labelle, on which contract he has sued and recovered judgment. The plaintiff did not do the work under any mistaken belief that he held title to the property, nor did he take any steps to ascertain just what Labelle's interest, if any, was in the property. Further, when it became apparent immediately after the work was completed that he was going to have difficulty securing payment from Labelle, he took no steps to secure whatever rights he may have had under the Mechanics Lien Act, R.S.O. 1970, c.267, within the limitation period imposed by that Act.

St. Denis never sought nor desired the work to be carried out on the property, and was given no opportunity to express his position until long after the work was completed. He has been guilty of no wrong doing, nor of encouraging the plaintiff in his work. I can see no grounds, under the circumstances of this case, for extending the doctrine of unjust enrichment or of restitution to the circumstances of this case."148

The operation of the precondition that the plaintiff did not confer the benefit while performing an obligation which s/he owed to a third party may be contrasted with the creditor's right of subrogation to the trustee's right of indemnity. As we shall see although the creditor traditionally has no direct right of recovery against the trust fund, in some situations the trustee's rights of indemnity are transferred to him. Through these rights the creditor can seek recovery from the trust fund. Pursuant to the subrogation theory the creditor's contractual obligations with the trustee are immaterial.

Carried to an extreme this 'limit' to relief would preclude any

148. Ibid. at 320 per MacKinnon J.A.
'restitutionary' right of recovery against the trust fund and/or the cestui(s) que trust by the creditor. Nevertheless for reasons which will be developed later it is considered that this limit (if applicable) should be restricted to those situations in which the creditor has no knowledge of the trust and took the risk of receiving payment from the trustee.

B. The Theory Advanced by Birks

i. Restitution Dependent on the Plaintiff's State of Mind

In contrast with Goff and Jones, Birks prefers not to advance a generalised right to restitution. He argues that the receipt of the benefit at the expense of the plaintiff per se is insufficient to justify relief.

In Birks discussion of this aspect of the principle of unjust enrichment he classifies the existing restitutionary remedies according to the factor which he believes makes the recipients retention of the benefit unjust. These categories are described as: - i) non voluntary transfer; ii) free acceptance; and iii) others.

The essence of the category of non voluntary transfer is "that the plaintiff's judgment was vitiated. Either he did not know that the defendant was being enriched at his expense or else he knew but was disabled by a mistake or by pressure or by any inequality." 151 This

149. Goff and Jones, The Law of Restitution supra

150. Birks, An Introduction to The Law of Restitution supra

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category reflects the situations in which restitutionary remedies are principally available.

It will be recalled that free acceptance\textsuperscript{152} by the defendant of a benefit repudiates the argument of subject devaluation. It also counters any argument that the retention of that benefit is unjust. The defendant has freely chosen to receive that benefit in circumstances in which s/he knew it was offered with an expectation of recompense.

The final category comprises miscellaneous cases which do not come within the rubric of the other two categories. These cases can be regarded as specific exceptions to the Falcke principle and are justified by reference to other policy considerations. One example given by Birks is the retention of unlawful taxes.\textsuperscript{153}

In the context of a non-voluntary transfer, Birks emphasis on the plaintiff's state of mind is reflected in the substantive categories such as mistake in which restitutionary claims are presently recog-

\textsuperscript{151} Birks, \textit{An Introduction to The Law of Restitution} supra at 219

\textsuperscript{152} Free acceptance occurs when the defendant accepts the benefit at a time when s/he had an opportunity to reject them or the knowledge that they were to be paid for

\textsuperscript{153} Birks, \textit{An Introduction to The Law of Restitution} supra at 294-313

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Pursuant to Birks' theory\textsuperscript{154} of unjust enrichment the creditor or trustee seeking restitutionary relief would have to prove more than the conferment of a benefit on the trust fund. The creditor or trustee would have to show that the cestui(s) que trust had freely accepted the benefit. Alternatively s/he would have to show that in conferring the benefit s/he was acting under an operative mistake or in some other way conferred the benefit non-voluntarily.

\textbf{ii. Problems Associated with this Theory}

Notwithstanding the importance placed by Birks\textsuperscript{155} on the plaintiff's state of mind in determining whether restitutionary relief should be granted he recognises that this emphasis raises (inter alia) "a metaphysical problem".

"Th[is] problem arises because mental processes cannot be weighed and measured. Will power has no voltage. So, if we ask, in relation to the mental process which goes into a decision to transfer wealth, how much disturbance shall count as an operative, restitution - yielding vitation (or, more particularly, how much pressure or how serious a mistake), the truth is that there can be no exact answer. There are no precise tests to choose from. This difficulty becomes acute whenever the facts leave room to say that the plaintiff might have made the transfer anyway."\textsuperscript{156}

\textbf{References}

154. Ibid.

155. Ibid.

156. Birks, \textit{An Introduction to The Law of Restitution} supra at 157
The difficulties associated with undue concentration on the plaintiff's state of mind has been discussed by R.J. Sutton.157

"The[se] difficulties ... are well illustrated in Birks treatment of mistake and duress in his chapter on 'vitiated consent'. Birks readily admits that 'mental processes cannot be weighed and measured' and that '[w]illpower has no voltage' (Introduction, p. 157). Yet he shrinks from Goff and Jones' logical proposition, that any mistake should be sufficient if it 'causes' the plaintiff to make the payment. This in Birks view, is inconsistent with the 'instinctive' view found in the case law (pp. 157-158), expressing a supposed 'fear' that there will be 'just too much restitution' (p. 148). Similarly, he finds that the authorities offer a perfectly workable definition of duress; it occurs when the defendants improper threat (p. 177) is a factor operating on the mind of the plaintiff when he enters the impugned transaction (p. 181). But again he draws back from the consequences of his argument and (in an uncharacteristic lapse into the language of moral fog) suggests that relief should be limited to cases where the defendant has 'sought, malafide, to exploit the weakness of the plaintiff' (p. 183)."

C. The Appropriateness of These Theories in Determining Ultimate Responsibility for Trust Debts

The differences in the theories of unjust enrichment advanced by Goff and Jones158, and Birks159 can be attributed to the apparent aims of their authors. Goff and Jones provide a framework for the recognition and development of a generalised right to restitution.

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158. Goff and Jones, The Law of Restitution supra

159. Birks, An Introduction to The Law of Restitution supra

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By contrast, although Birks provides an analysis of the principle of unjust enrichment, his theory is introspective; proving that this principle does exist and that it underlies recognised remedies. Birks' theory therefore provides little direct assistance for a court in determining ultimate responsibility for trust debts.

While the theory advanced by Goff and Jones does provide a framework for future developments, including the trust situation, it is too general. Further guidance should be given to the courts to assist them determine ultimate responsibility for trust debts.

In the context of restitutionary remedies Sutton considers that "this is the law of complex undercurrents; its vitality is far from completely expressed by saying that in all cases that 'depends' upon a principle of unjust enrichment or is expressive of some generalised right to restitution, as distinct from rights given under the Law of Contract, property or torts. The policies applicable to the prior relationship between the parties (whether as persons who have made a contract, or contending claimants to property, or confider and confidant) will often determine the outcome."\textsuperscript{160}

It is considered that a similar approach is the only way to determine ultimate responsibility for trust debts. As we shall see such an approach is contained within the multi-perspective analysis.

\textsuperscript{160} Sutton, Book Review, The Law of Restitution supra at 513
Before we consider the operation of the multi-perspective analysis we shall, in the succeeding three parts of this paper, examine the traditional approach taken by the courts to determine ultimate responsibility for trust debts, modifications to this approach and alternative approaches.
# PART II

## THE TRADITIONAL APPROACH

### THE TRUSTEE'S RIGHT OF INDEMNITY

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I

INTRODUCTION

It will be recalled that the Court of Chancery solved the issue of ultimate responsibility for trust debts by conferring on the trustee a right of indemnity.

In this part of the paper we shall examine the operation of the right of indemnity from the perspectives of the both the trustee and the cestui(s) que trust.

As a judicial device to determine ultimate responsibility for trust debts, the trustee's right of indemnity does not provide a unified solution. It merely facilitates the apportionment of responsibility for trust debts between the trustee on the one hand and the trust fund and/or the cestui(s) que trust on the other.

The trustee's right of indemnity is premised on his ultimate responsibility for trust debts. Should no right of indemnity be available, the trustee is responsible for the discharge of the debt. This has been the creditor's traditional safeguard to payment. It follows that those situations in which the protection provided by the trustee's personal responsibility proves to be illusory needs particular examination. We shall examine these situations in Part III of this paper.
II THE TRUSTEE'S RIGHT TO BE INDEMNIFIED

Reference to the trustee's right of indemnity is a misnomer. It suggests that the trustee derives the right to be indemnified from one source. A trustee may be entitled to be indemnified from a number of different sources. The Court of Chancery recognises two sources from which a trustee may be entitled to be indemnified; the trust fund and the cestui(s) que trust.

Supplementing the equitable right of indemnity against the trust fund is a statutory right conferred by section 38(2) of the Trustee Act 1956. An express right of indemnity may also be conferred by the settlor.

1. The Equitable Right of Indemnity Against the Trust Fund

Although the trustee is personally responsible for the discharge of trust debts, the Court of Chancery recognised that the cestui(s) que trust, through the medium of the trust fund, should bear ultimate responsibility. As Lindley L.J. noted "such an indemnity is the price paid by the cestuis que trust for the gratuitous and onerous services of trustees."¹

As explained by Lord Eldon in Worrall v Harford² "[i]t is in the na-

¹ In re Beddoe, Downes v. Cottam [1893] 1 Ch 547 at 558 (CA)
² (1802) 8 Ves Jnr 4; 32 ER 250 (HC Ch)
ture of the office of a trustee, whether expressed in the instru-
ment, or not that the trust property shall reimburse him all the
charges and expenses incurred in the execution of the trust. That
is implied in every such deed. 3

The trustee's equitable right of indemnity against the trust fund
has been the principal method of imposing responsibility for trust
debts upon the cestui(s) que trust. Viewed as incidental to and in-
herent in the office of a trustee, this right of indemnity would
also appear to be incapable of exclusion. 4

A. Rights of Exoneration and Recoupment

The trustee's equitable right of indemnity against the trust fund
comprises two components. The first component may be described as
one of exoneration. The trustee is not required to discharge the
trust debt and then seek indemnity. The trustee may discharge the
debt directly from the trust fund.

As a corollary of the right of exoneration, the trustee has a right
of recoupment. In situations in which the trustee has paid the debt
s/he has the right to be repaid from the trust fund. This is the
second component of the right of indemnity against the trust fund.

3. Ibid. at 9; 252

4. See also Re The Exhall Coal Company Limited (1866) 35 Beav 949;
55 ER 970 (Rolls Court)
The existence of these two components of the right of indemnity was recognised in *In re Blundell v. Blundell*.\(^5\) Stirling J. said:-

"What is the right of indemnity? I apprehend that in equity, at all events, it is not a right of the trustee to be indemnified only after he has made the necessary payments ... but that he is entitled to be indemnified, not merely against the payments actually made, but against his liability. ... It seems to me, therefore, that a trustee has a right to resort in the first instance to the trust estate to enable him to make the necessary payments to the persons whom he employs to assist him in the administration of the trust estate; that he is not bound in the first instance to pay those persons out of his own pocket, and then recoup himself out of the trust estate, but that he can properly in the first instance resort to the trust estate, and pay those persons whom he has properly employed the proper remuneration out of the trust estate."\(^6\)

B. **Indemnity only available for "properly incurred" debts**

The trustee's right of indemnity against the trust fund does not extend to all debts incurred by the trustee. Irrespective of whether the trustee is seeking exoneration or recoupment this right of indemnity is only available for those debts which have been "properly incurred".\(^7\)

For a debt to be "properly incurred" two conditions must be satisfied. The trustee must have been authorised to incur it. In

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5. (1890) 40 Ch D 370 (Ch)

6. Ibid. at 367 per Stirling J.

7. *Re Beddoe, Downes v. Cottam* [1893] 1 Ch 547 (CA); *Stott v. Milne* (1884) 25 Ch D 710 (CA)
incurring the debt the trustee must also have employed the requisite standard of diligence and care. As a consequence of exceeding the terms of the trust any improperly incurred liability is borne personally by the trustee.

The precondition that the liability be authorised suggests that a trustee can never be indemnified for a debt arising from a tortious act. Provided two requirements are satisfied, however, a trustee is entitled to be indemnified for such liabilities.

The first requirement is that the tort must have occurred in the proper execution of the trust. The second requirement is that responsibility for the tort cannot be attributable personally to the trustee. Such responsibility arises if the trustee was personally at fault in causing the tort or in employing the tortfeasor.

The operation of this principle is typically displayed in Benett v. Wyndham. Acting on the instructions of the trustee, the bailiff of the estate of land comprising part of the trust fund instructed woodcutters to fell a number of trees. A passer-by was injured when

8. In Re Beddoe, Downes v. Cottam supra, for instance, the trustee was not entitled to be indemnified the costs of defending an action in a situtation in which there was no reasonable cause for so doing.

9. (1862) 4 DeG F & J 259; 45 ER 1183 (CA Ch). Similar principles were applied in In re Raybould, Raybould v. Turner [1900] 1 Ch 199 (Ch D)
one of the trees fell on him and he successfully sued the trustee for damages.

In subsequent proceedings the Court of Appeal in Chancery held that the trustee had not been personally negligent. The trustee had acted with due diligence. Through the agency of the bailiff the trustee had employed suitably qualified woodcutters. The trustee's instructions were also within the scope of his trust. The trustee was therefore entitled to be indemnified from the trust fund for the damages which had been awarded against him.

C. Indemnity only Available when Trustee is not otherwise in Default to the Trust

Even if a liability was properly incurred a trustee may still be denied a full right of indemnity. This will occur if the trustee is otherwise in default to the trust.

The trustee may be guilty of a breach of trust which completely removes his right of indemnity. The breach of trust may constitute a repudiation of the trustee's obligations; for instance the trustee may have intermingled trust property with his own.10 While the

10. While the writer has been unable to find direct authority for this proposition, it is supported by agency principles. See F.M.B. Reynolds and B.J. Davenport ed, Bowstead on Agency 14th ed, Sweet & Maxwell, London (1976) at196-197 and 207; F.M.B. Reynolds ed, Bowstead on Agency 15th ed, Sweet & Maxwell, London (1985) at 240-241 and 252-253; Hurst v. Holding (1810) 3 Taunt 32; 128 ER 13 (CP) (agent preventing goods reaching principal)
trustee may then incur, what would have been, a properly incurred liability, the breach of trust will constitute a termination of the original trust and therefore the right of indemnity.

Alternatively the trustee may commit a non-fundamental breach of trust. While such a breach of trust does not constitute a termination of the trust, the trustee may have to account for it. The mere commission of any breach of trust, however, does not have this effect.

It has been held that to deprive the trustee of his right of indemnity "the breach [of trust] must be shown to be related to the subject matter of the indemnity."\textsuperscript{11} This was the approach taken in Re Staff Benefits Pty Ltd (in liq)\textsuperscript{12}

The trustee of an investment trust had employed a consultant to advise on an investment strategy. It was unsuccessfully argued that this employment was in breach of trust and therefore the trustee was deprived of his right of indemnity. The Supreme Court of New South Wales considered that to deprive a trustee of his right of indemnity the breach of trust would have had to have resulted in a loss of trust funds. On the facts it was held that even if the consultant's employment had been in breach of trust, there was no evidence of a

\textsuperscript{11} Re Staff Benefits Pty Ltd (in liq) (1979) 4 ACLR 54 at 61 per Needham J. (SC (NSW))

\textsuperscript{12} supra.
resulting loss to the trust fund.

Another way in which the trustee becomes in default to the trust occurs when his general accounts are in arrears. In this situation the value of the trustee's indemnity may be set-off against his liability to the trust. The trustee receives the balance, if any, of the value of the right of indemnity after deducting his own personal liability to the trust.\textsuperscript{13}

If the trustee purports to discharge a liability from the trust fund and the recipient has notice (actual or constructive) of a breach of trust of such a nature "as to preclude the trustee from resorting to the trust fund for payment"\textsuperscript{14} the recipient may be regarded as a constructive trustee. In this situation the recipient would be liable to account to the cestui(s) que trust for the payment.\textsuperscript{15} A

\textsuperscript{13} This ability to set-off the right of indemnity available to the trustee against liability to account to the trust would appear to be founded on the principle that where there is an aggregate fund in which the trustee is beneficially interested, whether by reason of a disposition in the trust or by virtue of the right of indemnity, and to which he has to account to, the trustee is regarded as having satisfied the obligation to account from his beneficial interest in the trust property.

\textsuperscript{14} \textit{In re Blundell}, Blundell v. Blundell (1888) 40 Ch D 370 at 383 per Stirling J. (Ch)

\textsuperscript{15} \textit{In re Blundell}, Blundell v. Blundell (1888) 40 Ch D 370 (Ch)
similar result occurs if the recipient had notice that the trustee is in arrears in his accounts to the trust.

D. **Several Trustees**

In trusts having several trustees the right of indemnity "belongs" to each individual trustee. The action of a trustee therefore does not necessarily reflect upon the right of another trustee to be indemnified. As each trustee is personally liable to discharge the trust liabilities, each is entitled to be indemnified.

A trustee's right of indemnity therefore may survive the default of a co-trustee. Provided the non-offending trustee is not liable for the co-trustee's default his right of indemnity remains.

As Kekewich J. explained in *In re Frith. Newton v. Rolfe*¹⁶:-

"The indemnity to the trustee is not to the trustees as a body, but to each of the trustees. Each of them who has acted properly is entitled to be indemnified against the debts properly incurred by him in the performance of the trusts imposed upon him. The Court prevents a trustee from insisting upon that right unless he comes in with clear accounts; but if he comes in with clear accounts he is not the less entitled to be indemnified because he has a co-trustee who has run away with certain moneys. I am, of course, excluding the case where a trustee who has a clear account is responsible for a co-trustee who has not. If that were so, the trustee who has a clear account of his own would still be found liable to the trust estate, because he would have to make good that which the defaulting trustee owed to the estate. Apart from that case, a trustee who has a clear account is entitled to an indemnity for what he has done quite independently of the question whether another trustee has been found a defaulter or has committed a breach of trust. This is not a question which for this purpose a trustee with

¹⁶. [1902] 1 Ch 342 (Ch)

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Having examined both components of this right of indemnity and the situations in which it is available we shall now consider the sources from which the funds for the indemnity comes and the ability of the trustee to collect the indemnity.

E. Source of Payment

The trust fund provides two sources for the payment of trust debts. There is the capital of the trust fund and the income arising therefrom. As these sources may be "owned" by different cestuis que trust the trustee must act impartially in discharging trust debts. In the absence of specific provisions, trust debts are apportioned between these two sources depending on whether they are of a revenue or capital nature.

F. Charge over the Trust Fund

While the payment of trust debts must be apportioned, the trustee has a "charge" over all the trust fund, both income and corpus. The purpose of the charge is to ensure that the trustee is indemnified. To achieve this the charge confers priority over the beneficial interest of the cestui(s) que trust and exists until the trustee has been indemnified.

17. Ibid. at 346

18. Stott v. Milne (1884) 25 Ch D 710 (CA)
By virtue of its priority the charge deprives the cestui(s) que trust of the right (if any) to call for a distribution of the trust fund. The trustee's charge also survives any transfer of a beneficial interest, or the creation of any other charge over a beneficial interest by a cestui que trust.

This latter situation occurred in Re The Exhall Coal Company (Limited). The cestui que trust - The Exhall Coal Company, issued debentures on the security of its beneficial interest in the trust fund. The trustees right of indemnity, however, was held to have priority over the debenture holders. As the Master of The Rolls, Lord Romilly, explained:-

"[The trustee] is entitled to deduct, out of the trust property in him, all that is necessary for the purpose of repaying him the sums he has properly paid, and of indemnifying him against such sums as he is liable to pay in the discharge of his trust; and, in my opinion, this liability to repay and to indemnify him is the first charge on the property. ... [T]he debenture-holders can only claim the property belonging to the company after payment of the charges previously and properly attaching thereto, of which I think the indemnity of the trustees is one. The debenture-holders can only take all that the company could give, the company could only give the net produce of the property, after discharging the charges properly attaching thereto, and, in my opinion, the first charge on the property is the indemnity of the trustees."

If necessary to indemnify the trustee, the court may authorise a sale of part of or all of the trust fund. The creation of a

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19. (1886) 35 Beav 949; 55 ER 970 (Rolls Court)

20. Re The Exhall Coal Company (Limited) supra at 542-453; 971
mortgage over all or part of the trust fund may similarly be sanctioned by the court.

It has been suggested that the court should only authorise a sale or mortgage if the sale or mortgage would not defeat or substantially impair the accomplishment the trust. In situations in which this would occur it has been further suggested that the court should decline the trustee's request for a sale or mortgage of the trust fund and postpone his indemnification until the termination of the trust.

Darke v. Williamson\(^{21}\) is usually cited for this proposition.\(^{22}\) The trustees of a Baptist chappel were authorised to demolish the existing chapel and erect a new one. To meet the cost of construction the trustees borrowed money. One of the trustees personally repaid the loan and on his death his personal representatives requested the court for a decree of foreclosure or sale. Although recognising the right of indemnity, the Court refused this request on the grounds that such an order would defeat the purpose for which the trust was established.

The situation which arose in Darke v. Williamson\(^{23}\) appears to be

\(^{21}\) (1858) 25 Beav 622; 53 ER 774 (Rolls Court)

unusual. In the context of most trusts a sale of trust property would not defeat or substantially impair the trust. The sale of land would not, for instance, defeat the purposes of a trust under which the trustees had the power to purchase and resell land. In *Darke v. Williamson* the purpose of the trust was to erect the chappel which the personal representative was seeking to be sold.

