The Revolution and Legacy of the Discretionary Trust

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The requirement of object certainty in express trusts underwent significant reform in the heady days of the late 1960s and early 1970s. This article argues that those changes have had important implications not only for the theoretical conception of the trust, but also for the modern practice of discretionary trusts.

I. Introduction

The express private trust, and specifically the discretionary express private trust, was the subject of two important developments in the late 1960s and early 1970s that significantly broadened its scope and, as we will argue herein, continue to have a profound effect on the law of trusts and on how the express trust is conceptualised.

Traditionally, to be valid an express trust required an ascertainable human beneficiary. This requirement manifested itself particularly in two rules: the list certainty rule which required that a complete list of beneficiaries could be drawn up at the moment of trust formation; and the rule against trusts for non-charitable and hence private purposes (based on what was styled the human beneficiary principle). Although both rules could be justified within a fairly orthodox understanding of trust law, they had their critics.

The list certainty rule was dramatically reformed by the House of Lords in 1970 in *McPhail v Doulton*.[1] The human beneficiary principle applied in the context of private purpose trusts was the subject of some clarification a year earlier by (Reginald) Goff J in *Re Denley*.[2]

In this article, we will suggest that these judicial developments, particularly when considered together, can be said to have been revolutionary in the theory and practice of trust law. They show a move away from a conception of the trust as a mechanism of split ownership of identified assets between trustee and beneficiary, towards the clearer adoption of an obligation-based model of the trust. They have in particular encouraged a practice of discretionary trusts that is now in many respects far more akin to contract-like voluntary arrangements than to the gifting of determinable key beneficial property rights in respect of identified assets. More significantly, the legacy of these decisions has been, we suggest, a proliferation of powers and discretions in respect of ownership, control and management of trust property that is far removed from what used to be expected of a trust, and in particular enables settlors to retain control over the property to an extent unimaginable in earlier times. This movement opens up a debate whether contemporary express trusts are really trusts at all.

We begin in Part II with a discussion of the nature of the trust and the two rules of express trust law that changed during the transformative period of the 1960s and 1970s. Part III then considers some modern implications of these changes which, we believe, reveal that both the theory and practice of express trusts were greatly affected. Judging the success or otherwise of a revolution is best reserved for after the dust has settled when the resulting legacy can be

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[1] *McPhail v Doulton* [1971] AC 424.

[2] *Re Denley's Trust Deed* [1969] 1 Ch 373.

compared with what was there before. It is clear that change is still ongoing and that the new world of discretionary trusts is one very different from the regime of old.

II. The Revolution

A) The Nature of the Trust

It is worth beginning with a "description" of the discretionary trust. However, it is a truism the exercise of defining a trust is not an easy one and immediately throws up difficult theoretical questions. For the purposes of this article, we *describe* the express trust in this way:

> The express trust arises when property is settled by one person (the settlor) on another person (the trustee) on terms where the trustee has ownership of the property but is not entitled *qua trustee* to the benefit of the property. The trust is not an entity in itself[3] but a relationship of obligation[4] in respect of some identified property. The trustee must administer the property for the benefit of