It may also be argued that the Court in *Darke v. Williamson* was not imposing a universal restriction against selling trust property but, in considering the exercise of its discretion whether to grant the order, displayed its sympathetic disposition towards charitable trusts.

Authorisation to sell or mortgage trust property may be conferred on the trustees by the trust instrument eliminating the need to seek the court's approval.

23. supra.

24. See *In re Pumfry, decd* (1882) 22 Ch D 255 (Ch)

25. (1858) 25 Beav 622; 53 ER 774 (Rolls Court)

26. supra.
2. **The Equitable Right of Indemnity Against the Cestui(s) Que Trust**

We have seen how the trustee provides a shield against the direct imposition of personal responsibility for trust debts upon the cestui(s) que trust. By virtue of their interest in the trust fund however the cestui(s) que trust bear the burden of discharging properly incurred debts. They do so through the operation of the right of indemnity against the trust fund. In some situations the responsibility of the cestui(s) que trust for trust debts may extend further.

**A. Arising from a Request**

If the cestuis que trust are sui juris and have requested the trustee to incur a liability they will be personally responsible for its discharge.27 Similarly if the cestuis que trust have requested the trustee to assume that office they will be personally responsible for properly incurred debts.28

In these situations the cestuis que trust have played an active role in the affairs of the trust. The personal responsibility of the cestuis que trust for trust debts is not restricted, however, to these situations. Personal responsibility may also be imposed upon

27. Balsh v. Hyham (1728) 2 P Wms 453; 24 ER 810 (Ch)

28. Matthews v. Ruggles-Brise [1911] 1 Ch 194 (Ch); Buchan v. Ayre [1915] 2 Ch 474 at 477-8 (Ch)
A cestui que trust who does not play an active role.

B. **Arising from the Operation of the Hardoon v. Belilios Principle**

i. **Introduction**

In *Hardoon v. Belilios* the Judicial Committee of the Privy Council recognised that irrespective of any request, a trustee may have a right of indemnity against a cestui que trust for debts arising from the ownership of trust property.

In this case a firm of sharebrokers acquired a number of partly paid up shares in a banking company. Although the shares were registered in the name of the plaintiff, the sharebrokers retained the beneficial interest. The sharebrokers subsequently assigned their interest to a syndicate which in turn transferred it to the defendant. The plaintiff then unsuccessfully requested the defendant to accept a transfer of the legal ownership of the shares.

The bank became insolvent and several calls were made on the stock. As the titular owner the plaintiff was obliged to pay. The plaintiff then successfully sought recovery of his money from the defendant. In tendering their advice the Judicial Committee opined:

"The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the obligation, are wholly

29. [1901] AC 118 (JC)

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irrelevant and beside the mark. Even where trust property is settled on tenants for life and children, the right of their trustees to be indemnified out of the whole trust estate against any liabilities arising out of any part of it is clear and indisputable. ... Where the only cestui que trust is a person sui juris, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the cestui que trust a personal obligation enforceable in equity to indemnify his trustee. This is no new principle, but is as old as trusts themselves.\(^{30}\)

It is important to note that the responsibility of the cestui que trust to indemnify the trustee arose independently of any request to incur the liability or undertake the trust.

As expressly recognised by the Privy Council in Hardoon v. Belilios\(^{31}\) and subsequently confirmed in Wise v. Perpetual Trustees Company Limited\(^{32}\) this additional right of indemnity does not apply to all trusts.

If the cestui que trust can show some good reason why the trustee should bear the burden of discharging the debt this right of indemnity does not apply. It may also be expressly removed by the trust deed or in a subsequent contract between the trustee and the cestui que trust. Alternatively the circumstances of the case may not war-

\(^{30}\) [1901] AC 118 at 123-124 per Lord Lindley (JC)

\(^{31}\) supra.

\(^{32}\) [1903] AC 139 (JC)
rant its imposition.

On the facts of Hardoon v. Belilios\textsuperscript{33} it is clear that this right of indemnity applies to all trusts in which the cestui que trust is sui juris and the liability arises from the retention of the trust property. It is unclear, however, to what extent the principle applies in other situations. The principal area of uncertainty is trusts having several cestuis que trust.

ii. Trusts having Several Cestuis Que Trust

It may be argued that the operation of the Hardoon v. Belilios\textsuperscript{34} principle is restricted to trusts in which there is only one cestui que trust.

In a number of cases the imposition of responsibility on cestuis que trust can be attributed, however, to this principle.\textsuperscript{35} Uncertainty arises because in all these cases the cestuis que trust played some active role. They have either requested the trustee to assume that office or incur the debt. Such requests are sufficient to warrant the imposition of personal responsibility upon the cestui que trust.

\textsuperscript{33} [1901] AC 118 (JC)

\textsuperscript{34} supra.

\textsuperscript{35} Ex parte Chippendale, Re German Mining Co (1854) 4 DeG M & G 19; 43 ER 415 (CA Ch); Buchan v. Ayre [1915] 2 Ch 474 (Ch); Matthews v. Ruggles-Brise [1911] 1 Ch 194 (Ch)
H.A.J. Ford argues that the *Hardoon v. Belilios* principle is not restricted to trusts in which there is only one cestui que trust. He believes that "[o]ne would expect that the same principle ought to apply where there is more than one beneficiary and all of them are sui juris and entitled to the same interest as absolute owners between them." In support of this argument he notes:

"The Privy Council in *Hardoon v. Belilios* relied on some earlier authority which concerned multiple beneficiaries for the proposition that a sole beneficiary who is sui juris is bound to indemnify even though the trustee does not prove a request by the beneficiary. This reliance suggests that the Privy Council thought that personal liability to indemnify would attach to several beneficiaries having the same interest, all of them being sui juris and absolutely entitled."  

The *Hardoon v. Belilios* principle is rationalised by Ford on the ground of an implied request by the cestui(s) que trust for the trustee to incur the debt. He argues that since the cestui que trust in that case was sui juris and absolutely entitled to the interest under the trust he could, by virtue of the rule in *Saunders* 


37. [1901] AC 118 (JC)

38. Ford, *Trading Trusts And Creditors' Rights* supra at 7


40. supra.
v. Vautier 41 terminate the trust.

As a corollary of the power to terminate the trust, Ford believes that a continuing term allowing the trustee to incur liabilities in the execution of the trust could be inferred. Such an implied term would support the obligation to indemnify the trustee.42

This rationalisation in turn supports the application of the Hardoon v. Belilios43 principle to situations involving cestuis que trust who are sui juris and absolutely entitled to the trust fund. Ford further argues that it also supports extending the principle to situations where the cestuis que trust have successive rather than concurrent interests in the trust property.44

Ford's suggestions have been adopted by the Supreme Court of Victoria in J.W. Boomhead (Vic) Pty Ltd (in Liquidation) v. J.W. Boomhead Pty Ltd.45 The Court considered that the general principle of Hardoon v. Belilios46 applies when there are several cestuis que

41. (1841) 4 Beav 115; 49 ER 282 (Rolls Court)

42. Ford, Trading Trusts And Creditors' Rights supra at 7

43. [1901] AC 118 (JC)

44. Ford, Trading Trusts And Creditors' Rights supra at 7

45. (1985) 9 ACLR 593 (SC (Vic))
trust.

In delivering the judgment of the Court McGarvie J. noted:-

"It was argued that the general principle applies only where there is a sole beneficiary. In Hardoon v. Belilios [1901] AC 118 at 124 the Privy Council stated the law as it applies where the only beneficiary is a person sui juris. It was dealing with a case where there was only one beneficiary. Its statement was in accordance with the sound judicial practice of not stating a principle wider than necessary for the decision of the case. Such a statement should not be construed as though the Privy Council was following the opposite practice of stating the principle as widely as it was possible to state it. Neither the submissions of counsel nor the cases have revealed to me any consideration of principle, concept, fairness or practicality which would justify its restriction to the case of a sole beneficiary."47

iii. Debts Specifically Incurred

On a restrictive interpretation of Hardoon v. Belilios48, this principle could also be restricted to debts which arose from the ownership of trust property and not debts specifically incurred. It will be recalled that in Hardoon v. Belilios49 the debt arose from the ownership of shares.

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46. supra

47. (1985) 9 ACLR 593 at 636 (SC (Vic))

48. [1901] AC 118 (JC)

49. supra.
To paraphrase from the judgment of McGarvie in J W Broomhead (Vic) Pty Ltd (in Liq) v. J W Broomhead Pty Ltd50 there would appear to be no consideration of principle, concept, fairness or practicality, however, which would justify such a restriction. Indeed in that case the Court considered that the Hardoon v. Belilios51 principle extended to all liabilities which had been properly incurred.

3. Right of Indemnity Under

The Trustee Act

Not only is there an equitable right of indemnity against the trust fund; there is also a statutory right. Section 38(2) of the Trustee Act 1956 provides that "a trustee may reimburse himself or pay or discharge out of the trust property all expenses reasonable incurred in or about the execution of the trusts or powers; ...".

The effect of this seemingly explicit section, however, is not certain. It has been said that it "merely gives statutory form to a right which trustees had always had".52 This right is presumably the implied equitable right of indemnity against the trust fund.

This belief is strengthened by the recent decision of the Supreme

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50. (1985) 9 ACLR 593 (SC (Vic))

51. [1901] AC 118 (JC)

Court of Victoria in RWG Management Ltd. v. Commissioner of Corporate Affairs (Vic). The Court held that a similar statutory right of indemnity conferred by the Victorian Trustee Act 1958 was a codification of the implied equitable right of indemnity.

Section 36(2) of the Victorian Trustee Act 1958 mirrors section 30(2) of the Trustee Act 1925 (UK). These sections provide that:

"A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers."

A similar interpretation of section 38(2) of the Trustee Act 1956 is available to a New Zealand court. It can be argued, however, that the New Zealand section is wider than its Victorian cousin. In contrast with the Victorian and English statutes which refer to "expense incurred", the New Zealand provision refers to "expenses reasonably incurred".

In the Victorian section the precondition that the expenses be "properly incurred" can be implied. By virtue of the express inclusion of the condition of reasonableness in the New Zealand section, however, the implication of this additional requirement would appear nonsensical. If this requirement is implied, the statutory right of indemnity would only be available for those expenses which are both properly incurred and reasonable. The statutory right of indemnity would therefore be narrower than the equitable right.

53. (1985) 9 ACLR 739 (SC (Vic))
By expressly including the requirement that the expense be reasonably incurred it can be argued that Parliament considered that the equitable right of indemnity was too narrow. Pursuant to this argument Parliament has formulated a wider test which does not focus on the trustee's authorisation. Provided his actions in incurring the liability were in the circumstances reasonable the trustee is entitled to be indemnified.

This interpretation of section 38(2) would also appear to receive support from the power conferred by section 2(4) of the Trustee Act 1956 to exclude the statutory right of indemnity. We shall examine this power later.\textsuperscript{54}

4. \textbf{Express Right of Indemnity}

In addition to the implied equitable rights of indemnity and the statutory right, the express right conferred on the trustee is that given by the settlor through the medium of the trust deed. Clearly the extent of the right of indemnity will be dependent on the particular terms of the trust. How these terms are interpreted will depend, of course, on the actual words used, their application to the facts and, in cases of doubt, the approaches adopted in similar situation.

\textsuperscript{54} Pages 145-151 infra.
III THE CREDITOR'S RIGHT OF SUBROGATION TO THE TRUSTEE'S RIGHT OF INDEMNITY

1. Introduction

Irrespective of the source or basis of the trustee's right of indemnity, it does not reflect on the creditor's right of recovery. The creditor's right of recovery is against the trustee. The trustee's ultimate responsibility for the trust debt has been and remains the creditor's safeguard of payment.

The personal responsibility of the trustee is not the only right of the creditor. In some situations where this right has failed to reimburse the creditor, s/he has been subrogated\(^{55}\) to the trustee's right of indemnity. A commonplace situation in which the creditor enjoys a right of subrogation is when the trustee becomes insolvent.

This situation occurred in In re Johnson, Shearman v. Robinson.\(^{56}\) In the course of carrying on a business the defendant trustee incurred a number of debts. The creditor's attempts to recover these

\(^{55}\) "Subrogation" is "a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and takes place by operation of law ... ." Orakpo v. Manson Investments Ltd [1977] 3 All ER 1 at 7 per Lord Diplock (HL)

\(^{56}\) (1880) LR 15 Ch D 548 (Ch D)
debts from the defendant were frustrated by the defendant's insol-
vency. Pursuant to the equitable right of indemnity against the
trust fund, however, the defendant was entitled to be indemnified
for these debts. The creditor's therefore sought recovery from the
trust fund.

The Court of Appeal held that these creditors were entitled to be
subrogated to the trustee's right of indemnity. The rationale for
this subrogation was to stop the cestui(s) que trust benefiting at
the creditors' expense.

The classic discussion of the subrogation theory is contained within
the judgment of the Master of Rolls, Sir George Jessel. He said:-

"I understand the doctrine to be this, that where a
trustee is authorised by a testator, or by a settlor ...
... to carry on a business with certain funds which he
gives to the trustee for that purpose, the creditor who
trusts the executor has a right to say, 'I had the per-
sonal liability of the man I trusted, and I have also a
right to be put in his place against the assets; that
is, I have a right to the benefit of indemnity or lien
which he has against the assets devoted to the purposes
of the trade.' The first right is his general right by
contract, because he trusted the trustee or executor: he
has a personal right to sue him and get judgment and
make him a bankrupt. The second right is a mere corol-
ary to those numerous cases in Equity in which persons
are allowed to follow trust assets. The trust assets
having been devoted to carrying on the trade it would
not be right that the cestui que trust should get the
benefit of the trade without paying the liabilities;
therefore the Court says to him, You shall not set up a
trustee who may be a man of straw, and make him a
bankrupt to avoid the responsibility of the assets for
carrying on the trade: the Court puts the creditor, so
to speak, as I understand it, in the place of the
trustee."57

57. (1880) LR 15 Ch D 548 at 552 (Ch D)
Inherent in the operation of the creditor's right of subrogation is the substitution of the creditor for the trustee. The creditor is allowed to stand in the place of the trustee and enjoy whatever rights the trustee has to be indemnified in respect of that debt. It is important to note that the creditor's rights against the trust fund and/or the cestui(s) que trust are derived from the trustee.

If the debt was improperly incurred the creditor can have no right of recourse against the trust fund and/or the cestui(s) que trust. Similarly if the trustee is in default to the trust the creditor's right of recourse is effected.

The derivative nature of the right of subrogation is also displayed in *In re Johnson, Shearman v. Robinson*. The defendant was not only insolvent but was also in default to the trust. Jessel M.R. noted:-

"But if the trustee has wronged the trust estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts has put them into his own pocket, then it appears to me there is no such equity, because the cestui que trust are not taking the benefit. The trustee having pocketed the money, the title of the creditor, so to speak, to be put in the place of the trustee, is a title to get nothing, because nothing is due to the trustee. It does not appear to me that in that case the creditor, who has never contracted for anything, who has only got the benefit of this equity, if I may say so, by means of

58. (1880) LR 15 Ch D 548 (Ch D)
the trustee, through the lucky accident of there being a trust, ought to be put in a better position than any other creditor. I do not see that any Judge has said so."59

"If the right of the creditors is, as is stated by Lord Justice Turner, the right to put themselves, so to speak, in the place of a trustee, who is entitled to an indemnity, of course, if the trustee is not entitled, except on terms to make good a loss to the trust estate, the creditors cannot have a better right ... . [T]he injustice to be avoided is the injustice of the cestui que trust walking off with the assets which have been earned by the use of the property of the creditor: but where the cestui que trust does not get that benefit, there is no injustice as between him and the creditors, and there is no reason for the court interfering at the instance of the creditors to give them a larger right than they have bargained for, namely, their personal right against the trustee."60

59. Ibid. at 552-553

60. Ibid. at 555-556
3. **Operation of the Right of Subrogation**

In considering the operation of the creditor's right of subrogation to the trustee's right of indemnity it must be remembered that the trustee's creditors comprise two distinct classes; "trust creditors" and "personal creditors". "Trust creditors" comprise those creditors for whom the trustee is entitled to seek indemnity from the trust fund and/or the cestui(s) que trust.

"Personal creditors" refers to those creditors who have supplied goods or services to the trustee for his personal use. This group also encompasses improperly incurred "trust" debts. Although these creditors supplied goods or services for use in the trust the trustee has no right of indemnity in respect of them.

A. **Insolvent Trustee**

The distinction between trust creditors and personal creditors become important in the context of an insolvent trustee. Insolvency does not relieve the trustee from ultimate responsibility for trust debts. The creditor may prove the debt and share ratably in the distribution of the trustee's personal property.

i. **Immunity of the Trust Fund from Execution**

The trustee's insolvency also does not deprive the trust fund of its immunity from execution. Section 42(3) of the Insolvency Act 1967

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61 Jennings v. Mather [1901] 1 QB 108 (QBD). Execution cannot ordinarily be levied against trust property because the writ of fi. fa. does not extend to equitable assets unless the whole beneficial
supplies further protection for the trust fund by providing that trust property held by the bankrupt trustee does not pass to the Official Assignee.

ii. Transfer of the Trustee's Rights of Indemnity

While the trust fund per se does not pass to the Official Assignee, trust property due to the trustee pursuant to the right of indemnity does pass. This was the conclusion of both the Divisional Court and Court of Appeal in Jennings v. Mather. As Kennedy J. said in the Divisional Court:-

"Section 44 of the Bankruptcy Act, 1833, is perfectly plain and explicit that Mather's trust property did not pass to his trustee in bankruptcy. It is not divisible among his creditors. That is clear. But, on the other hand, it is equally clear that Mather had a lien or right of indemnity over the assets of the trust estate. ... [I] cannot see why that lien should not have passed to the trustee in bankruptcy of the person carrying on ... [the trust] business. No doubt the property of the trust estate cannot be said to be property divisible among the creditors, yet it is property over which the bankrupt had a lien. Every trade creditor who has a personal right in this case against Mather, and has the interest is in the judgment creditor - Stevens v. Hince (1914) 110 LTR 935. See Generally Finn ed, Essays in Equity Law Book Company, North Ryde NSW (1985) at 151 (being Chapter 8 McPherson, The Insolvent Trading Trust)

62. [1901] 1 QB 108 (QBD); [1902] 1 KB 1 (CA)

63. Section 44 of the Bankruptcy Act 1933 (UK) is identical to section 42(3) of the Insolvency Act 1967.
right to prove against Mather's estate in the 
bankruptcy in respect of debts incurred by Mather in 
the course of carrying on this business has also a 
right through Mather to a satisfaction of that lien 
which Mather had over what is in one sense, no doubt, 
trust property. It seems to me that the lien has 
passed to the trustee in bankruptcy ...."64

Both court's held that the trust property due to the trustee pur-
suant to the right of indemnity passed to the Official Assignee for 
distribution between the creditor's of the insolvent trustee.

This decision in turn raises the question of which class (personal 
and/or trust) of the trustee's creditors are to partake in the dis-
tribution. Two answers to this question have been developed. We 
shall now consider each solution.

B. Distribution Between Personal and Trust Creditors

i. Dependent upon whether it is exoneration or recoupment

One solution is to distribute these funds according to whether they 
are attributable to the trustee's right of exoneration or 
recoupment.65 This was the solution advanced by the Court of Appeal 
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64. Jennings v. Mather [1901] 1 QB 108 at 116-117 (QBD)

65. It will be recalled that the trustees' right of indemnity 
against the trust fund comprises two components, exoneration and 
recoupment. The right of exoneration enables a trustee to discharge 
properly incurred trust debts directly from the trust fund. The 
right of recoupment in turn enables a trustee to reimburse himself 
from the trust fund for those properly incurred trust debts which he 
has personally discharged.

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Judgment had been obtained against a bankrupt trustee for a properly incurred liability. The judgment creditor and the trustee's representative in bankruptcy then commenced an action to recover the judgment debt from the cestui que trust. On the settlement of this action the judgment creditor and the trustee's representative in bankruptcy could not agree on the distribution of proceeds from the settlement.

At first instance the Judge in Bankruptcy held that these proceeds formed part of the bankrupt trustee's personal estate and were therefore divisible amongst all his creditors. From this decision the judgment creditor successfully appealed to the Court of Appeal.

In his judgment Cozens-Hardy M.R. held that the distribution of these proceeds between all the creditors would allow the personal creditors of the trustee (in the guise of the trustee) to profit from his office. He said:-

"The respondent says 'This right to an indemnity which the bankrupt as trustee had against his cestui que trust is property which vests in me as his trustee in bankruptcy and I am bound to apply that like all other assets of the bankrupt for the benefit of all the creditors.' But is that quite so? I cannot think it is. If and when he pays the amount of the [trust] debt he will have a right to treat the money, which he can then sue for from the person who is bound to indemnify [i.e the cestui que trust of trust property], as part of the estate, but unless and until he pays I fail to see

66. [1911] 2 KB 705 (CA)
how it can be in accordance with justice and common fairness that he should be allowed to augment the estate of the bankrupt in a way which results in this, that the greater the liability the greater will be the advantage to the estate. The trustee cannot be allowed to say 'I will take the money recovered under my right of indemnity [ie exoneration] against the claim of St. Thomas's Hospital [the judgment creditor] and will apply it, not towards satisfying the claim of the hospital in the way which the indemnity implies, but as part of the general assets, and I will give no effect whatever to the indemnity except so far as the hospital come in and prove for their claim in the bankruptcy.' To allow that would be to allow a trustee to make a profit out of his position as trustee. It seems to me that it cannot be right that the trustee should be allowed to say more than this: 'If I pay this amount to St. Thomas's Hospital then I can come against the cestui que trust's estate and claim upon that, or, if I do not pay, then I will take proceedings to indemnify myself against the liability which I am under, giving effect to that indemnity in the only way in which effect can reasonably and properly be given to it by applying the money so recovered in the reduction or complete satisfaction, as the case may be, of the amount due to the hospital.'

Support for this solution is provided by the analogous situation of the bankruptcy of a partner. As Sutton notes "[t]he bankruptcy of one partner gives the Assignee no authority to administer any partnership property which comes into his hands, or to distribute any part of it to the partnership creditors. ... Even ... [if the partnership itself becomes bankrupt the Assignee] must keep distinct accounts of the partnership assets and debts and the 'separate estate' of each bankrupt partner." 68

67. In re Richardson, Ex. p. The Governors of St. Thomas's Hospital [1911] 2 KB 705 at 711 (CA)

ii. Between all Creditors

An alternative solution to determining the respective rights of the trustee's creditors is displayed in a number of Australian cases. These cases suggest that whether it be comprised of exoneration or recoupment, the trustee's right of indemnity is an asset which is available for distribution between all the trustee's creditors.

Before we examine these cases we must, however, place them in context. Previously we have considered the situation in which the insolvent trustee is human. Different considerations apply when the trustee is a company.

When a corporate trustee is wound up its property, including the trust fund, remains vested in it. The winding up suspends the directors' powers and confers analogous powers on the liquidator. In the Australian cases we are to examine the companies had nominal assets, usually only a few dollars in share capital. The only source of funds for the payment of the liquidator's expenses has been the property due to the company pursuant to its right of indemnity.

Our examination commences with the decision of the High Court of Australia in Octavo Investments Pty Ltd v. Knight. Although this case did not involve a claim by a liquidator for payment of his expenses it does provide necessary background. Indeed some of the subsequent difficulties have arisen because of problems in inter-

69. (1979) 54 ALJR 87 (HC of A)
Coastline Distributors Pty Ltd ("Coastline") was the trustee of a trading trust and had a fully paid up capital of $5.00. The trading operations were financed through borrowing.

One loan for $100,000.00 was from Octavo Investments Pty Ltd ("Octavo"). In the six months preceding its liquidation Coastline repaid $49,750.00 of this loan. The liquidator successfully sought to have these repayments declared void as constituting a voidable preference.

The ratio decidendi of the decision of the High Court of Australia is relatively narrow. Any payment from an insolvent trustee to a trust creditor which has the effect of giving that creditor a preference, priority or advantage over other trust creditors contravenes section 122 of the Bankruptcy Act (Cth) and is voidable.

The decision has become important, however, for the observations that the right of indemnity confers a "beneficial interest" in the trust fund upon the trustee. After referring to the trustee's charge over the trust fund in situations in which s/he enjoys a right of indemnity Stephen, Manson, Aickin and Wilson JJ. in their joint judgment said:

"In such a case there are then two classes of persons having a beneficial interest in the trust assets: first the cestuis que trustent, ... and secondly, the trustee, in respect of his right to be indemnified out of the trust assets against personal liabilities incurred in the performance of the trust."
These observations have attracted considerable criticism, especially from Ford.\textsuperscript{71} In circumstances in which the trustee has personally discharged a trust debt and is entitled to receive recoupment Ford acknowledges that the trustee does have a "beneficial interest" in the trust fund.\textsuperscript{72} Nevertheless he argues that the right of exoneration does not confer a beneficial interest in the trust property but merely a power over it.\textsuperscript{73}

The observations of the High Court of Australia have been relied upon in support of arguments that the proceeds of the trustee's right of indemnity is available for distribution between all the trustee's creditors. This argument was unsuccessfully advanced in Re Byrne Australia Pty Ltd and the Companies Act.\textsuperscript{74}

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Bryne Australia Pty. Ltd. carried on business as the trustee of a

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70. (1979) 54 ALJR 87 at 89

71. Ford, Trading Trusts and Creditors' Rights supra at 26; See also R Brett, Trusts and Creditors' Rights: Octavo Investments Pty. Ltd. v. Knight (1982) 11 ATR 3

72. Ford, Trading Trusts And Creditors' Rights supra at 26

73. Idem.

74. [1981] 1 NSWLR 394 (SC (NSW))
trading trust. It incurred significant debts and was eventually wound up. Apart from the money due to it by virtue of its right of exoneration the Company lacked sufficient assets to pay the liquidator's fee. Its other creditors were trust creditors.

The liquidator argued that the right of indemnity was "property" which belonged to the trustee and as such was available for distribution between all the creditors. The trust creditors, however, successfully argued that the proceeds from the right of exoneration was available for distribution only between trust creditors.

The Court held that the decision of the High Court of Australia in Octavo Investments Pty Ltd v. Knight did not support the liquidator's argument. Needham J. noted:-

"[Octavo Investments Pty. Ltd. v. Knight] is important in this case not only for what it decides but also for what it does not. Octavo was a creditor of the trust business, and the result of the avoidance of payments made to it would be that the trust fund would be held for distribution equally amongst the creditors. There is no suggestion in the case that there were any creditors other than creditors of the trust business, and there was certainly no suggestion that the 'proprietary interest' which the trustee had in the trust fund was property divisible among the creditors other than those who were subrogated to the trustee's right of indemnity. In other words, the case is not authority for the proposition that, where a trustee company carries on business with a trust fund and incurs liabilities and then is wound up, the whole of the trust fund is property divisible amongst all the company's creditors, whether trust creditors or not. The right of indemnity arises only because the trustee is liable to creditors whose debts arose because of its activities as trustee of the fund. If there is no right of indemnity, there is no 'proprietary interest'. For example, if a company, having various powers in-

75. (1979) 54 ALJR 87 (HC of A)
cluding a power to act as trustee, carries on business on its own account as well as in its capacity as a trustee, it would have no right of indemnity out of the assets of the trust for liabilities it incurred in the business it carried on on its own account, and the creditors of that business would have no right to look to the trust assets for payment of their debts by subrogation to the company's rights."

Unless the liquidator was a trust creditor he was not entitled to partake in this distribution. The claim of the liquidator that he was a trust creditor was determined by the same Court in Re Byrne Australia Pty Ltd and the Companies Act [No 2].

In this second case Needham J. held that the liquidator was not a trust creditor. The liquidator therefore could not look to the money due to the trustee from its right of recoupment for the payment of his expenses and fee.

As Needham J. expressly recognised in Re Byrne Australia Pty Ltd, unless payment was guaranteed by the creditors, the consequence of his decision was to effectively deprive liquidators of corporate trustees of any chance of recovering their fees and expenses. Although this may result in a general reluctance to act as a liquidator in the winding up of a corporate trustee Needham J. believed that this situation could only be solved by the legislature.

76. [1981] 1 NSWLR 394 at 398 (SC (NSW))
77. [1981] 2 NSWLR 364 (SC (NSW))
78. [1981] 1 NSWLR 394 (SC (NSW))
Although "Needham J.'s great experience in equity and company matters" was recognised by Lush J. in Re Enhill Pty Ltd the Full Supreme Court of Victoria declined to follow Re Byrne Australia Pty Ltd. The Court held that "the trustee company's right of indemnity forms part of the assets of the company in a winding up and is property under the control of the liquidator. ... [T]he trust assets ... [are] divisible among the company's creditors generally and not merely among the trust creditors ...." 

The principal judgment was delivered by Lush J. He considered that the resolution of this question depended on an analysis of the basic principles underlying the trustee's right of indemnity or lien. The phrase lien was used to describe the right of the trustee to retain trust assets against the claims of the cestui(s) que trust until s/he is supplied with sufficient funds with which to discharge trust debts.

Ford's argument that the right of exoneration is not a right of

79. Ibid. at 399

80. (1982) 7 ACLR 8 at 19 (SC (Vic))

81. [1981] 1 NSWLR 394 (SC (NSW))

82. Re Succo Gold Pty. Ltd (in liq) (1983) 7 ACLR 873 at 877 per King C.J. (SC (SA))

83. Ford, Trading Trusts And Creditors' Rights supra
property but a power was also noted by Lush J. Nevertheless his Honour considered that the right of exoneration is a power "which can be, and is designed to be, used for the trustee's own benefit, and is ... properly to be classified as a chose in action, and therefore as property of the trustee."85

This conclusion formed the key to the analysis advanced by Lush J. of the basic principles underlying the trustee's right of indemnity. An analysis which in turn has been summarised as:

"[Firstly] property is a bundle of rights [which] may be divided, and different rights given to different persons. ... Secondly, a trading trustee is personally liable for debts incurred in trading ... and the trust property cannot be taken by the creditors in execution. ... Thirdly, the trustee has the right to indemnify himself against his personal liability out of the trust assets and the related and perhaps overlapping right of lien, in the sense ... defined [above]. ... Fourthly, when the trustee's rights come into existence, the rights of the beneficiaries are to that extent reduced. ... Fifthly, a trust creditor, being unable to levy execution on the trust property, may claim to be subrogated to the trustee's right of indemnity or lien to the extent of his debt. ... Sixthly, the trustee's right of lien is a chose in action capable of passing to a trustee in Bankruptcy or liquidator of the trustee."86

84. Re Enhill Pty Ltd (1982) 7 ACLR 8 at 18 (SC (Vic))

85. Ibid. at 15

86. Slater, Another View on Insolvent Trustee Companies (1983) 1 C & SLJ 272 at 273
Crucial to the sixth proposition is the belief that the right of exoneration is a power which may be used for the trustee's own benefit. It has been argued, however, that this "confuses cause and effect." While the power of exoneration does benefit the trustee in that s/he may use it to discharge trust debts which s/he would otherwise be personally liable for, the contrary is not true. The power of exoneration is not available to discharge trust debts because it exists for the trustee's benefit.

Notwithstanding his decision to the contrary, Lush J. recognised that two passages from the majority's judgment in *Octavo Investments Pty Ltd v. Knight* implied that, although the trustee's right passes to the trustee in bankruptcy, the proceeds of it are available only to the trust creditors.

87. Idem.

88. (1979) 54 ALJR 87 (HC of A)

89. Re Enhill Pty Ltd supra at 18; This can be contrasted with the judgment of Young C.J.. He noted that in *Octavo Investments Pty. Ltd v. Knight* supra "[n]o limitation was expressed upon the purposes for which the trustee in bankruptcy or the liquidator might apply the proceeds of the right. Moreover, the reasoning of the majority of the High Court and the authorities upon which their Honours rely suggest that no limitation was intended." at 12
These passages were to the effect that the trustee's right of indemnity "will pass to the trustee in bankruptcy for the benefit of the creditors of the trust trading operation should the trustee become bankrupt"\(^{90}\); and "[t]hose creditors are nevertheless subrogated to the rights of the trustee in relation to that property, and in the event of the trustee becoming bankrupt it is those rights which are to be realised in their favour."\(^{91}\) The persuassiveness of these passages was discounted by Lush J. on the basis that they were obiter dictum.

The decision of the Court in *Re Enhill Pty Ltd*\(^{92}\) has been labeled as "a just result for the liquidator".\(^{93}\) It must be recognised that by providing a means by which the trust fund could become liable to pay the liquidator's fee and expenses the Court did address the immediate problem before it.

Nevertheless subsequent judicial and academic opinion note that the Courts did so at the expense of basic trust principles. This has been labeled the "unfortunate"\(^{94}\) aspect of the case and as raising

\(^{90}\) *Octavo Investments Pty Ltd* (1979) 54 ALJR 87 at 90 (HC of A)

\(^{91}\) Ibid. at 91

\(^{92}\) (1982) 7 ACLR 8 (SC (Vic))

\(^{93}\) Durack, *Insolvent Trading Trust* (1983) 1 C & SLJ 170 at 174

\(^{94}\) Idem.
some "disquieting implications". The principle expounded by the Court is not restricted to liquidators but applies to all creditors of the trustee, allowing the personal creditors of the trustee to benefit at the expense of the trust creditors.

Policy reasons would appear to underly the approach taken in re Enhill Pty Ltd. These policy reasons may be discerned in Grime Carter & Co Pty Ltd v. Whytes Furniture (Dubbo) Pty Ltd, a decision of the Supreme Court of New South Wales. The Court declined to follow its earlier approach in Re Byrne Australia Pty Ltd in favour of that advanced in re Enhill Pty Ltd. In support of this action, specific reference was made to "the proliferation of corporate trustees of trading trusts and the absence of specific legislative provisions to deal with the commercial and legal difficulties to which their insolvency gives rise to ...".

95. Idem.

96. (1982) 7 ACLR 8 (SC (Vic))

97. (1983) 7 ACLR 540 (SC (NSW))

98. [1981] 1 NSWLR 394 (SC (NSW))

99. supra

100. Grime Carter & Co Pty Ltd v. Whytes Furniture (Dubbo) Pty Ltd supra at 542 per McLelland J.
The next case is *Re Suco Gold Pty Ltd (in liq)*,101 a decision of the Full Supreme Court of South Australia. In this case the approach adopted in *re Enhill Pty Ltd*102 was held by King C.J. to be "in conflict with fundamental principles of the law of trusts."103

King C.J. delivered the principal judgment. He considered that the right of indemnity should be divided into its components of exoneration and recoupment. The right of exoneration being available for distribution only between the trust creditors while the the right of recoupment may be distributed between all the trustee's creditors. He said:-

"[T]he right of indemnity can only produce proceeds for division among the creditors generally if the trustee has discharged the liabilities incurred in the performance of the trust and is therefore entitled to recoup himself out of trust property. If he has not discharged the liabilities the right of indemnity entitles him to resort to the trust property only for the purpose of discharging those liabilities."104

Notwithstanding this confirmation of the approach taken by the Court in *Re Bryne Australia Pty Ltd*105 the liquidator was held to be en-

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101. (1983) 7 ACLR 873 (SC (SA))

102. (1982) 7 ACLR 8 (SC (Vic))

103. *Re Suco Gold Pty Ltd (in liq)* supra at 879

104. Ibid. at 902

105. [1981] 1 NSWLR 394 (SC (NSW))
titled to deduct his fee and expenses from the proceeds of the trustee's right of exoneration. King C.J. considered that there were strong practical considerations why the Court should sanction this payment.

He argued that this payment was "justified" "by reference to the obligations of the trustee company"¹⁰⁶ to incur and discharge trust debts. Irrespective of the trustee's winding up the trust debts still had to be discharged in accordance with the provisions of the Companies Act. This in turn required the appointment of a liquidator. King C.J. therefore believed it was reasonable to regard the liquidator's expenses as "debts of the company incurred in discharging the duties imposed by the trust and as covered by the trustee's right of indemnity."¹⁰⁷

Jacobs J. agreed with the "analysis of the general principles"¹⁰⁸ advanced by King C.J.. He also believed that as the liquidator had been appointed by the court, he was entitled to receive remuneration; Parliament must have intended such a result in this situation.¹⁰⁹


¹⁰⁷. *Idem.*

¹⁰⁸. *Ibid.* at 884

¹⁰⁹. *Ibid.* at 886
Re Byrne Australia Pty Ltd\textsuperscript{110} was also distinguished on the ground that in that case the liquidation was carried out pursuant to a voluntary winding up requested by the creditors and not a compulsory winding up ordered by the court as occurred in this case.\textsuperscript{111}

The most recent examination of this question has been by the Supreme Court of New South Wales in Re A.D.M. Franchise Pty Ltd\textsuperscript{112}. McLelland J. who, it will be recalled, was the judge in Grime Carter & Co Pty Ltd v. Whites Furniture (Dubbo) Pty Ltd\textsuperscript{113} presided.

Notwithstanding his earlier judgment McLelland J. adopted the approach advanced in Re Suco Gold Pty Ltd (in liq).\textsuperscript{114} He believed that although "the process of reasoning employed in Re Suco Gold Pty. Ltd (in liq)\textsuperscript{115} leads to the same practical result as the

\textsuperscript{110} [1981] 1 NSWLR 394 (SC (NSW))

\textsuperscript{111} Re Suco Gold Pty Ltd (in liq) (1983) 7 ACLR 873 at 884 (SC (SA)). Although factually correct, the legal basis of this distinction is, with respect, novel.

\textsuperscript{112} (1983) 7 ACLR 987 (SC (NSW))

\textsuperscript{113} (1983) 7 ACLR 540 (SC (NSW))

\textsuperscript{114} (1983) 7 ACLR 873 (SC (SA))

\textsuperscript{115} Ibid.
process of reasoning employed in *Re Enhill Pty Ltd* ... the judgments in *Re Suco Gold Pty Ltd (in liq)* appear to provide a more acceptable means of reaching this common conclusion ... "116

These Australian decisions are interesting for the insight into the problems which the courts have faced in the context of the trading trust. It has been suggested that "[t]he indemnity concept arose in days when persons of substance often assumed fiduciary roles and trust liabilities may well have been paid out of personal assets before the trustee was indemnified out of trust assets."117

The inability of the trustee's right of indemnity to adapt to commercial and trading pressures is also displayed in these cases. It has been suggested that *Re Enhill Pty Ltd*118 "must be regarded as doubtful merit"119 and that it "resulted from an overwhelming desire to do justice to liquidators rather than from a correct analysis of principle, ... [It] is an example of hard cases making bad law."120

116. (1983) 7 ACLR 987 at 989 (SC (NSW))


118. (1982) 7 ACLR 8 (SC (Vic))

119. Dureck, *Insolvent Trading Trust* supra at 172

120. De Wijn, *Re Enhill Pty Ltd: Trust and Non-Trust Creditors* supra at 25
The solution to the question of which class (personal and/or trust) of the trustee's creditors are to partake in the distribution of the trust property due to the trustee pursuant to the right of indemnity, advanced by the English Court of Appeal in *In re Richardson, ex. p. The Governor of St. Thomas's Hospital*121 is to be preferred.

The elasticity of the trust has encouraged not only a growth in the nature and variety of situations in which the trust is employed; it has also enabled the avoidance of responsibility for trust debts. We shall now consider the various attempts which have been made to insulate the trustee, the cestui(s) que trust and the trust fund from such responsibility.

121. [1911] 2 KB 705 (CA)
PART III
MODIFICATIONS
TO THE TRUSTEE'S
RIGHT OF INDEMNITY

I

THE REMOVAL OF
THE TRUSTEE'S
PERSONAL LIABILITY

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II

THE REMOVAL OF THE
TRUSTEE'S RIGHTS
OF INDEMNITY
I
THE REMOVAL OF THE
TRUSTEE'S PERSONAL
LIABILITY

1.
Introduction

As we have seen, irrespective of the trustee's obligations to the
cestui(s) que trust, the trustee is the owner of the trust fund and
the principal through whom all contracts are made or tortious acts
committed.

Although a trustee may have incurred a liability for the benefit of
the cestui(s) que trust there is no contractual nexus between the
cestui(s) que trust and the creditor on which to transfer legal
liability. Irrespective of whether the creditor knew of the exist­
ence of the trust and that the trustee had incurred the debt in its
execution, the trustee remains personally responsible for the dis­
charge of trust debts.

A. Personal Liability - a Hardship ?

In theory ultimate responsibility for trust debts should result in
no hardship for the trustee.¹ In situations in which the debt was
properly incurred the trustee has the right to be indemnified from
the trust fund. Should the trust fund prove insufficient to fully
indemnify the trustee there may be a right of recourse against the
cestui(s) que trust.

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¹. See generally White, Trustee's Avoidance of Personal Liability on
Contracts (1929) 3 Temple L Q 117 at 120
The trustee only faces personal responsibility for properly incurred trust debts in those situations in which s/he has not received a complete indemnity. This will occur if the trust debts exceed the value of the trust fund and there is either no additional right of indemnity available against the cestui(s) que trust or if there is, it is also insufficient to discharge the debts.

This is a situation in which some would say that the trustee has no one but himself to blame for the resultant personal liability. As was noted in Connally v. Lyons & Co.2

"That such trustees should be held personally liable is reasonable because they have in their own hands the means wherewith to reimburse themselves and should not assume a debt for the benefit of an estate of which they have the sole management and control without the prospect of funds for payment thereof."3

Viewed from the perspectives of the creditor and the cestui(s) que trust the trustee's responsibility for improperly incurred debts is appropriate. Irrespective of whether the trustee had authorisation pursuant to the trust to incur a debt, as between the trustee and the creditor the debt may be validly incurred. The creditor is still able to rely on the contract with the trustee for payment.

To the extent that the trust fund has not benefited from the trustee's improper actions it is also fair that it and/or the

2. 27 ASR 935 (1891)

3. Ibid. at 940 per Garrett P.J.
cestui(s) que trust should not indemnify the trustee. The trustee's predicament in having to discharge the debt has arisen as a consequence of his actions in exceeding the terms of the trust.

From the trustee's perspective, however, ultimate responsibility for trust debts may be viewed as an unwarranted imposition. As a reward for undertaking onerous duties from which, in the absence of express authority, s/he is not entitled to benefit, the trustee is exposed to unlimited personal liability. As Lord Penzance noted in *Muir v. City of Glasgow Bank*4:-

"Speaking generally, there might no doubt arise an inference ... that a person who derived no benefit himself, and who acted only for the benefit of others in contracts or engagements of any kind into which he might enter, would not intend thereby to expose himself to personal liability if it could be avoided."5

B. **The Influence of the Trading Trust**

Examples of attempts by trustees to avoid personal responsibility for trust debts may be found in all types of express trusts. It is in the context of the trading trust, however, that the greatest endeavours to avoid responsibility for trust debts have occurred.

The impetus for the trading trustee's wish to avoid ultimate responsibility for trust debts can be attributed to two factors. As we have seen it is one of the special features of the trading trust

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4. (1879) 4 App Cas 337 (HL)

5. Ibid. at 368
that the trustee will be constantly incurring debts. This is the first factor. When compared with other trustees the trustee of a trading trust is exposed to a greater risk of having to personally discharge trust debts.

Another special feature of the trading trust is its ability to be organised along corporate lines. The role of the trustee in such trusts is often viewed as analogous to that of a company director. This perception of the trustee's role has further encouraged the trustee to seek ways to remove his or her ultimate responsibility for trust debts.

2. The Transfer of Primary Responsibility for Trust Debts to the Trust Fund

Although the common law takes no cognizance of the trust, the trustee is the owner of two distinct funds - the trustee's personal assets and the trust fund. In seeking to exclude personal responsibility for trust debts the trustee is trying to deny access by the creditor to personal assets only; not the trust fund.

A. Muir v. City of Glasgow Bank

The leading commonwealth case in this area is Muir v. City of Glasgow Bank. The House of Lords specifically recognised that a

6. (1879) 4 App Cas 337 (HL). Although involving an appeal from Scotland to the House of Lords, their Lordships considered that the law of Scotland was identical with the English common law in this situation. See Earl Cairns L.C. at 355 and Lord Penzance at 368
trustee may exclude personal responsibility for trust debts and impose it on the trust fund.

Trustees had acquired stock in a Scottish banking company. This company went into liquidation and calls were made on the stockholders. While the stock carried with it unlimited liability for the company's debts, the trustees argued that they were not personally liable.

In acquiring the stock the trustees had signed the deed of transfer "as trust disponees" and had accepted the stock "as trust disponees aforesaid". The trustees were also described as such in the shareholder register. It was argued by the trustees that by this "qualified" acceptance of the stock they had excluded their personal liability.

The House of Lords nevertheless held that the phrase "as trustee disponees" in this case was merely descriptive of the trustee's office. It will be recalled that mere knowledge of the existence of the trust by a creditor is insufficient to exclude the trustee's personal responsibility. The trustees therefore remained personally liable to pay the calls.

The decisive factor in favour of this interpretation was the finding that the directors of the Bank had no power to enter into or accept a contract by which the liability of a stockholder for calls was to be limited. Any such contract as was argued for by the trustees would have been ultra vires the company.7

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Notwithstanding the specific decision in this case, the House of Lords recognised the ability of trustees to exclude their personal liability and impose all potential liability upon the trust property. The three principal speeches in this respect were those of the Lord Chancellor Earl Cairns, Lord Penzance and Lord Blackburn. Earl Cairns L.C. said:

"My Lords, whether, in any particular case, the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or in the other. I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the testator." 8

Lord Penzance noted:

"[T]o exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to shew that upon a proper interpretation of any contract he had made, viewed as a whole - in its language, its incidents, and its subject-matter - the intention of the parties to that contract was apparent.

7. See generally Earl Cains L.C. at 359-360; Lord Hatherley at 364-365; Lord Penzance at 369-371; Lord O'Hagen at 373-374, 377; Lord Selbourne at 380-382; and Lord Blackburn at 387.

8. Muir v. City of Glasgow Bank (1879) 4 App Cas 337 at 355 (HL)
that his personal liability should be excluded; and
that although he was a contracting party to the obliga-
tion the creditors should look to the trust estate
alone."  

"It is not enough, then, in the present case, to shew
that the Appellants on the face of the transfer deed
accepted the 'stock' in question 'as trustee disponees;' but they must go on to shew that the proper
construction of that instrument shewed the intention of
the parties to be that, being trustees, they should not
be personally liable."  

While in the words of Lord Blackburn:

"I have myself no doubt that if individuals enter into
a contract because they are trustees, and for the
benefit of the trust, it would be prudent in them to
stipulate that, though they bind themselves to see that
the trust funds are properly applied to fulfil that
contract, their contract shall extend no further, and
that they will not be personally liable to make good
the deficiency, if any; and if they express such a
limitation with sufficient clearness, and the other
contracting party (being sui juris) accepts such a
limited engangement, he cannot call on the trustees to
do more than to fulfill that limited engagement."  

B. The Rationale for the Transfer of Responsibility

While it is established that a trustee may contractually exclude
direct personal responsibility for trust debts, the theoretical jus-
tification for it remains unclear.

On a traditional analysis of the trust the trustee's personal
responsibility for trust debts would appear to be a necessary and

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9. Ibid. at 368

10. Ibid. at 368-369

11. Ibid. at 388

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inseparable cororally. Any contract in which the trustee purports to exclude personal responsibility would appear to be illusory. 12 If the trustee is not potentially liable the other contracting party has no avenue of recourse to ensure that the contract is performed.

This approach is displayed in Furnivall v. Coombes. 13 Coombes and three others described in the contract as "churchwardens, and overseers of the poor" promised to pay a specified sum of money. This promise contained the proviso that "nothing in these presents contained shall extend, or be deemed, adjudged, construed, or taken to extend, to any personal covenant of, or obligation upon, the said several persons parties thereto ... or in anywise personally affect them, any or either of them, their, or any or either of their executors, administrators, goods, effects, or estates, in their private capacity, but shall be, and is intended to be, binding upon and obligatory upon churchwardens ... and their successors for the time, being, as such ... but not further or otherwise." 14

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12. As the Court noted in Taylor v. Davis 110 US 330 at 334-335 per Woods J. (1883) (CC Ill)

"A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee."

13. 5 Man & G 736; 134 ER 756 (CF)

Although Coombes and the other churchwardens had attempted to impose liability for the debt upon the trust fund, it was held that they were unsuccessful. The promise to pay was found to be personal to the trustees, binding them to pay the money. As the proviso in turn purported to exclude the trustee's personal liability it was inconsistent with their promise. The proviso was accordingly void; being repugnant to the promise.

Notwithstanding the traditional analysis of the trust two rationales for the exclusion of the trustees' direct personal liability have been advanced. We shall now consider these rationales.

i. 'Representative' Liability

Muir v. City of Glasgow Bank\(^{15}\) is also interesting for the jurisprudential basis which was suggested by Earl Cairns L.C. for the transfer of the liability from the trustee to the trust fund. To reiterate part of and continue from the speech of Earl Cairns, L.C.:

"I know of no reason why an executor [or a trustee] ... entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the testator. If, for example, A. B., the executor of X., contracted to make a payment as executor of X., and as executor only, to C.D., it would be difficult to suppose that any obligation except an obligation to pay out of assets was intended."\(^{16}\)

\(^{15}\) (1879) 4 App Cas 337 (HL)

\(^{16}\) Muir v. City of Glasgow Bank supra at 355
This extract suggests that Earl Cairns L.C. considered that a trustee may be regarded as a representative of the trust. On this rationale the trustee does not contract in a personal but a representative capacity. It therefore follows that although the creditor may have no right of recourse against the trustee personally to enforce his promise the contract is valid.

As Story J. noted in Thayer v. Wendall 17

"I take it however to be true, that where a party contracts in a particular, and not a personal capacity, it is of no consequence, as to the legal result, whether supposing no remedy can be had against him personally, none will lie against another. It is the party's own folly to take such a contract; and unless there be fraud, deceit, misrepresentation, or warranty, there can be no reason in nature, why a recovery should be had."

Although this rationale may appear novel English law has in a number of situations recognised the existence of 'representative' personalities. One such situation is that of the representatives of a deceased. In respect of debts incurred by the deceased an executor or administrator is regarded as merely continuing the deceased's personality. While the executor/administrator has no direct personal liability in respect of such existing debts s/he still owes enforceable duties to those creditors.

17. 1 Gall 37 at 39; Fed Cas No 13873 (1812) (CC Mass)
A similar situation is recognised in respect of partnerships. While a partnership is not accorded legal personality there is recognition that the partnership is an entity distinct from the partners. In bankruptcy, for example, "the partnership is treated almost as if it were a separate entity from the individual members of the firm."\textsuperscript{18}

As suggested by Scott\textsuperscript{19} the flexibility of equitable remedies may also enable an indirect conferment of 'representative' personality upon the trustee.

A legal judgment declares the rights of the parties in absolute terms. By contrast an equitable decree is inherently flexible and acts personally on the parties. Equitable remedies may order, for instance, that a defendant act or refrain from acting in a certain way. They may also be granted on such terms and subject to such conditions as the court considers appropriate.

By virtue of the flexibility of equitable remedies Scott argues that the courts are able to decree that the trustee apply trust property in discharge of a creditor's claim. Irrespective of whether the creditor has a cause of action against the trustee the creditor's claim can therefore be satisfied from the trust fund.

\textsuperscript{18} Sutton, The Law of Creditor's Remedies in New Zealand supra para 8.42

ii. Subrogation

The creditor's right of subrogation to the trustee's rights of indemnity provides an alternative rationale by which the trustee can exclude personal liability yet confer on the creditor a right to have his or her claim satisfied from the trust fund.

It will be recalled that it is unclear in what circumstances the subrogation of the trustee's right of indemnity to a creditor will be recognised. The Court of Chancery historically displayed a willingness to make such decrees when the creditor's legal remedy against the trustee proved inadequate. Traditionally this has occurred when the trustee is insolvent or outside the court's jurisdiction. To recognise this right in situations in which the legal remedy against the trustee is inadequate because the parties have agreed to waive it is a minor step.

Indeed In re Raybould, Raybould v. Turner suggests that the Court of Chancery will decree payment of a trust debt directly from the trust property in situations in which neither the trustee, the

20. It has been suggested that "direct payment out of the trust fund has been contemplated or allowed only where the fund has been subject to the administration of the court, or where the trustee has acquiesced in an order for payment of what was evidently the sole trust liability." Finn ed., Essays in Equity supra at 151 [being Chapter 8 by McPherson]

21. [1900] 1 Ch 199
It will be recalled that this case arose from damage sustained by land and buildings adjoining a coal mine. Damages had been awarded against the trustee to recompense the neighbouring land owner and in this action he was seeking to have them paid from the trust fund. On concluding that the trustee was entitled to be indemnified for this liability the court granted the order.

"[O]nce a trustee is entitled to be ... indemnified out of his trust estate, I cannot myself see why the person who has recovered judgment against the trustee should not have the benefit of this right to indemnity and go direct against the trust estate or the assets, ... instead of having to go through the double process of suing the trustee, recovering the damages from him, and leaving the trustee to recoup himself out of the trust estate." 22

C. The Continuation of Personal Liability

The subrogation rationale helps explain a number of American decisions in which, it has been held that the trustee cannot absolutely exclude personal responsibility. 23 American courts have recognised that there are two situations in which any purported exclusion of personal liability is ineffectual.

22. In re Raybould, Raybould v. Turner supra at 201-202

23. For a general discussion of this area see Austin W. Scott, The Law of Trusts (3rd) Little, Brown and Company, Boston (1967) section 263.
In both situations personal responsibility is imposed on the trustee as a consequence of the creditor's right of recovery against the trust fund being non-existent or else diminished because of the trustee's actions.

It will be recalled that pursuant to the right of subrogation the creditor receives no greater right of recovery than that possessed by the trustee. The creditor's recovery from the trust fund therefore depends on two factors. The first factor is whether the debt was properly incurred by the trustee; did s/he have the necessary authorisation. If the debt was improperly incurred the creditor is automatically deprived of any right of recovery against the trust fund.

In this situation, irrespective of the purported exclusion of personal responsibility, the trustee may remain personally liable. Liability may be imposed on the trustee by virtue of an implied warranty that s/he had authority to incur that debt and charge the trust fund with its discharge. It is a question of fact whether the trustee represented that s/he had the authority to charge the trust fund in such a manner.

The second factor on which the creditor's right of recovery against the trust fund depends is whether the trust fund is sufficient to discharge the debt. Although the creditor must take the risk that the trust fund is naturally insufficient this does not include the risk that the trust fund has been diminished by the improper actions of the trustee. In this latter situation the trustee must account to the trust for his actions.
The trustee's obligation to account to the trust in this situation may be regarded as a form of trust property which becomes available for the satisfaction of the creditor's debt.

Liability for the trustee in this situation may also arise in another way. It has been suggested that a trustee owes a duty of care to creditors; s/he must use reasonable care and diligence in safeguarding the trust fund against loss.24

D. Non-Contractual Liabilities

Contractual debts must be distinguished from those of a quasi-contractual or tortious nature. In these latter situations the trustee may not have the opportunity to exclude personal responsibility. The trustee cannot contract with every potential victim of a tort committed by him or his agents or otherwise exclude personal liability and limit recovery to the trust property. Similarly in respect of quasi-contractual liabilities, in the absence of an implied restriction of liability to the trust fund, the trustee will remain personally liable.

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II THE REMOVAL OF THE TRUSTEE'S RIGHTS OF INDEMNITY

Attempts to modify the apportionment of ultimate responsibility for trust debts as determined by the trustee's right of indemnity can not only be attributed to trustees. Settlor's of trading trusts, for instance, have also sought to protect the cestui(s) que trust from responsibility; indeed some have even sought to insulate the trust fund.

The combined effect of these various attempts to alter the imposition of responsibility for trust debts has been to frustrate the claims of creditors.

By virtue of section 2(4) of the Trustee Act 1956, the statutory right of indemnity may be excluded by a "contrary intention" expressed in the trust deed. It has also been recognised that a trust deed may restrict the trust property which is available to satisfy a right of indemnity.25

It is uncertain, however, whether the settlor may specifically exclude the equitable right of indemnity against the trust fund and thereby insulate it from the payment of trust debts.

Such an exclusion would operate to the detriment of the trustee and

25. Strickland v. Symons (1881) 26 Ch D 245 (CA); Vacuum Oil Pty Ltd v. Wiltshire (1945) 72 CLR (HC of A)
it has been suggested that if the trustee is willing to accept the trusteeship without any such right of recourse s/he should be free to do so.

By virtue of the ability of the settlor to restrict the trust property available to satisfy a right of indemnity it has been argued that a total exclusion of this right is possible; a total exclusion being simply a logical extension of this ability to restrict.

It has been suggested that support for this argument may be found in the judgment of Turner L.J. in *Ex parte Chippendale, re German Mining Company*. In an obiter dictum passage Turner L.J. recognised that the trustee's right of indemnity against the trust property may be excluded by appropriately drawn provisions in a trust deed. He said:

"[N]o doubt, a company's deed, or any other deed, may be so framed as to deprive directors or trustees of the right to indemnity, and, if parties think proper to accept directorships or trusts under deeds so framed, they must abide by the consequences; but the right of indemnity is incidental to the position of a trustee, and if it is sought to exclude that right, the provisions for that purpose must, as I apprehend, be clearly expressed."

Because the equitable right of indemnity against the trust property is incidental to and inherent in the office of a trustee others

26. (1854) DeG M & G 19; 43 ER 415 (CA Ch)

27. Ibid. at 52; 427
argue that it is incapable of exclusion. This was the approach apparently endorsed by the courts in Re The Exhall Coal Company Limited\textsuperscript{28} and Worrall v. Harford.\textsuperscript{29}

It will be recalled that the equitable right of indemnity against the cestui que trust conferred by the Hardoon v. Belilos\textsuperscript{30} is capable of exclusion. It has been suggested that the remarks of Turner L.J. in Ex parte Chipperdale, re German Mining Company\textsuperscript{31} were addressed specifically to this situation.\textsuperscript{32}

\begin{itemize}
\item 28. (1866) 35 Beav 499; 55 ER 970 (Rolls Court). "[I]n my opinion, ... [the trustees' right of indemnity against the trust fund] is a right incidental to the character of trustee and inseparable from it, that he should be saved harmless from obligations which are attached inseparably to his office ... ." at 453; 971-972 per Lord Romilly M.R.

\item 29. (1802) 8 Ves Jnr 4; 32 ER 250 (Ch). "It is in the nature of the office of a trustee, whether expressed in the instrument, or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust." at 9; 252 per Lord Eldon.

\item 30. [1901] AC 118 (JC)

\item 31. (1854) 4 DeG M & G 19; 43 ER 415 (CA Ch)

\item 32. Finn ed., Essays in Equity supra at 149 [Being Chapter 8 by McPherson]
\end{itemize}
The position becomes more complicated by the statutory right of indemnity conferred by the Trustee Act 1956. As we have seen section 2(4) of that Act provides that this right applies if and only so far as a "contrary intention" is not expressed in the trust deed.

In the Victorian case of **RWG Management Ltd v. Commissioner for Corporate Affairs (Vic)**\(^{33}\) considered earlier the Court concluded that irrespective of whether the traditional equitable right of indemnity was capable of exclusion, by conferring the power to exclude the statutory right of indemnity - the codification of the equitable right, "Parliament must now be taken to have determined this matter."\(^{34}\)

Although this will not determine whether the equitable right of indemnity against the trust fund is incapable of exclusion, if, as has been argued, the Trustee Act 1956 confers a more extensive right of indemnity against the trust fund then that conferred by the Court of Chancery, the power to exclude the statutory right of indemnity can be placed in perspective.

Pursuant to this argument Parliament has conferred an additional and more extensive right of indemnity on the trustee. On the assumption

\(^{33}\) (1985) 9 ACLR 739 (SC (Vic))

\(^{34}\) **RWG Management Ltd v. Commissioner for Corporate Affairs (Vic)** supra at 748 per Brooking J.
that the equitable right of indemnity is incapable of exclusion Parliament has also conferred the power to excluded the statutory right of indemnity.

Even if the equitable and statutory rights of indemnity against the trust property are one and the same and by virtue of section 2(4) of the Trustee Act 1956 can be excluded, it is believed that a New Zealand court would be reluctant to recognise such an exclusion. This reluctance can be attributed to two factors.

The first factor is the criterion which must be established to exclude the statutory right of indemnity. Section 2(4) of the Trustee Act 1956 provides that the trust deed must show a "contrary intention" to its inclusion. Although this phrase has not been considered by a New Zealand court in the context of this section, it has been considered in respect of section 64 of the same Act.

In Re Murray's Trust35 the Supreme Court adopted the interpretation of this phrase as was advanced by the English Court of Appeal in Re Warren, Public Trustee v. Fletcher.36 The Court of Appeal had held that "contrary intention" meant "unless expressly forbidden". On the basis of this authority, to exclude the statutory right of indemnity the trust deed would have to expressly and unambiguously forbid its inclusion. The court would not imply any such exclusion.

35. [1967] NZLR 341 (SC)

36. [1939] 2 All ER 599 (CA)
The second reason for the court's reluctance to recognise an effective exclusion of the trustee's right of indemnity is the effect of such an exclusion on creditors. Such an exclusion operates not only at the expense of the trustee but also prejudices the creditor.

Even in situations in which the trustee has not purported to exclude personal responsibility for the payment of a properly incurred debt it is in practice the trust property and therefore the cestui(s) que trust which bear ultimate responsibility.

In this situation although the exclusion of the trustee's right to be indemnified does not destroy the trustee's personal responsibility it does deprive the creditor of the ability to seek recovery from the trust fund. The trust fund which pursuant to the right of indemnity should provide the funds for the debt's discharge, or at least contribute to the trustee's personal assets in meeting the discharge are no longer available.

The situation has become more disconcerting with the recent trend in Australia to employ limited liability companies as trustees. Daunted by the prospect of the ultimate personal liability of the trustee, Australians have employed the limited liability company as a

37. This occurs through either the trustee, in reliance of the right of exoneration discharging the trust debts directly from the trust income or capital, or alternatively recouping himself from these sources after paying the liability personally.
the trustee. Although the corporate trustee remains ultimately personally liable for the discharge of the trust debts, such liability is effectively defeated by the limited liability of its shareholders.

The conjunction of a corporate trustee having only nominal capital with no right of indemnity against the trust fund may destroy any prospect held by the creditor for recovery of the debt. Indeed some would suggest that the exclusion of this right is tantamount to a fraud on the trust creditors; a situation in which the court in McLean v. Burns Philp Trustee Company Pty Ltd\(^3\) considered equity would intervene and not allow the purported exclusion of the indemnity against the trust fund to remain.

Whether equity does intervene in this situation, personal responsibility for the trust debts may be imposed upon the directors of the corporate trustee. Section 320 of the Companies Act 1955 now provides that directors may be personally liable for the debts of the company, if the debts were incurred at a time when the directors did not honestly on reasonable grounds believe that the company would be able to discharge them.

\[^{3}\text{38. (1985) 9 ACLR 926 (SC (NSW))}\]
# PART IV

## ALTERNATIVE APPROACHES

### I. INTRODUCTION

### II. THE TRUSTEE AS AN AGENT

1. Pursuant to a "Bare" Trust

2. Pursuant to the "Control" Test
   - A. Introduction
   - B. Recognition at English Law
     - i. Introduction
     - ii. Smith v. Anderson
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INTRODUCTION

It will be recalled that the impetus for the development of the alternative approaches to determining the issue of ultimate responsibility for trust debts can be attributed to three principal factors; viz:–

(i) commercial and trading pressures;

(ii) changes in public perception of the trustee’s role; and

(iii) the development of theories of unjust enrichment.

The influence of these factors has been reflected in various ways by the alternative approaches. Some of these approaches advance new rationales for the trust pursuant to which the trustee becomes an agent or a manager. Other approaches have adopted theories of unjust enrichment. A number of the alternative trust rationales and theories of unjust enrichment have already been considered.¹

The alternative approach which has received the greatest judicial consideration is that of agency. While the trustee is the legal owner of the trust fund s/he may also be an agent of the cestui(s) que trust. In this situation ultimate responsibility for trust debts is transferred to the cestui(s) que trust. We shall now examine two agency approaches which have been developed.

¹. Pages 22-79 supra.
THE TRUSTEE AS AN AGENT

1. Pursuant To A "Bare" Trust

A trustee who has no independent discretion, powers or responsibilities but must refer all decision making to the cestuis que trust and obey their decisions, is in an agency relationship with them. The agency relationship co-exists with the trust. Such a situation is often described as a "bare" trust.2

A bare trust was held to exist in re Thomas.3 This case involved a Loan and Building Society. Although the Society's assets were held in trust, the trustee possessed no independent powers or responsibilities. The trustee's sole responsibility was to hold the title to the property comprising the trust fund.

The power to regulate the operations of the Society was vested in a committee of the cestuis que trusts and counsel conceded that this

2. Lord Hailsham of Marylebone ed., Halsbury's Laws Of England supra Volume 48 at paragraph 641 describes a bare trustee as "a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and sui juris in respect of it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so."

3. (1884) 14 QBD 379 (QB)
committee acted as the agent for all the cestuis que trust. Not surprisingly the Court held that the business was being run by the trustee as agent for the cestuis que trust who were therefore ultimately responsible for the discharge of the trust debts.

2. **Pursuant to the "Control" Test**

**A. Introduction**

There is also American authority which suggests that even where a trustee is not a bare trustee, but has independent discretion, powers or responsibilities, s/he may still be an agent of the cestui(s) que trust.

Pursuant to this authority, if a trustee is subject to the control of the cestui(s) que trust in the management of the trust, the cestui(s) que trust are regarded as having mastery over the trust affairs and are therefore the trustee's principals. This has been described as the "control" test.

The control test distinguishes between the situation in which the trustees exercise uncontrolled discretion in the management of the trust and the situation in which the trustees' management of the trust is subject to the control of the cestui(s) que trust.

This distinction was explained by the Massachusetts' Supreme Court

4. In such a situation the cestuis que trust are regarded as collectively being partners.
"A deed of trust or other instrument providing for the holding of property for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership."\(^6\)

In determining whether the cestuis que trust have such control the American courts have not generally required evidence of its actual exercise. It has been considered that the mere existence of potential control is sufficient to hold the cestui(s) que trust responsible for trust debts as the undisclosed principal(s).\(^7\)

Liquid Carbonic Company v Sullivan\(^8\) is typical of this approach. The Court considered that the power to elect trustees annually, approve the issue of additional shares (i.e. beneficial interests in the trust), amend and terminate the trust "reserved powers in the

\(^5\) in Frost v Thompson

\(^6\) Ibid. at 1010

\(^7\) Flannigan, Beneficiary Liability in Business Trusts (1984) 6 E & TQ 278 at 286 & 288

\(^8\) 229P 561 (1924)
shareholders [the cestuis que trust] inconsistent with that full and complete control and management of the trust property necessary to the creation of a pure trust."

Although the approach required by the control test is clear, there has been judicial disagreement over the type and number of rights which the cestuis que trust may possess before they have control. It has been noted that for every case which indicates that the existence of a certain right constitutes control, there are contrary holdings.

Because of this diversity of judicial opinion it is "exceedingly difficult to make any accurate statement as to what powers may be given to the shareholders without subjecting them to personal liability". "[I]n the precedent value of the existing American cases it is probably unsafe to provide beneficiaries with much more than the right to terminate the trust and approve an amendment to the trust deed".

9. Ibid. at 563

10. Flannigan, Beneficiary Liability in Business Trusts supra at 289-292

11. Ibid. at 289

12. Ibid at 291
B. Recognition at English Law

i. Introduction

The control test has not received universal application by American courts; its use appears to be restricted to the context of the trading trust. Notwithstanding this Flannigan suggests that the control test has received general recognition at English law.\textsuperscript{13} Smith v Anderson,\textsuperscript{14} Crowther v Thorley,\textsuperscript{15} Re Siddall\textsuperscript{16} and Re Thomas\textsuperscript{17} are cited in support. This suggestion has received in turn adverse comment by Maurice C. Cullity, Q.C..\textsuperscript{18}

It is worthy of note that both Flannigan and Cullity refer to the

\begin{itemize}
  \item[13.] Flannigan, \textit{Beneficiary Liability in Business Trusts} supra; The Control Test of Principal Status Applied to Business Trusts (1986) 6 E & TQ 37 and 97
  \item[14.] (1880) 15 Ch D 247 (CA)
  \item[15.] (1884) 32 WR 330 (CA)
  \item[16.] (1885) 29 Ch D 1 (CA)
  \item[17.] (1884) 14 QBD 379 (QB)
  \item[18.] Cullity, \textit{Liability of Beneficiaries - A Rejoinder} (1935) 7 E & TQ 35; and \textit{Liability of Beneficiaries - A Further Rejoinder to Mr Flannigan} (1986) 8 E & TQ 130
\end{itemize}
same line of authority in support of their respective arguments. Smith v Anderson,19 Crowther v Thorley,20 Re Siddall21 and Re Thomas22 involved the interpretation and application of section 4 of the Companies Act 1862 (UK).

This section imposed the requirement that "any company, association or partnership consisting of more than 25 persons ... formed for the purpose of carrying on any ... business ... that has for its object the acquisition of gain by the company, association or partnership ..." had to be registered. Any company association or partnership contravening this requirement was declared to be illegal.23

19. (1880) 15 Ch D 247 (CA)

20. (1884) 32 WR 330 (CA)

21. (1885) 29 Ch D 1 (CA)

22. (1884) 14 QBD 379 (QB)

23. A literal reading of this provision could suggest that the legislature intended to prohibit those non registered companies associations and partnerships which were formed with the object of making a financial gain for their members and whose membership exceeded twenty five. Smith v Anderson supra and subsequent authority establish that the mere fact that an association is formed with the intention of making a profit is insufficient. The association must carry on the business and the object of that business must be to make a profit. As Brett LJ commented in that case "the
The business activities of a trust can contravene this section in a number of ways. Notwithstanding the trust, the trustee may be the agent of the cestui(s) que trust. If the cestuis que trust exceed the prescribed number and the other prerequisites are satisfied the section will be contravened. A variation of this occurs if the trustee and cestui(s) que trust are partners. Alternatively the trustees, while remaining the principals, may exceed the prescribed number.

We shall now consider each of these case to determine whether they support the application of a control test.

ii. Smith v. Anderson\textsuperscript{24}

Shares in a number of submarine telegraph companies had been purchased by subscription and vested in six trustees. For every ninety shares subscribed, the subscriber received a certificate for the nominal amount of one hundred shares together with a deferred coupon for $\frac{1}{4200}$th part of the total fund.

From dividend income the trustees were to pay all the trust ex-

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statute meant to deal, not with the people who were associated together for the purpose of obtaining gain, but with people who were associated together for the purpose of carrying on a business having for its object the acquisition of gain" at 178-179

\textsuperscript{24. (1880) 15 Ch D 247 (CA)}
penses, pay 6% interest on the nominal value of the certificates and redeem the certificates. In certain situations the trustees also had the power to sell the shares and reinvest the proceeds.

Meetings of the certificate holders were to be held for the purposes of receiving reports from the trustees, appoint auditors and, if necessary, replacement trustees. The cestuis que trust also had the right to consent to the reinvestment of the proceeds of the sale of the original shares, approve the payment of the extra-ordinary expenses and, in specified circumstances, approve the termination of the trust.

When all the certificates had been redeemed the surplus if any was to be divided among the holders of the deferred coupons.

Although the cestuis que trust were held to be associated together for financial gain the Court of Appeal held that the investment scheme did not constitute a business. The trust therefore did not infringe section 4 of the Companies Act 1862 (UK). If the investment scheme did constitute a business the Court held that it was carried on by the trustees - an association of less than 25 members, and not by the cestuis que trust.

The argument that the cestuis que trust were the undisclosed principals of the trustees was unanimously dismissed. Both James and Brett L.JJ. dismissed it on the general principle that before an agency can arise, the agent must be authorised to bind the principal. A precondition which did not exist in this case. As James L.J. said:-
"[The cestuis que trust] are from the first entire strangers who have entered into no contract whatever with each other, nor has either of them entered into any contract with the trustees or any trustee on behalf of the other, there being nothing in the deed pointing to any mandate or delegation of authority to anybody to act for the certificate holders as between themselves, and nothing, as it appears to me, by which any liability could ever be cast upon the certificate holders either as between themselves or as between themselves and anybody else. Therefore, I cannot arrive at the conclusion that certificate holders form an association within the meaning of this Act of Parliament ..."25

Brett L.J. said:-

"But supposing that this was such a business as is mentioned in the Act, were the certificate holders the persons who were to carry it on? It seems to me that they certainly were not. I take it that the persons called trustees in the deed are clearly trustees as distinguished from agents and from directors.... If, indeed, although they were called trustees, the duties which they had to perform were really those of directors, then, although they were called trustees, the legal effect of the deed would be that they would be directors, and if they are directors they are agents; but here it seems to me clear that according to the true construction of the deed they were not directors or agents, but trustees. If that be so, the certificate holders, even if they were associated at all, were not associated for carrying on the business. It was not their business. They could not have been made liable for any contract made by the trustees. It was of course urged that they would be liable as undisclosed principals. But that assumes that the persons who made the contracts upon which they are to be liable are their agents authorized to bind them by their contracts, which is obviously not true. Therefore, even if there be here a business within the meaning of the section, yet it is not carried on by the certificate holders, who are of a larger number than twenty, but by the trustees, who are not of the number of twenty or more; and therefore in either view the case is not within the statute."26

25. Smith v. Anderson (1880) 15 Ch D 247 at 274-275 (CA)

26. Ibid. at 280
Cotton L.J. was the only member of the Court who, in resolving whether the cestuis que trust carried on the business, specifically considered the powers conferred upon them. He also rejected the argument that the trustees were their agents.

"In my opinion there must be a company, association, or partnership, which is formed for the purpose of carrying on a business by itself or its agents. If it is formed for the purpose, it must register if it is within the Act. ... Whatever may have been the object of using the word 'association,' what we have to consider, in my opinion, is whether this conglomeration, as I will call it, of the persons who subscribe their money under this trust deed, is an association formed to carry on any business within the meaning of this section having for its object the acquisition of gain."27

"[W]hat must be shewn is that the association by themselves or by their agents carry on a business. Now, here, how can that be said? That the certificate holders do it by themselves can, I think, hardly be contended. ... Then can it be said that they carry on a business by their agents? In my opinion that cannot be maintained. The trustees here are the only persons who are dealing with the investments, and they are dealing, not as agents for some principal, but as trustees in whom the property and the management of it are vested, and who have the power of changing the investments and securities. ... In my opinion, therefore, in this case the only alleged association of more than twenty, being the persons who have contributed their money, stand in this position, that they are not by themselves or their agents carrying on any business whatever. Therefore, in my opinion, this cannot be said to be an association prohibited by the Act. Of course if the trustees are carrying on a business for the purposes of profit, as they are not twenty in number there could be no objection under the Act to their doing so."28

27. Ibid. at 281-282

28. Ibid. at 284-285
Although Smith v Anderson\textsuperscript{29} is inconsistent with an application of the control test Flannigan suggests otherwise:-

"[Smith v. Anderson] may be legitimately questioned. ... the decision ... appears to turn on the Courts understanding of the reinvestment approval right. The Court was of the view that this was an incidental or subsidiary right. That view appears to have been the basis for both grounds in each judgment. If the Court had taken the view that the reinvestment provisions were significant and amounted to a business, it may well have determined that it was certificate holders who carried on that business because it was they who possessed the significant power. In any event, one can sense that the Court would have found objectionable a greater degree of control on the part of the certificate holders. This is important, of course, because the Court was of the view that there was only a very modest, if not an insignificant, degree of certificate holder control. Very little perceived real control, as it is submitted, would have lead to a different result."\textsuperscript{30}

As with Cullity we must reply:- "[w]ith all due respect to Mr Flannigan, it is clear that neither he nor I have found in Smith v Anderson what he would like to find and the passage [of Flannigan's] just quoted hardly appeals to an acceptable level of authority".\textsuperscript{31}

\textsuperscript{29} (1880) 15 Ch D 247 (CA)

\textsuperscript{30} Flannigan, The Control Test of Principal Status Applied to Business Trusts supra at 63-64

\textsuperscript{31} Cullity, Liability of Beneficiaries - A Further Rejoinder to Mr Flannigan supra at 135
iii. **Crowther v. Thorley**\textsuperscript{32}

**Smith v Anderson**\textsuperscript{33} was considered four years later by the Court of Appeal in **Crowther v Thorley**.\textsuperscript{34}

The trust deed in that case established the Eastwood View Freehold Land Society. The object of this society was to purchase a freehold estate, to divide it into lots and to apportion those lots among the members. The right to mine and dispose of the coal and minerals in the Estate, however, was to remain "vested in the trustees, who shall have full power to sell, lease, get or win the coals at such price or prices, and in such manner, as they may think best, the profits or proceeds of which shall be divided among the shareholders".

The principal issue before the Court was whether the mining business contravened section 4 of the Companies Act 1867 (UK). This in turn raised the issue of who was the principal of the business - the trustees or the cestuis que trust.

In his judgment Coleridge C.J. did express the reservation that, but for **Smith v Anderson**,\textsuperscript{35} he may have considered the use of trustees

\textsuperscript{32} (1884) 32 WR 330 (CA)

\textsuperscript{33} (1880) 15 Ch D 247 (CA)

\textsuperscript{34} supra

\textsuperscript{35} supra
to run a business for the benefit of the cestuis que trust constituted an evasion of this section.

"Having been no party to Smith v. Anderson, I will admit that it seems to me that there might have been great force in the argument that, where trustees are appointed ... to carry on a business in effect for the benefit of the association which they represent, there is an evasion of section 4 of the Act of 1862. So far as I can make out, that point does not seem to have been argued at length before the Master of the Rolls, who seems to assume it almost without argument, because his judgment proceeds on other grounds. I admit that, but for Smith v. Anderson, I should have thought there was much to be said for the argument that you cannot get rid of the true effect of section 4 in that manner; but that view is not open to us in the face of Smith v. Anderson, which was decided by judges of great authority after deliberative argument."36

Notwithstanding this reservation, the Chief Justice did not suggest that the approach advanced in Smith v. Anderson37 in respect of the issue of agency was wrong.

"I understand all the judges to have said that there is no magic in the names of trustee and director. There may be cases in which, trustees are nevertheless directors or agents, and there is nothing inconsistent in that. There is nothing in the word "trustee," apart from the circumstances of each particular case, which makes a trustee the agent of the cestui que trust. If he is such agent, the cestui que trust is carrying on the business through him, and if that had been so in Smith v. Anderson, the judgment would have been the other way. But the judges appear to me to have said that, where trustees are carrying on business in their own names, and, as between themselves and third parties, are responsible on their contracts, then they are carrying it on as trustees only, and not as agents for the association."38

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36. Crowther v. Thorley (1884) 32 WR 330 at 332 per Coleridge C.J. (CA)

37. supra
Nevertheless Flannigan suggests that Coleridge's "statement of principle reduces to a differentiation between trustees and agents purely on the basis of control. It is of no significance that trustees act in their own name given that agents for undisclosed principals do the same".39

Cullity in turn retorts:-

"Mr Flannigan clearly feels much more comfortable with Crowther v Thorley ... . Notwithstanding the fact that the court in that case purported to follow Smith v Anderson, that Lord Justice Brett was a party to each of the decisions and expressly defended the earlier decision, that the court found there was no agency and that the principles expounded are perfectly consistent with the reasoning of the court in Smith v Anderson, Mr Flannigan appears to conclude that Crowther v Thorley places some limitation on Smith v Anderson which, accordingly, must be understood to define 'a degree of beneficiary control (where the reinvestment approval right is seen to be incidental) that one ought prudently not to exceed if any agency characterisation is to be avoided.' It is submitted, again, that Mr Flannigan's conclusion simply does not follow from the authority he cites. We do not even know what powers were conferred upon the investors in Crowther v Thorley and, for that reason alone, it is a somewhat indeterminate authority."40

Brett L.J., who it will be recalled was a member of the Court in

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38. Crowther v. Thorley (1884) 32 WR 330 at 332

39. Flannigan, The Control Test of Principal States Applied to Business Trusts supra at 65

40. Cullity, Liability of Beneficiaries - A Further Rejoinder to Mr Flannigan supra at 135-136
Smith v Anderson\textsuperscript{41}, confirmed that "[a]n agent for a principal is a person who, having no interest of his own, is bound to observe and obey the order of his principal".\textsuperscript{42}

Smith v. Anderson\textsuperscript{43} and Crowther v. Thorley\textsuperscript{44} were in turn followed by Re Siddall\textsuperscript{45} and Re Thomas.\textsuperscript{46} Apart from supporting, albeit reluctantly, the interpretation of section 4 of the Companies Act 1862 (UK) advanced in Smith v. Anderson\textsuperscript{47}, Re Siddall\textsuperscript{48} adds nothing to this discussion.

Re Thomas\textsuperscript{49} is significant. It is the only case in which the ces-

\textsuperscript{41}. (1880) 15 Ch D 247 (CA)

\textsuperscript{42}. Crowther v. Thorley (1884) 32 WR 330 at 333

\textsuperscript{43}. supra

\textsuperscript{44}. supra

\textsuperscript{45}. (1885) 29 Ch.D 1 (CA)

\textsuperscript{46}. (1884) 14 QBD 379 (QB)

\textsuperscript{47}. supra

\textsuperscript{48}. supra

\textsuperscript{49}. (1884) 14 QBD 379 (QB)
tuis que trust were held to be the principals. As we have seen this conclusion is supported by the complete absence of any power reposed in the trustee. The trustee was a bare trustee who apart from implementing the decisions of the cestuis que trust, had no responsibilities.

When these cases are examined in the context of other English authority it is clear that although English law acknowledges that trust and agency relationships may co-exist, it has, in preference to the control test, developed different principles to determine whether there is a co-existing agency relationship.

iv. **Cox v. Hickman**\(^{50}\)

This difference in judicial development may be discerned in the decision of the House of Lords in *Cox v. Hickman*.\(^{51}\)

This decision not only predates *Smith v. Anderson*\(^{52}\) but by its rejection of profit sharing as the test for determining the existence of a partnership is a landmark decision.

Messrs. B and J T Smith carried on the business of iron masters and coal merchants. The firm experienced financial difficulties and the

50. (1860) 8 H L C 267; 11 ER 431 (HL)

51. supra

52. (1880) 15 Ch D 247 (CA)
business was transferred to trustees for the benefit of the firm's creditors. The net income arising from the trustees' endeavours was to be distributed amongst the firm's creditors and on the discharge of all indebtedness the property and business was to be transferred back to the Smiths.

The deed of assignment authorised meetings of the creditors, at which a majority in value of the creditors present had the power to make rules for the conduct of the business. The creditors could also order the termination of the trust.

In carrying on the business the trustees drew a number of bills of exchange which they were ultimately unable to meet. The holders of these bills then sought to recover from the creditors on the basis that they constituted the trustees' principals.

On the basis of the control test the cestuis que trust would have been lucky to avoid personal responsibility. The ability to make rules for the conduct of the business would appear to "reserv[e] powers in the ... [cestuis que trust] inconsistent with ... full and complete control and management of the trust property ... ."53

Indeed an agency relationship was found to exist by the Court of


In Williams v. Boston 208 Mass 497 (1911); 94 N E 808 the power of the cestui que trust at any meeting to authorise or instruct the trustees in any manner was held to contravene this test.
Exchequer Chamber on the basis of the cestuis que trust's control and their right to receive the profits.

Notwithstanding this control the House of Lords held that no agency relationship existed. Their Lordships also rejected the argument that the trustees and the cestuis que trust were partners. The trustees were held to be the principals.

Their lordships complete rejection of a control test is further highlighted by the fact that only Lord Cranworth examined in any depth the argument that the control available to the cestuis que trust made the trustees their agents. He said:

"But I am aware that in this deed special powers are given to the creditors, which, it was said, showed that they had become partners, even if that had not been the consequence of their concurrence in the previous trust. The powers may be described briefly as, first, a power of determining by a majority in value of their body, that the trade should be discontinued, or, if not discontinued, then, secondly, a power of making rules and orders as to its conduct and management.

These powers do not appear to me to alter the case. The creditors might, by process of law, have obtained possession of the whole of the property. By the earlier provisions of the deed, they consented to abandon that right, and to allow the trade to be carried on by the trustees. The effect of these powers is only to qualify their consent. They stipulate for a right to withdraw it altogether; or, if not, then to impose terms as to the mode in which the trusts to which they had agreed should be executed; I do not think that this alters the legal condition of the creditors. The trade did not become a trade carried on for them as principals, because they might have insisted on taking possession of the stock, and so compelling the abandonment of the trade, or because they might have prescribed terms on which alone it should be continued. Any trustee might have refused to act if he considered the terms prescribed by the creditors to be objectionable. Suppose the deed had stipulated, not that the creditors might order the discontinuance of the trade, or impose terms as to its management, but that some third person might do so, if, on inspecting the accounts, he should deem it advisable, it could not be contended that this
would make the creditors partners, if they were not so already; and I can see no difference between stipulating for such a power to be reserved to a third person, and reserving it to themselves." 54

On a careful examination of this passage it will be seen that his Lordship merged the questions of partnership and agency. Significantly, it was held that the powers reserved to the cestuis que trust only qualified their consent to the operation of the trust and did not make them partners or principals.

A trust relationship was the only relationship existing between the trustees and the cestuis que trust. It was considered that if the trustees found the power potential available to the cestui que trust objectionable, they could have refused to accepted the office.

The weakness in Flannigan's thesis is graphically displayed by his attempt to incorporate this decision into it. He suggests that "[i]n the end Cox v. Hickman is a case that supports a control test of agency. This is express in the advising judgements and implicit in the Law Lords' judgments. There was not a partnership, on a control analysis, because there was not seen to be any current right to interfere in the business." 55 As we have seen the creditors 'only'

54. Cox v. Hickman (1860) 8 H L C 267 at 307-308; 11 ER 431 at 447 (HL)

55. Flannigan, The Control Test of Principal Status Applied to Business Trusts supra at 76-86. Cf Cullity, Liability of Beneficiaries - A Rejoinder supra at 42-44, and Liability of Beneficiaries - A Further Rejoinder to Mr Flannigan supra at 138-140.
had the power to make rules for the conduct of the business.

v. Mollwo, March & Co., v. Court of Wards

The opinion of the Judicial Committee of the Privy Council in Mollwo, March & Co., v. Court of Wards further helps to clarify the differences between the Massachusetts's control test and the English approach.

The Rajah of Bahadoor had entered into an agreement with a firm of English merchants who were indebted to him. While the indebtedness to the Rajah remained, he was given both the right to receive profits and considerable powers of control over the firm. Without his consent the partners of the firm were unable to make shipments, order consignments, sell goods, or draw money. The Rajah also had to be consulted on office business; he could direct a reduction or enlargement of the firm and was entitled to view certain documents. A number of the firms' creditors who had supplied credit after this agreement sought to recover their money from the Rajah. It was argued that the agreement either constituted the Rajah a member of the partnership or alternatively its principal. Both arguments were rejected.

56. (1872) L R 4 P C 419 (JC)

57. Supra. Discussed by Cullity, Liability of Beneficiaries - A Rejoinder supra at 44-45, and Liability of Beneficiaries - A Further Rejoinder to Mr Flannigan supra at 140; and Flannigan, The Control Test of Principal Status Applied to Business Trusts supra at 89-94
The Judicial Committee of the Privy Council advised that the Rajah's participation in the profits was inconclusive evidence in support of a partnership. The control exercised by the Rajah also did not constitute him a partner. Although the Rajah exercised great powers of "control and security" he did not have "initiative power"; he could not direct the firm to make contracts, deal with particular customers, nor trade in any particular manner.

Similar considerations were relevant in rejecting the argument that the Rajah was the principal of the firm. Sir Montague Smith who delivered the opinion of the Judicial Committee said:-

"It is said that [an agency relationship] ... ought to be implied from the fact of the commission on profits and the powers of control given to the Rajah. But this is again an attempt to create, by operation of law, a relation opposed to the real agreement and intention of the parties, exactly in the same manner as that of Partners was sought to be established, and on the same facts and presumptions. Their Lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the [debtors] ... and the Rajah so as to create a partnership; and they think there is no sufficient ground for holding that it was carried on for the Rajah, as principal, in any other character. He was not, in any sense, the Owner of the business, and had no power to deal with it as Owner. None of the ordinary attributes of Principal belonged to him. The [debtors] ... were to carry on the business; he could neither direct them to make contracts, nor to deal with particular Customers, nor to trade in the manner which he might desire: his powers were confined to those of control and security, and subject to these powers, the [debtors] ... remained Owners of the business and of the common property of the firm. The Agreement in terms, and, as their Lordships think, in substance, is founded on the relation of Creditor and Debtors, and establishes no other."59

58. (1872) L R 4 P C 419 at 436 per Sir Montague Smith

59. Ibid. at 437-438
To conclude this examination of English authority reference should be made to the decision of the House of Lords in Gosling v. Gaskell & Grocott. While the specific facts of this case need not concern us, their Lordships had to determine whether control over the conduct of a receiver established a relationship of agency. The control in this case comprised a power of dismissal and signing authority on cheques.

The House held that the existence of this control did not make the receiver an agent. Cox v. Hickman and Mollwo, March & Co v. Court of Wards were cited in support of this judgment.

vi. Conclusion

The development of the trading trust has placed pressure on the trustee's right of indemnity as a solution to the issue of ultimate

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60. [1897] AC 575 (HL) A case which "on its facts" Flannigan regards as "perfectly consistent with a control test." Flannigan, The Control Test of Principal Status Applied to Business Trusts supra at 89. Cf Cullity, Liability of Beneficiaries - A Rejoinder supra at 45-46, Liability of Beneficiaries - A Further Rejoinder to Mr Flannigan supra at 141.

61. (1860) 8 H L C 267; 11 ER 431 (HL)

62. (1872) L R 4 P C 419 (JC)
responsibility for trust debts. This pressure has arisen (inter alia) through the alteration of a number of the premises upon which which the right of indemnity is based.

Through the removal of the trustee's personal responsibility the creditor has been deprived of the traditional safeguard for payment. The development of the control test can be attributed to a perceived need to counter these developments. The control test also provides an alternative approach for the trust.

The persuasiveness of the arguments in favour of the adoption of the control test is not restricted to the American context. It is incorrect, however, to argue that the control test has been recognised at English law. The cases which we have examined show that English courts have developed different principles to determine whether an agency relationship co-exists with a trust.

Although the actions of the cestui(s) que trust may not warrant the conferment of principal status they are not irrelevant in determining ultimate responsibility for trust debts. Adoption of a multi-perspective analysis as advanced in this paper will enable the courts to take into account the actions of the cestui(s) que trust. The multi-perspective analysis shall now be examined.
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I | INTRODUCTION

In the preceding pages we have examined the various rights of indemnity available to the trustee. Through their application ultimate responsibility for trust debts may be transferred from the trustee to the trust fund and, in some situations, the cestui(s) que trust.

Although unnecessarily complicated by the existence of the various and different individual rights of indemnity, these rights have hitherto enabled the courts to achieve generally satisfactory results.

Nevertheless the thesis of this paper is that the issue of ultimate responsibility for trust debts has not been consistently treated by the courts to date, and that the judicial adoption of an approach (which has been termed a multi-perspective analysis) and which is discernible from the earlier body of cases, would provide a coherent and more certain framework to ascertain that responsibility justly.

It is further suggested that a multi-perspective analysis would enable the court to take into account five factors in determining the claim of a trustee or creditor that the trust fund and/or the cestui(s) que trust should bear ultimate responsibility for a trust debt. It will be recalled that these factors are:-

(i) The actions and expectations of the trustee;
(ii) The actions and expectation of the creditor;
(iii) The authorisation conferred by the trust deed;
(iv) The actions of the cestui(s) que trust; and
(v) The resulting benefit (if any) on the trust fund.
It is submitted that by analysing the effect and weight of each of these components of the multi-perspective analysis, the courts obtain a method to enable a sensible exercise of discretion and apply an appreciable coherence of approach.

A. Re-examination of the Trustee's Rights of Indemnity

Before we consider the operation of the multi-perspective analysis we must briefly re-examine the operation of the present devices available to the courts to assist in determining ultimate responsibility for trust debts. This examination will be of assistance in understanding the operation of the multi-perspective analysis.

As we have seen the present devices available to assist the courts determine ultimate responsibility for trust debts may be divided into two groups. One group comprises those devices which confer a right of indemnity against the trust fund. Such devices include the equitable and statutory rights of indemnity.

The other group of devices comprise those which confer a right of indemnity against the cestui(s) que trust. The Hardoon v. Belilios principle is an example of one such device.

B. Rights of Indemnity against the Trust Fund

As we have seen those devices which confer a right of indemnity against the trust fund direct the court's attention to the trustee's authorisation as conferred by the trust deed to incur debts.

1. [1901] AC 118
Whether it be equitable, statutory or express, the trustees right of indemnity against the trust fund is dependent upon the existence of authorisation. Although the trust fund may have received an incontrovertible benefit, the trustee is not entitled to be indemnified for the associated expense unless it was authorised.

The trustee's authorisation is not the only factor which the court's consider. The trustee's actions in a wider sense are also relevant. Although a debt may have been properly incurred if the trustee is otherwise in default to the trust the right of indemnity may be lost or diminished in value. The inter-relationship of authorisation and the trustee's actions may be reproduced as in figure 1.

As occurs in all the diagrams we shall consider, each limb thereof is a linear representation of a perspective. The nearer the claim falls to the hub of intersection the greater is the argument that the trust fund and possibly the cestui(s) que trust should bear ultimate responsibility for the discharge of the debt.
A - express right of indemnity conferred by Settlor.
B - "properly incurred debt"; implied equitable right of indemnity against Trust Fund
C - "reasonably incurred debt"; implied statutory right of indemnity against Trust Fund
D - authorised debt but trustee otherwise in default
E - unauthorised debt
An express right of indemnity may be the most extensive of all the rights. It is therefore illustrated in figure 1 as being closest to the hub of intersection. Nevertheless it must be remembered that the existence and operation of an express right of indemnity is dependent on the settlor.

As the statutory right of indemnity may be more extensive that the equitable right it is further out from the hub of intersection. Although dependent on authorisation, the trustee's authorisation may extend to reasonably incurred debts. This positioning also represents the increased vulnerability of the statutory right of indemnity of being removed.

The equitable right of indemnity falls between the express right of indemnity and the statutory right of indemnity. This positioning reflects its potentially narrower operation as compared to an express right of indemnity. It also reflects its arguably greater immunity from being removed by the settlor as compared with the statutory right of indemnity.

C. Right of Indemnity against the Cestui(s) Que Trust

Although the source of recovery differs from the first group of devices, the trustees right of indemnity against the cestui(s) que trust is similarly dependent on the existence of authorisation.

As with those devices which comprise a right of indemnity against the trust fund, the trustee's actions are also relevant. Nevertheless in this context the trustee's actions are relevant in ascertaining whether the trustee was 'encouraged' by the cestui(s) que
trust to incur a liability.

The inter-relationship of authorisation (as conferred by the cestui que trust) and the actions of the trustee may be reproduced as in figure 2.

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**Figure 2**

- **F** - request by Cestui Que Trust for Trustee to incur specific debt
- **G** - Request by Cestui Que Trust for Trustee to assume office - implied authority
- **H** - Operation of the Hardoon v. Beiliios principle
- **I** - "Bare" Trust
- **J** - Cestui Que Trust not sui juris or absolutely entitled to Trust fund
The cestui(s) que trust can confer authorisation on the trustee by requesting him to incur a specific debt. Further authorisation can be conferred onto the trustee by the cestui(s) que trust asking him to assume the trusteeship. In this situation should the trust fund be insufficient to indemnify the trustee for property incurred debts the cestui(s) que trust must bear ultimate responsibility.

Further out from the hub lies the operation of the Hardoon v. Belilios\(^2\) principle. Although the cestui(s) que trust exercise no role in the management of the trust affairs, ultimate responsibility may still be imposed on them by this principle.

These devices are premised on the trustee remaining the principal. Figure 2 also represents the situation in which the cestui(s) que trust become the principal. If the trustee has no discretion but must obey the directions of the cestui(s) que trust there is a bare trust.

In all these situations the cestui(s) que trust must be sui juris and absolutely entitled to call for the distribution of the trust fund. Sector "J" represents the situation in which this precondition is not satisfied. While the trustee may have incurred a debt on the strength of "encouragement" provided by some of the cestuis que trust, according to these devices ultimate responsibility for that debt cannot be imposed onto that body.

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2. [1901] AC 118
D. A Common Perspective

Notwithstanding the division of the various devices into these two groups, the devices share a common perspective. This is the trustee's authorisation. Nevertheless the perceived differences between these groups hide this similarity. As a result the two groups of devices are often regarded as embodying competing and non-complementing rationales for recovery.

This can be profitably contrasted with theories of unjust enrichment. Notwithstanding the differences in the operation of the theories advanced by Goff and Jones\(^3\) and Birks\(^4\), they share a recognised common rationale. To restore to the plaintiff the benefit which the defendant has unjustly gained at his expense.

E. Inter-relationship with Theories of Unjust Enrichment

A common denominator between the present devices and theories of unjust enrichment is authorisation. As viewed by the present devices, authorisation to incur the debt is a prerequisite to any successful claim. The strongest claims to restitutionary relief also occur when there is authorisation.

As recognised by Goff and Jones, and Birks in their respective works on restitutionary principles, the principle of unjust enrichment "presupposes three things: first, that the defendant has been en-

\(^3\) Goff and Jones, The Law of Restitution supra

\(^4\) Birks, An Introduction to The Law of Restitution supra
riched by the receipt of a benefit; secondly, that he has been so enriched that the plaintiffs expense; and thirdly, that it would be unjust to allow him to retain that benefit".5

The inter-relationship and operation of these theories may be reproduced as in figure 3.

5. Goff and Jones, The Law of Restitution supra at 16; Birks, An Introduction to the Law of Restitution supra at 9-22
I - Unjust Enrichment - conferor's actions authorised by request (actual or implied)

L - Unjust Enrichment - conferor's actions authorised by free acceptance

M - Prima Facie Unjust Enrichment - incontroversible benefit - Goff and Jones theory

N - Unjust Enrichment - incontroversible benefit plus non-voluntary transfer - Birks theory.

O - Officious behaviour
From our examination of the theories of unjust enrichment, and in particular the devices to establish the receipt of a benefit, it will be recalled that evidence of a request for the 'benefit' or its free acceptance defeats the argument that no quantifiable benefit was bestowed. It also supports the argument that the retention of the benefit is unjust.

These two situations are therefore closest to the hub of intersection. Precedence is given to 'request' to reflect the authorisation which it provides prior to the benefit being so conferred. 'Free acceptance', by contrast, may be regarded as a ratification of the conferor's action by the recipient.

'Incontrovertible benefit' is further out from the hub of intersection. This positioning reflects that in this situation the recipient plays no role in accepting the benefit. There is therefore no acknowledgment by the recipient of the value of the benefit so received.

The argument in support of the receipt of a quantifiable benefit is premised on factual evidence of an increase in the recipient's assets or the avoidance of a necessary expense. The 'benefit' so assessed therefore may be less than the expense associated with its conferment. In this situation the conferor is only entitled to recover the value of the benefit.

It will be recalled that the theories of unjust enrichment advanced by Goff and Jones⁶, and Birks⁷ differ on the consequences of the
receipt of an incontrovertible benefit. Goff and Jones argue that it establishes a prima facie case for restitution. Birks argues that it merely provides evidence of the receipt of a quantifiable benefit. To establish that the retention of the benefit is unjust Birks argues that the conferor's state of mind is relevant. There must be what he describes as a non voluntary transfer of the benefit. These differences are also reflected in figure 3.

F. **Recognition by the Multi-Perspective Analysis of the Common Perspectives**

The multi-perspective analysis enables the courts to recognise the existence and significance of the common denominator of authorisation. From this the multi-perspective analysis adopts a framework suggested by theories of unjust enrichment. Through this framework the impact of each of the five factors on the particular fact situation before the court can be identified and assessed.

At the outset it is important to appreciate that the judicial consideration of each factor inherent in the multi-perspective analysis will not always suggest the same conclusion. In some situations a factor may be neutral. In other situations it may be paramount.

The analysis of two factors may even produce conflicting results.


7. Birks, *An Introduction to The Law of Restitution* supra
This will occur, for instance, when the trustee lacked authorisation to incur a particular debt. Notwithstanding the lack of authorisation, as a result of the trustee's actions the trust fund may have received a quantifiable benefit.

In this example the analysis of the trustee's lack of authorisation suggests that s/he should not be entitled to be indemnified. By contrast an analysis of the resulting benefit suggests that to the extent of the value of the benefit, the trustee should be indemnified. By analysing the other perspectives the court can assess and weigh the conflicting and competing policy considerations.

The operation of the multi-perspective analysis is illustrated in figure 4.
A - express right of indemnity conferred by Settlor.

B - "properly incurred debt"; implied equitable right of indemnity against Trust Fund

C - "reasonably incurred debt"; implied statutory right of indemnity against Trust Fund

D - authorised debt but trustee otherwise in default

E - unauthorised debt

F - request by Cestui Que Trust for Trustee to incur specific debt

G - Request by Cestui Que Trust for Trustee to assume office - implied authority

H - Operation of the Hardoon v. Belilios principle

I - "Bare" Trust

J - Cestui Que Trust not sui juris or absolutely entitled to Trust fund

K - Unjust Enrichment - conferor's actions authorised by request (actual or implied)

L - Unjust Enrichment - conferor's actions authorised by free acceptance

M - Prima Facie Unjust Enrichment - incontrovertible benefit - Goff and Jones theory

N - Unjust Enrichment - incontrovertible benefit plus non-voluntary transfer - Birks theory.

O - Officious behaviour
A number of the individual factors share common limbs in this diagram. Because in any given situation, whether it be the trustee or creditor, there will only be one claimant it is convenient for the actions and expectations of the trustee/creditor, to share one limb.

It will be recalled that the strongest claim for restitutioory relief occurs when the recipient has requested the plaintiff to confer the benefit upon him. In the context of a trust this 'request' takes the form of authorisation conferred in the trust deed. Because of this overlap it is also appropriate for authorisation to share that part of the limb representing devices which establishes the receipt of a quantifiable benefit, and which equate to 'request'.

The operation of the multi-perspective analysis and the interaction of the various limbs thereof is best understood in practice. To avoid unnecessary complexity its operation will be considered in three general situations. When the debt was authorised. When the claimant's claim is premised on free acceptance. Finally, claims based on incontrovertible benefit.
II THE OPERATION OF THE MULTI-PERSPECTIVE ANALYSIS

1. Ultimate Responsibility For Authorised Debts

A. When the trustee is not in Default to the Trust

This is the strongest situation for claims that ultimate responsibility for a trust debt should be born by the trust fund and, in some situations the cestui(s) que trust. We shall consider this situation first from the perspective of the trustee and then from that of the creditor.

i. Trustee as Claimant

If the trustee is the claimant the court should recognise in this situation a right of indemnity. The perspectives contained within the multi-perspective analysis point to responsibility for the debt being imposed upon the trust fund. The debt was authorised. The trustee's actions were proper. By virtue of the authorisation a quantifiable benefit was conferred upon the trust. The authorisation also makes the retention of the benefit unjust.

In determining the responsibility of the trust fund, the actions of the cestui(s) que trust are immaterial. Nevertheless if the cestui(s) que trust are sui juris and absolutely entitled to the trust fund and have 'authorised' the trustee to incur the debt they will become ultimately responsible for its discharge.

ii. Creditor as Claimant

Before we consider the operation of the multi-perspective analysis
in this context, we must diverge and examine some of the special characteristics of a creditor's claim.

From our examination of the theory of unjust enrichment advanced by Goff and Jones\(^8\), it will be recalled that they believe that restitutionary relief should be denied when a plaintiff (i.e. a creditor) conferred a benefit while performing a contractual obligation to another.

This 'limit' to restitutionary relief could preclude any direct right of recovery by the creditor against the trust fund and/or the cestui(s) que trust.

In this respect the creditor's expectations become important. It is considered that this 'limit' (if applicable) should be restricted to those situations in which the creditor had no knowledge of the trust and took the risk of receiving payment from the trustee. As will be recalled this corresponds to the situation which occurred in Nicholson v. St. Denis.\(^9\) Nicholson had no knowledge of St. Denis. His contract was with Labelle whom he believed owned the property.

To return to the claim of a creditor while the debt may have arisen by virtue of a contract with the trustee, the creditor may have entered into the contract with an expectation that the trust fund

\(^8\) Goff and Jones, *The Law of Restitution* supra

\(^9\) (1975) 80 R (2d) 315. See pages 71-73 supra.
and/or the cestui(s) que trust would bear ultimate responsibility. Indeed the creditor's expectation may have been encouraged by the actions of the trustee and/or the cestui(s) que trust.

In its simplest form this expectation may have been based on the creditor's knowledge that the trustee had authorisation to incur the debt and that s/he would be entitled to receive the trustee's right of indemnity.

In such situations it is considered that the creditor should not by reason of the contract with the trustee be precluded from seeking recovery from the trust fund and/or the cestui(s) que trust.

Nevertheless a creditor cannot base his claim solely upon his expectation of payment from the trust fund and/or the cestui que trust. There must be valid grounds for this expectation. The creditor, for instance, may have believed that the cestui(s) que trust would bear ultimate responsibility. Notwithstanding the creditor's 'belief', responsibility for the debt should only be imposed upon the cestui(s) que trust if the cestui que trust authorised the trustee to incur the debt. In this respect the creditor's expectations can not enlarge the responsibility of the cestui(s) que trust.

To examine further the importance of the creditor's expectations of payment the distinction between two situations in which the creditor may be seeking recovery from the trust fund ought to be recalled.

One situation is when the trustee has excluded personal liability and the creditor has agreed to look to the trust fund for recovery.
In this situation the contract itself furnishes proof of the creditor's expectations.

An insolvent trustee provides the second situation. It will be recalled that the English Court of Appeal in In re Johnson, Shearman v. Robinson\(^\text{10}\) held that trust property due to the insolvent trustee pursuant to the right of exoneration is available for distribution only among trust creditors. The creditor's knowledge of the trust is immaterial to recovery.

The rationale for the special treatment of trust creditors in this situation is to ensure that the trustee and his personal creditors do not make a profit from the trust and the trust creditors.\(^\text{11}\) This restriction does not, however, apply to the funds due to the trustee pursuant to the right of recoupment. These funds are available for distribution between all the trustee's creditors.

Irrespective of the adoption of the multi-perspective analysis, the policy argument against distributing funds due to the insolvent trustee from the right of exoneration to personal creditors remain. In this situation, and to the extent of the right of exoneration, the trust creditors' expectations of payment, therefore, may not be crucial to their claim.

\(^{10}\) (1880) L R 15 Ch D 548

\(^{11}\) In re Johnson, Shearman v. Robinson supra at 552
Similar policy considerations apply when the trustee is solvent. To the extent that the trustee is entitled to be exonerated the creditor's claim against the trust fund may not be dependent upon his or her expectation of payment. Because of the authorisation and resulting benefit it may be improper not to recognise a right of recovery against the trust fund.

In this respect the operation of the 'contractual' limit to relief suggested by Goff and Jones\(^\text{12}\) may be inappropriate.

B. **When the Trustee is in Default to the Trust**

i. **Trustee as Claimant**

It will be recalled that pursuant to the traditional devices although a debt may have been properly incurred if the trustee is in default to the trust the right of indemnity may be reduced or removed.

The right of indemnity will be removed if the trustee commits a fundamental breach of trust (that is if his actions constitute a repudiation of the trust) and thereby terminates the original trust.

If the trustee commits a non-fundamental breach of trust, s/he will have to account for any resulting loss to the trust. Here the right of indemnity can be reduced in value to account for the loss. The trustee receives the balance, if any, of the value of the right of indemnity after deducting his personal liability to the trust.

\(^\text{12}\) Goff and Jones, *The Law of Restitution* supra
From the trustee's perspective, an examination of the multi-perspective analysis suggests that the courts should not readily depart from these results. In both situations the trustee is the author of his own misfortune. By repudiating the trust the trustee has terminated his authority to incur debts. The trustee becomes a constructive trustee.

To have any prospect of transferring responsibility for the debt onto the trust fund and/or the cestui(s) que trust the trustee will have to prove evidence of specific authorisation/free acceptance by the cestui(s) que trust or alternatively the receipt of an incontrovertible benefit. Such claims are considered later.

In those situations where the value of the right of indemnity is reduced the trustee similarly has little to complain about. Provided the set-off was available, there would appear to be no grounds to object to reducing the value of the right of indemnity to the extent that the trustee has to account to the trust. The set-off has the effect of paying the trustee by discharging one of his own liabilities.

ii. Creditor as Claimant

When the trustee is guilty of a fundamental breach of trust, an examination of some of the perspectives of the multi-perspective analysis may nevertheless indicate in favour of the trust fund and the cestui(s) que trust bearing ultimate responsibility for trust debts.

The creditor may have had no knowledge of the trustee's misdeeds and
expected payment from the trust fund and/or the cestui(s) que trust for what would otherwise have been an authorised debt. Nevertheless the actual lack of authorisation suggests against recovery. To provide evidence of the receipt of a quantifiable benefit by the trust fund the creditor will have to supply evidence of free acceptance or incontrovertible benefit.

The creditor's claim will be more favourably received when the trustee is in arrears in his accounts to the trust. Provided the creditor knew of the trust and expected payment from it his or her claim should be recognised. Indeed most of the other perspectives support the claim. The debt was authorised and by virtue of this these can be no argument that no benefit was received.

Although the analysis of the trustee's actions suggests that the claim should be denied as the creditor's claim is direct the trustees' actions should not carry much weight. Indeed to allow the trust to set-off the arrears against the creditor's claim may constitute an unwarranted preference of one creditor. In this situation it must be recalled that the trustee is a debtor of both the creditor and the trust fund. Except where a 'creditor'(including the trust fund) has been granted some form of security by the trustee, all 'creditors' should partake equally in the distribution of the trust property owing to the trustee.

Should the trust fund prove insufficient to fully indemnify the creditor an analysis of the actions of the cestui(s) que trust will determine whether they should bear ultimate responsibility for the trust debt. As in the situation in which the trustee is not in
default to the trust if the cestui(s) que trust have requested the trustee to assume that office or incur the debt s/he will become personally liable for the debt.

C. **Ultimate Responsibility for Freely Accepted Debts**

In situations in which the cestui(s) que trust are sui juris and collectively absolutely entitled to the trust fund, responsibility for a debt may be imposed upon them by their free acceptance of the associated goods or services.

It will be recalled that free acceptance occurs when the recipient accepts a benefit at a time when s/he had an opportunity to reject it and with the knowledge that it was to be paid for.

Free acceptance of a benefit negates both the argument of subjective devaluation and the issue of voluntariness. The ratification of the trustee's actions provides evidence of the conferment of a quantifiable benefit upon the trust fund and/or the cestui(s) que trust. It also makes the retention of the benefit at the expense of the conferrer unjust.

Viewed from the framework of the multi-perspective analysis, although the trustee has exceeded his express authorisation, the actions of the cestui(s) que trust constitute implied authorisation.

Claims premised upon free acceptance illustrate an interesting aspect of the multi-perspective analysis. By its very nature a successful claim for recovery from the cestui(s) que trust includes the right to recover from the trust fund.
A claimant who has successful premised his claim on free acceptance by the cestui(s) que trust therefore may seek recovery from the trust fund. Indeed it is only in those situations where the trust fund proves insufficient to discharge the debt is the claimant likely to attempt to recover from other property belonging to the cestui(s) que trust.

We shall now consider those situations in which the trustee has incurred a debt in the absence of authorisation or free acceptance.

D. **Ultimate Responsibility for Debts Associated with Incontrovertible Benefits**

It will be recalled that evidence of the recipient's concurrence in the receipt of the benefit has historically been a prerequisite to 'restitutionary' based remedies. The recipient's actions counter any argument against liability premised upon subjective devaluation.

Although the recipient may not have concurred in his receipt of a benefit it is believed that this need not defeat the claim. In some situations the argument of subjective devaluation may be outweighed by other considerations.

Arguably this occurs when the recipient has objectively received a quantifiable benefit. To the extent of the benefit so conferred "[t]he equities of the plaintiff's claim may be more compelling than the defendant's plea: 'I did not ask you to do what you did; and I did not have the opportunity of rejecting ... [your actions]."\(^{13}\) This is the nature of a claim based upon incontrover-
Incontrovertible benefit occurs when (inter alia) the recipient has been saved an expense which s/he would otherwise have necessarily incurred. As argued by Birks this may occur when no reasonable man would deny that it was likely that the defendant would have incurred the expense.14

An incontrovertible benefit may also be conferred in those situations in which, in the absence of the plaintiff's intervention, the recipient would have been legally bound to make the expenditure.

As recognised by Birks the "no reasonable man" test "does no more than moderate the greater absurdities of a subjective approach."15 In this respect Birks' conception of a claim based upon incontrovertible benefit is narrower than that advanced by Jones16, or Goff and Jones.17

13. Jones, Restitutionary Claims for Services Rendered supra at 275

14. Birks, An Introduction to The Law of Restitution supra at 116-117

15. Idem.

16. Jones, Restitutionary Claims for Services Rendered supra

17. Goff and Jones, The Law of Restitution supra
From our earlier examination\textsuperscript{18} of the generalised right to restitution advanced by Goff and Jones\textsuperscript{19}, in particular the limit of officiousness, it will be recalled that Craven-Ellis v. Canons, Limited\textsuperscript{20}, the dissenting judgment of Greene M.R. in Re Cleadon Trust Ltd\textsuperscript{21} and the judgment of the Court of Appeal in Owen v. Tate\textsuperscript{22} suggest that where an incontrovertible benefit has been conferred after 'encouragement' provided by the 'recipient' or an agent thereof restitutionary relief should be granted. Although the encouragement can not constitute and does not constitute authorisation it does provide evidence that the conferor's actions were not officious.

'Encouragement' is an abstract concept. The determination of both its existence and whether the trustee/creditor was justified in acting on it depends on the fact situation before the court.

An advantage and strength of the multi-perspective analysis is that it directs the court's attention to the part played by the cestui(s)

\textsuperscript{18} See pages 53-74 supra.

\textsuperscript{19} Goff and Jones, \textit{The Law of Restitution} supra

\textsuperscript{20} [1936] 2 KB 403 (CA)

\textsuperscript{21} [1938] 4 All ER 518 (CA)

\textsuperscript{22} [1975] 2 All ER 129 (CA)
gue trust (or some thereof) in encouraging the trustee/creditor to confer a benefit upon the trust. It also enables the court to consider whether the actions of the trustee/creditor or his reliance upon this encouragement was reasonable.

From this the court can determine whether it is unjust for the trust fund to retain the incontrovertible benefit so conferred.

The operation of the multi-perspective analysis may appear novel. It must be recognised that it merges the traditional devices available to the courts to assist determine ultimate responsibility for trust debts with theories of unjust enrichment. Nevertheless the multi-perspective analysis is not revolutionary but evolutionary in its influence on the existing law. This is another one of its strengths.

Indeed the existence of the multi-perspective analysis may have been recognised (albeit imperfectly) by the Judicial Committee of the Privy Council in Hardoon v. Belilios. As we shall now see their Lordship's opinion is a micocosm of the operation of the multi-perspective analysis.

23. [1901] AC 118 (JC)
It will be recalled24 that in this case, the Judicial Committee of the Privy Council recognised that irrespective of an express request to incur a debt or assume the office of trustee, a trustee may have a right of indemnity against a cestui que trust who was sui juris for debts arising from the ownership of trust property.

As we have seen there has been academic interest in ascertaining the rationale for the court's intervention. Because the cestui que trust could call for the legal title to the shares Ford has suggested that "there can be inferred a continuing request by ... [the cestui que trust] to the trustee to incur liabilities in the course of the administration of the trust."25

This is one rationale for their Lordship's opinion. It is believed, however, that such a rationale reads too much into their Lordships' advice. Indeed as recognised by Ford, their Lordships believed that in the situation before them "[i]: ... [was] not necessary for the trustee to show that the beneficiary requested him to incur the liability."26

24. See pages 96-102 supra.

25. Ford, Trading Trusts and Creditors Rights supra at 7

26. Ibid. at 6
Of more concern, a rationale of 'inferred request' as advanced by Ford may result in restricting the development of the principle expounded in this case. To paraphrase from Lord Aitken, an 'inferred request' rationale may introduce new ghosts to stand in the path of justice.27

A better rationale for the operation of this principle is the receipt of a quantifiable benefit. While we have examined the implications of the receipt of a quantifiable benefit from the devices which are available to establish its existence (i.e. authorisation, free acceptance and incontrovertible benefit) the similarity with the multi-perspective analysis is readily apparent.

In Hardoon v. Belilios28 the cestui que trust was saved an expense which in the absence of the trust and his continued ownership of the shares he would have incurred. The titular owner of the shares was under a legal obligation to pay the calls.

27. United Australia Ltd v. Barclays Bank Ltd [1941] AC 1 at 29 (JC). Lord Aitken's comments were directed to quasi-contractual remedies and the argument that they were premised upon an 'implied contract'.

"These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of actions which have now disappeared should not in these days be allowed to affect natural rights. When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred."

28. [1901] AC 118 (JC)
As recognised by Ford the important aspect of Hardoon v. Belilios\textsuperscript{29} was that the cestui que trust could, at any time, have terminated the trust and ask for the shares to be legally transferred to him.\textsuperscript{30}

The continued operation of the trust was apparently a matter of convenience for the cestui que trust. Indeed he specifically declined a request by the trustee to accept a transfer of the legal ownership of the shares. The result of the trustee's action was therefore to discharge a debt which, in the absence of the trust, would have otherwise fallen upon the cestui que trust.

While a rationale of a receipt of a 'quantifiable benefit' may initially appear novel, it is inherent in their Lordships' advice. It will be recalled that the Judicial Committee opined:-

"The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can shew some good reason why his trustee should bear them himself."\textsuperscript{31}

The crucial phrase in this extract is 'benefit'.

To illustrate that [t]his is no new principle, but is as old as trusts themselves"\textsuperscript{32} their Lordships referred to a number of cases.

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29. supra.

30. Ford, Trading Trusts And Creditors' Rights supra at 7

In all these cases the cestuis que trust were sui juris and collectively absolutely entitled to the trust fund.

One such case was *Balsh v. Hyham*. At the express request of the cestuis que trust the trustee borrowed money. Not surprisingly the Court held that the trustee was entitled to be indemnified from the cestuis que trust. Viewed from the multi-perspective analysis this decision is an example of authorisation conferred by the cestuis que trust.

Another case referred to as illustrating this principle was *Ex parte Chippenendale, In the matter of The German Mining Co.*

The German Mining Co. was a joint stock company formed to work some mines in Germany. When the subscribed capital proved insufficient to finance the Company’s operations, the directors (on their personal guarantees) borrowed from the London and Westminster Bank.

Notwithstanding this loan the payment of the miners’ wages fell into arrears and a number of debts became overdue. To prevent the seizure of the mines with the resultant loss, the directors and a

32. Ibid at 124 per Lord Lindley

33. (1728) 2 P Wms 453; 24 ER 810 (Ch)

34. (1854) 4 DeG M & G 19; 43 ER 415 (CA Ch)
number of shareholders made additional monetary advances.

These endeavours to save the Company were unsuccessful and it was ultimately wound up. During this process the liability of the Company for the loan and subsequent advances was questioned.

In determining assumpsit proceedings commenced by the London and Westminster Bank, the Court of Exchequer held that the loan was unenforceable against the Company. Although used for authorised purposes the loan per se was unauthorised. The deed of settlement pursuant to which the company had been formed conferred no power to borrow upon the directors. Additional funds could only be attained through injections of capital.

By contrast, the Court of Appeal in Chancery held that the Company was liable for the advances of directors and shareholders. Although the directors lacked authority to borrow the Court held that they had a right to obtain the advances. The Court decreed that the advances could be accredited as set-offs against the impending calls to discharge the Company's debts.

The director's then repaid the London and Westminster Bank pursuant to their personal guarantees and sought reimbursement from the Company.

The validity of the directors' claim was determined by the Court of Appeal comprised of the same membership as sat in the earlier case. Knight Bruce L.J. considered that both the Company's liability for the advances and the directors' claim for indemnity were governed
by the same principles.

Although the borrowing was ultra vires, once repaid by the directors pursuant to their personal guarantees they became in effect advances.35 Because this money had been employed bona fide in the Company's operations Knight Bruce L.J. believed the directors were entitled to be reimbursed.

Because the "borrowing" was used for authorised purposes Turner L.J. also recognised a right of reimbursement. He said:-

"[I]t was insisted on the Appellants' behalf that, it having been established at law that this company was not liable to the bankers for the monies advanced by them, it would follow, as a necessary consequence, that the Respondents could not be entitled to be repaid by the company the monies which they had paid, in discharge of the amount due to the bankers; although directors undoubtedly stand in the position of agents, and cannot bind their companies beyond the limits of their authority, they also stand, in some degree, in the position of trustees; and all trustees are entitled to be indemnified against expenses bona fide incurred by them in the due execution of their trust. There is no inconsistency in this double view of the position of directors. They are agents, and cannot bind their companies beyond their powers. They are trustees, and are entitled to be indemnified for expenses incurred by them within the limits of their trust. If therefore it appears that monies advanced by the directors of companies have been duly applied for the purposes of the trust reposed in them (and it can make no difference whether the monies were originally advanced, or, were

35. A similar rationale applies in respect of borrowings in excess of the borrowers authority. To the extent that the unauthorised borrowing is used to repay an existing and authorised loan it is pro tanto validated. See Goff and Jones, The Law of Restitution supra at 551-567.
in the first instance borrowed, and afterwards repaid by them), it may well be, that they may be entitled to be repaid by their companies the monies which they have so advanced, although, the persons from whom they have borrowed for the purpose of making the advance may not be entitled to recover against the companies.\textsuperscript{36}

The similarity between these illustrations of the "application of the principle\textsuperscript{37} is the conferment of a quantifiable benefit. In Balsh v. Hyham\textsuperscript{38} the quantifiable benefit arose by virtue of a request. In Ex. p. Chippendale, The German Mining Co\textsuperscript{39} the quantifiable benefit arose by the trustees applying the money in a manner authorised by the trust deed. In Hardoon v. Belilios\textsuperscript{40} an incontrovertible benefit was conferred.

This distinction and its implications was noted by their Lordships in Hardoon v. Belilios\textsuperscript{41}:-

"Where, as in Balsh v. Hyham, a trustee seeks indemnity in respect of transactions in which he need not have

\begin{itemize}
\item \textsuperscript{36} (1854) 4 DeG M & G 19 at 51-52; 43 ER 415 at 427
\item \textsuperscript{37} Hardoon v. Belilios [1901] AC 118 at 124 per Lord Lindley (JC)
\item \textsuperscript{38} (1728) 2 P Wms 453; 24 ER 810 (Ch)
\item \textsuperscript{39} (1854) 4 DeG M & G 19; 43 ER 415 (CA Ch)
\item \textsuperscript{40} [1901] AC 118 (JC)
\item \textsuperscript{41} supra.
\end{itemize}
engaged and which were not within the scope of his trust, he must prove that his cestui que trust either authorized or ratified such transactions. But if he has incurred liability within the scope of his trust, and for the benefit of his cestui que trust, Ex parte Chippendale shows that nothing more is required.

When a trustee seeks indemnity from his cestui que trust against liabilities arising from the mere fact of ownership, there is neither principle nor authority for saying that the trustee need prove any request from his cestui que trust to incur such liability. 42

The similarity between the Hardoon v. Belilios 43 principle and the multi-perspective analysis is further displayed by the decision of the Judicial Committee of the Privy Council in Wise v. Perpetual Trustee Company Limited 44

While the conferment of an incontrovertible benefit arising from the preservation of trust property adds persuassion to a claim for recovery, it may not result in the imposition of responsibility upon the cestui(s) que trust. It will be recalled that Goff and Jones argue that the receipt of an incontrovertible benefit only raises a prima facie claim for restitutionary relief. 45 The claim may be defeated if the claimant acted officiously.

42. Ibid. per Lord Lindley at 125

43. supra

44. [1903] AC 139 (JC)

This limitation is displayed in Wise v. Perpetual Trustee Company Limited. This case involved the claim of the trustees of an unincorporated club to be indemnified from the members thereof (the cestuis que trust) against liabilities associated with the lease of club premises.

As in Hardoon v. Belilios, the opinion of the Judicial Committee of the Privy Council was delivered by Lord Lindley.

"In Hardoon v. Belilios this Board had to consider the right of trustees to be indemnified by their cestuis que trust against liabilities incurred by the trustees by holding trust property. The right of trustees to such indemnity was recognized as well established in the simple case of a trustee and an adult cestui que trust. But, as was then pointed out, this principle by no means applies to all trusts, and it cannot be applied to cases in which the nature of the transaction excludes it.

Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognized."

46. [1903] AC 139 (JC)

47. [1901] AC 118 (JC)

48. [1903] AC 139 at 149 per Lord Lindley (JC)
Although the cestuis que trust received a benefit from the trustees actions, their retention of the benefit was not "unjust". To the extent that the trustee had incurred liabilities beyond their ability to discharge them from the annual subscriptions they had acted officiously.

While they appear novel the principles inherent in the multi-perspective analysis may be "as old as trusts themselves". We shall now consider some of the advantages which the application of the multi-perspective analysis would result in.

49. Hardoon v. Belilios supra at 124 per Lord Lindley
IV ADVANTAGES OF THE MULTI-PERSPECTIVE ANALYSIS

1. Introduction

As we have seen the effectiveness of the various rights of indemnity to assist the courts determine ultimate responsibility for trust debts has been increasingly undermined by a number of factors. These factors can be primarily identified as:

(i) commercial and trading pressures;
(ii) changes in public perception of the trustee's role; and
(iii) the development of theories of unjust enrichment.

The same factors, it has been argued, have also provided the impetus for the development of the alternative approaches considered earlier.

The impact and significance of commercial and trading pressures, changes in public perception of the trustee's role and the development of theories of unjust enrichment therefore warrants recall to re-establish the point that a coherent and comprehensive approach (as has been advanced) is needed to replace the present disparate and seemingly piecemeal devices that have been used.

A. Commercial and Trading Pressures

The development of the trading trust has placed commercial and trading pressure on the trustee's rights of indemnity as a judicial device to solve the issue of ultimate responsibility for trust debts. Although most trusts involve the trustee in incurring debts, it is a special feature of the trading trust that the trustee is
constantly incurring debts.

Because the trustee's rights of indemnity are premised on the creditor having a right of recourse against the trustee alone, the significance of the trading trust, however, has been to restrict the creditor to whatever rights the trustee has had to be indemnified.

What devices the courts have to counter this development have become increasingly strained and ineffectual. Indeed the courts have been unable to easily adapt the trustee's rights of indemnity to counter this development and thereby provide a means of protection to creditors.

B. Changes in Public Perception of the Trustee's Role

The development of the trading trust also illustrates a change in the public perception of the trust. Notwithstanding the passage of time and the fusion of the courts of Common Law and Chancery the trustee continues to be the legal owner of the trust fund. The essence of the trust remains an equitable obligation in the trustee to deal with property owned by him for the benefit of the cestui(s) que trust.

This view of the trust, however, is increasingly at variance with public perception and expectation. Often as not the trustee is viewed as an administrator or manager, not as the sole focus of rights and liabilities - rather as being in charge of a broader fund and not as a lone person.

The elasticity of the trust has enabled the trading trust to be or-
ganised along corporate lines. Quite naturally the trustee's role in such trusts becomes viewed as analogous to that of a company director. This has added impetus to attempts to insulate the trustee from personal liability.

The use of a limited liability company as trustee further highlights this change in public perception.

C. The Development of Theories of Unjust Enrichment

The third factor, it is contended, which has added impetus to the development of alternative approaches to assist the courts determine ultimate responsibility for trust debts has been the evolution of theories of unjust enrichment.

The idea behind the principle of unjust enrichment is not new. During 1762-63 when lecturing on "quasi-ex contractual obligations" or as he described them "the right of restitution", Adam Smith is attributed as saying that "whenever I am benefited by the property of another in a manner to which I have no just claim, I am bound to make restitution quantum ex re aliena locu/pletior factus sum" (to the extent that I have been enriched out of another's property). 50

Notions of unjust enrichment in this general sense are incorporated in the rights of indemnity. As the Judicial Committee of the Privy Council in Hardoon v. Belilios 51 opined:-

"The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself."52

Notions of unjust enrichment are also incorporated in the rationale for the creditor's subrogation to the trustee's rights of indemnity. As noted in In re Johnson, Shearman v. Robinson53:-

"The trust assets having been devoted to carrying on the trade it would not be right that the cestui que trust should get the benefit of the trade without paying the liabilities ... ."54

As a judicial device to determine ultimate responsibility for trust debts, the trustee's rights of indemnity, however, have not developed beyond these general notions. The courts have not directly gone on to consider whether, as a result of the trustee's actions, the trust fund has benefited.

Pursuant to the operation of the present devices available to the courts it is immaterial whether the trust fund has increased in value or has been saved a necessary expense by the actions of the

51. [1901] AC 108 (JC)
52. supra. at 123 per Lord Lindley
53. (1880) L R 15 Ch D 548 (ChD)
54. supra. at 552 per Jessel M.R.
trustee. The responsibility of the trust fund and/or the cestui(s) que trust for a debt depends on whether it was authorised.

Notwithstanding the failure of the courts to explore the implications of the evolution of theories of unjust enrichment in this context, the seminal notions of unjust enrichment this doctrine imports have obvious relevance to many of the factual problems arising out of the cases.

2. **Principal Advantages**

A. **Introduction**

The multi-perspective analysis has three principal advantages over the present devices available to the courts. One advantage is that it enables the court in appropriate cases to consider a creditor's claim for payment from the trust fund and/or the cestui(s) que trust on its own merits. The creditor is not subrogated to whatever rights of indemnity the trustee possessed.

The multi-perspective analysis also enables the courts to employ refined theories of unjust enrichment. The ultimate responsibility of the trust fund and cestui(s) que trust for debts is therefore no longer dependent on authorisation. If the trust fund has received, for instance, an incontrovertible benefit, it may become responsible, to the value of the benefit so conferred, for the associated debt.

These two advantages enable the courts to adapt solutions to reflect commercial and trading pressures. They provide devices by which the courts can re-examine/counter attempts by settlors to insulate the
trust fund and cestui(s) que trust from ultimate responsibility for trust debts.

By enabling the recognition of a direct claim against the trust fund and/or the cestui(s) que trust by creditors, the multi-perspective analysis also goes someway towards reflecting changing public perception of the trust.

The third principal advantage of the multi-perspective analysis is the coherence which it provides to an area of the law which is presently unnecessarily fragmented.

We shall now consider each of these advantages more closely.

B. Claims of Creditors

As we have seen irrespective of the trustee's obligations to the cestui(s) que trust, in the absence of an agency relationship, s/he is the principal through whom all contracts are made or tortious acts committed. There is no nexus between the cestui(s) que trust and the creditor on which to transfer legal liability. The trustee is personally liable for trust debts.

Complications arise when the creditor's right of recovery against the trustee proves illusory. Traditionally this has principally occurred when the trustee is insolvent. Increasingly, however, this occurs because the trustee has contractually excluded direct responsibility. In these situations the creditor may have the right to enjoy the trustee's rights of indemnity.
The creditor's right of subrogation, however, is derivative. S/he is afforded no greater right of recovery from the trust fund and/or the cestui(s) que trust than that possessed by the trustee. As we have seen if the debt was unauthorised or if the trustee is otherwise in default to the trust, the creditor's right of recovery is correspondingly destroyed or reduced.

As observed by the Master of the Rolls Sir George Jessel in *In re Johnson, Shearman v. Robinson*\(^55\), the rationale for the right of subrogation is to stop the cestui(s) que trust "get[ting] the benefit of the trade without paying the liabilities... ."\(^56\)

> 
> "[T]he injustice to be avoided is the injustice of the cestui que trust walking off with the assets which have been earned by the use of the property of the creditors, and there is no injustice as between him and the creditors, and there is no reason for the court interfering at the instance of the creditors to give them a larger right than they have bargained for, namely, their personal right against the trustee."\(^57\)

A trust creditor like any other creditor takes the risk of his debtor becoming insolvent. Pursuant to the subrogation theory the trustee's creditors are able, in varying degrees, to participate in the distribution of the proceeds of the trustee's rights of indemnity and his personal property.

\(^{55}\) (1880) 1 R 15 ch D 548 (ChD)

\(^{56}\) supra at 552

\(^{57}\) Ibid. at 552 per Jessel M.R.
But should trust creditors have to bear the risk that although their transaction with the trustee was proper, the trustee is otherwise in default to the trust?

The operation of the subrogation theory in this situation has been described as "shocking to one's sense of justice". It "enables a cestui que trust to enjoy the fruits of the creditor's property or services without compensating him for them, merely because in another transaction the trustee was guilty of a breach of trust...".

Support for recognising a right of recovery for the creditor in this situation can be found in a number of American decisions and academic writings.

Harlan F. Stone is one of the academic writers who have questioned the operation of the subrogation theory. He argued that the result suggested by the subrogation theory in this situation "leaves something to be desired". He believed that this result arose from an

58. Stone, A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee (1922) 22 Col L Rev 527 at 528

59. Ibid. at 532

60. Brandeis, Liability of Trust-Estates On Contracts Made For Their Benefit (1881) 15 A L R 449; Stone, A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee supra.

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erroneous understanding of the trustee's right of indemnity.

According to Stone the trustee's relationship with the cestui(s) que trust comprised more than the right of reimbursement for properly incurred debts. He believed that it also "embraces the power to apply the trust funds for the payment of all expenses necessary or proper for the administration of the trust whether ... [the trustee] be entitled to reimbursement or not."62

In furtherance of the trustee's 'power to apply' the trust property, Stone argued that s/he could confer on the creditor a direct claim against the trust estate.63 The creditor was not restricted to a mere right of subrogation.

It was immaterial, therefore, whether the trustee was indebted to the trust. To give the creditor a right against the estate it was only necessary that the trustee was authorised in incurring the debt.

Stone's theory provides support for a number of American decisions

61. Stone, A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee supra at 532

62. Ibid. at 534; His emphasis.

63. Ibid. at 533-6
in which, when confronted with the claims of creditors of insolvent or absent trustees, the courts were prepared to recognise a right of recovery.

In situations in which the debt had been properly incurred but the trustee was in arrears in his accounts to the trust it was argued that the creditor should still be compensated from the trust fund. In support of this argument it was stressed that by virtue of the trustee's authorised act, the trust fund must have received what the settlor of the trust regarded as a benefit. To deny full recovery to the creditor in this situation because of some unrelated breach of trust was viewed as unconscionable.

"In such a case, the cestui que trust may continue to enjoy the full economic benefit of the trust property, including the benefit conferred upon it by the creditor of the trustee without the necessity of paying for it from the trust property or otherwise - the one authentic instance in the law where one may pay his debts with his losses."64

In recognising this right of recovery the courts appeared preoccupied with achieving what they saw as a 'just' result. The courts chose not to advance an analysis of the relationships between the various parties upon which such a right of recovery could be based.

As Stone noted the courts appeared content to justify recovery in these situations upon grounds of "social policy and convenience without the support, however, of any very adequate analysis of the

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64. Ibid. at 529

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relation of the parties on which a right on behalf of the creditor could be based".65

In one case, for instance, recovery was granted because "[i]t was the trust estate, and not the trustee individually, that was benefited by the ... [creditors] well directed and successful services; and hence it is both reasonable and just that they should be paid out of the trust fund".66

To rationalise their actions the courts did recognise that this right of recovery would have to be distinct from the trustee's right of indemnity. As the creditor's right was not related to the trustee's right of indemnity there was "no reason why the absconding trustee's sins, either of omission or commission, should be visited on a creditor ... who at the instance of the trustee, having authority to employ him, has rendered necessary and beneficial services to the trust, and has not yet been compensated therefor."67

The most cited example of this approach is the judgment of the Supreme Court of Georgia in Wylly v. Collins & Co.68

65. Ibid. at 529

66. Manderson's Appeal 113 Pa 893 (1886) at 894 per Sterrett J.

67. Ibid. at 894-5 per Sterrett J.

68. 9 Ga 223 (1851)
The trust fund included a plantation and slaves. As trustee, Wylly had purchased goods for use in the plantation together with food and other items of a consumer nature for consumption by his wife, his children, and the trust slaves. Wylly's wife and children were the cestuis que trust.

Although the associated debts were properly incurred, Wylly was in default to the trust and his rights of indemnity had therefore been extinguished. Wylly was also insolvent.

The operation of the subrogation theory suggests that to the extent that no distribution was available from Wylly's personal assets, the trust creditors would have to bear the loss. The Court, however, granted recovery from the trust fund.

In response to the argument that, to the extent that the trustee is in default to the trust, a trustee or creditor claiming through him cannot recover from the trust property, Lumpkin J. replied: -

"But if this ... principle is to be understood as maintaining that, where the trustee, in this class of trusts, is in arrears to the trust estate, the trustee has furnished articles for the use and benefit of the trust estate, and which are necessary and proper for it, is not entitled to payment, unless the trust estate is in debt to the trustee, so that the creditor may be subrogated to his rights - equity making that party responsible, at once, on whom the burden must ultimately fall, we are compelled to withhold from it our assent. We cannot subscribe to the proposition, that the equity of the creditor depends upon the fact of whether or not the trustee be in advance or in default to the trust estate. It rests, we suppose, upon an entirely different principle. Humanity to trust estates - the necessity of the case - forbid, in our judgment, the establishment of such a principle.

The trustee may be delinquent for thousands for past mis-management; that, however, cannot deprive the Trust estate of things necessary and proper for present
subsistence. And suppose my agent has received and squandered my effects, are third persons to suffer on that account? It may constitute a very good reason why he should be removed, and a more faithful steward substituted in his place, but it cannot justify the withholding payment from the creditor who has fed and clothed me, and administered to my wants.”

This line of authority was also the subject of examination by Louis D. Brandeis. He suggested that the recognition of a right of recovery directly against the trust fund in this situation was based "upon the broad principle of natural equity that a benefit given at request, with the understanding that it is not to be gratuitous, ought to be paid for.”

The South Carolina case of Magwood v. Patterson was cited as an example of the recognition of this equity. In this case Chancellor Harper said:-

"The equity on which a creditor comes into this court to render the trust-estates liable for the payment of his debt is this: that he has advanced his money or given his credit to effect the objects of the trust, and, having accomplished the objects of the trust at his own expense, he has a right to be put in the place

69. Ibid. at 235

70. Brandeis, Liability of Trust-Estates On Contracts Made For Their Benefit supra

71. Supra. at 452

72. 1 Hill's Ch 228 (Hill's South Carolina Equity Reports (10-11 Sc Eq) (1833-37))
of the cestui que trust, or to be reimbursed out of the trust fund."\textsuperscript{73}

It was conceded by Brandeis that just as a voluntary service rendered to an individual can per se create no rights, the mere fact that the estate received a benefit, even a necessary benefit, was insufficient to raise the equity. The authority of the trustee to give the request for the goods, services or money was a prerequisite.\textsuperscript{74}

"The request of the person having charge and control of the estate is essential; there must be personal liability of the trustee ... which was created by his contract and not discharged by reason of his insolvency. The limitation of the right against the estate to cases where the trustee ... is insolvent is not only consonant with reason, but would seem to follow from the general rule that a court of equity will afford no relief where a party has a complete and adequate remedy at law."\textsuperscript{75}

Whilst recognising that English law and the majority of the American states afforded no precise analogy of this equity, Brandeis argued that the principle on which it rested had received recognition in other areas of the law and should be extended to the trust situation.

\textsuperscript{73} Ibid. at 232

\textsuperscript{74} Brandeis, \textit{Liability of Trust-Estates On Contracts Made For Their Benefit} supra at 456-7.

\textsuperscript{75} Ibid. at 457
These areas of the law included contracts for the supply of necessi-
ties to infants and lunatics, the repayment of money lent to a
married woman for the purchase of necessities and the ultra vires
borrowing of money by a company and the use of that money in the
payment of its legal debts and the purchase of necessities.\textsuperscript{76}

In all these situations although there was no contractual link be-
tween the creditors and the ultimate payer "they furnish instances
of our courts having acted on the principle that where goods, serv-
ices, or money are furnished on request to supply a want which the
law considers a necessary one, a liability to pay arises although
the power to contract did not exist."\textsuperscript{77}

To return to our examination of the claims of creditors, the situa-
tion of an authorised debt and a trustee in arrears to the trust is
not, however, the only situation in which the creditor may be disad-
vantaged by the operation of the subrogation theory.

As with the trustee, to the extent that the trustee's rights of in-
demnity do not fully 'indemnify' the trustee for the debts which
s/he has incurred on behalf of the trust and which have resulted in
a quantifiable benefit the trust creditor is further disadvantaged.
In this situation the cestui(s) que trust are also "getting the
benefit of the trade without paying its liabilities".\textsuperscript{78}

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\textsuperscript{76} Ibid. at 453

\textsuperscript{77} Idem.
Brandeis's theory\textsuperscript{79} provides justification for the judicial recognition of a right of recovery for authorised debts. The 'request' provides evidence of the receipt of a quantifiable benefit which justifies recovery.

Nevertheless the application of this theory is restricted by the limitations inherent in skeletal notions of unjust enrichment. As we have seen theories of unjust enrichment have evolved. Evidence of a request is just one of the devices by which evidence of the receipt of a quantifiable benefit is attained. Free acceptance and incontrovertible benefit are other devices.

When judicially determined through the assistance of the multi-perspective analysis the creditor's claim is not derivative; it is determined on its own merits. The creditor, may be granted a more extensive right of recovery than that available to the trustee.

While the multi-perspective analysis enables the courts to confer a right of recovery on the creditor where no such right previously existed, this will not necessarily be so. In some situations the creditor's claim for relief may be reduced or destroyed.

\textsuperscript{78} In re Johnson, Shearman v. Robinson (1880) L R 15 Ch D 548 at 552 per Jessel M.R.

\textsuperscript{79} Brandeis, Liability of Trust-Estates On Contracts Made For Their Benefit supra
The ability to view the creditor's claim independently of the trustee is one of the principal differences between the multi-perspective analysis and the traditional devices.

C. **Theories of Unjust Enrichment**

A second advantage enjoyed by the multi-perspective analysis is its ability to recognise and reflect the importance which the development of theories of unjust enrichment has had on the issue of responsibility for trust debts.

The existing devices do not enable the courts to directly consider whether the trust fund has been benefited by the trustees' actions. It is immaterial whether the actions of the trustee have increased the value of the trust fund or has relieved it from a necessary expense. The responsibility of the trust fund and/or the cestui(s) que trust for a debt depends on whether it was authorised.

When considered against theories of unjust enrichment, the present devices produce inequitable results. Irrespective of the trustees' authorisation to incur a debt it may be appropriate for the trust fund and/or the cestui(s) que trust to bear responsibility.

Such a situation may arise when, as a result of the trustee's actions, the trust fund has increased in value or has been saved a necessary expense. To the extent of the increase in value or the saved expenditure it may be argued that the trustee/creditor should have a right of recovery.

The receipt of a benefit by the trust fund is another perspective
which the multi-perspective analysis enables the court to consider in determining ultimate responsibility for trust debts.

D. A Coherent Solution

By introducing additional perspectives by which the courts can determine ultimate responsibility for trust debts it could be argued that the multi-perspective analysis results in increased complexity and uncertainty. Nevertheless the contrary is true.

As we have seen the elasticity of the trust has encouraged a growth in the nature and variety of situations in which the trust is employed. This elasticity, however, has complicated endeavours to determine responsibility for trust debts.

To reflect the elasticity of the trust the courts employ a number of different approaches or devices to assist determine ultimate responsibility for trust debts.

By enabling the courts to recognise the common perspective of authorisation the multi-perspective analysis assimilates the existing devices. The impact of the multi-perspective analysis, however, is not restricted to this.

To determine responsibility for a trust debt a court may be required to employ devices from both groups. This will occur, for instance, when the trust fund is insufficient to provide a full indemnity to the trustee. To obtain a full indemnity the trustee must then seek the balance from the cestui(s) que trust. Because each group of devices restrict the courts examination of the issue of ultimate
responsibility to its own particular perspectives, the courts have been precluded from recognising both the inter-relationship between each group and the fact that they are components of a comprehensive solution.

In addition to considering the existence of authorisation the devices which provide a right of indemnity against the trust fund direct the court to consider some of the trustee's actions. The devices which provide a right of indemnity against the cestui(s) que trust also direct the court's attention to the actions of the cestui(s) que trust.

Each group of devices offer relevant but differing perspectives to assist the courts in determining ultimate responsibility for trust debts. The strength of the multi-perspective analysis is that it enables the courts to consider this issue from all the perspectives inherent in the various devices.

Adoption of the multi-perspective analysis will not result in the wholesale abandonment of the solutions suggested by the operation of the present devices but enables them to evolve pragmatically.

The multi-perspective analysis provides a unifying framework against which the present devices can be viewed. By placing these devices in a wider context the multi-perspective analysis provides a necessary refinement. The differences between the various devices are seen as aspects of a coherent theory. This is one of the principal advantages of the multi-perspective analysis.
V. CONCLUSION

It will be recalled that the recognition and development of the trust has been attributed as being "the greatest and most distinct achievement performed by Englishman in the field of jurisprudence."80 "It has all the generality, all the elasticity of contract".81

The present devices available to the court to assist in determining ultimate responsibility for trust debts, however, do not share the same degree of elasticity.

The elasticity so provided is also at the expense of a coherent theory. The courts are restricted to using a mixture of seemingly different devices to determine ultimate responsibility for trust debts. This has led to unnecessary complexities.

As we have seen the multi-perspective analysis provides the necessary elasticity by which the courts can determine ultimate responsibility for trust debts. Moreover this can be achieved within a coherent theory.

Not only does the multi-perspective analysis encompass and explain the present devices but it supplies a necessary refinement.

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80. Fisher ed, Maitland The Collected Papers supra at 272
81. Ibid. at 322
Unlike the present disparate devices, the multi-perspective analysis also provides the courts with a framework against which they can respond to commercial and trading pressures.

Furthermore although skeletal notions of unjust enrichment are implied in the present devices, these devices have not evolved to reflect developments in the theories of unjust enrichment. The multi-perspective analysis, however, enables the courts to recognise these developments and acknowledge their implications.

These are some of the immediately perceivable advantages which the adoption and utilisation of the multi-perspective analysis would effect.

This paper, we believe, has shown the issue of ultimate responsibility for trust debts is not now coherently resolved. The multi-perspective analysis we have advocated would provide a means to enable a more sensible resolution.
BIBLIOGRAPHY
OF WORKS CITED AND SOURCES OF FURTHER REFERENCE

Aaron, H.J.: Massachusetts Trusts as Distinguished from Partnership (1918) 12 Ill L Rev 482.


Brake, M.E.: Creditors' Rights Against the Trustee, the Trustee Estate and the Beneficiary 28 Mich S B J 12.

Brandeis, L.D.: Liability of Trust Estates on Contracts Made For Their Benefit (1881) 5 A L R 449.


------Modern Status of the Massachusetts or Business Trust 88 A L R 3d 704.


------Liability of Beneficiaries - A Further Rejoinder To Mr Flannigan (1986) 8 E & TQ 13.


------ *The Control Test of Principal Status Applied To Business Trusts (Part I)* (1986) 8 E & TQ 37.

------ *The Control Test of Principal Status Applied To Business Trusts (Part II)* (1986) 8 E & TQ 97.


Grbich, Y.: *Can Liabilities For $2 Nominee Trustee Companies be Recovered From the Trust Fund and Beneficiaries* (1979) A paper presented in Monash University "Problems of Administering $2 Nominee Trustee Companies".


Hildebrand, I.P.: *Liability of the Trustees, Property and Shareholders of a Massachusetts Trust* (1924) 2 Tex L Rev 139.
Jeanblanc, L.R.: Personal Liabilities of Trustees and Beneficiaries (1936) 25 Ill B J 112.


Judah, N.B.: Possible Partnership Liability Under the Business Trust (1922) 17 Ill L Rev 77.


Reif, H.R.: Trustee in a Business Trust as a Limited Partner (1922) 8 Cornell L Q 90.


Rommell, J.F.: **Associations, Massachusetts Trust** (1923) 17 Ill L Rev 450.

-----**Business Trusts** (1921) 14 Law & Bank 154.


Scott, A.W.: **Liabilities Incurred in the Administration of Trusts** (1915) 28 Harv L Rev 725.


Sears, J.H.: **Dangers to be Avoided in the Organization of So-Called "Massachusetts Trusts"** (1918) 86 Cent L J 286.

-----**Trust Estates as Business Companies** Counselors Publishing Co, St Louis, Mo.


------A New Look At Business Trusts (1961) 49 Ill Bar J 744.

White, A.H.: Trustee's Avoidance of Personal Liability on Contracts (1929) 3 Temple L Q 17.


------The Massachusetts Trust Form of Organization (1921) 13 Am Bankers' Ass'n J 315.

------Voluntary Associations in Massachusetts (1912) 21 Yale L J 311.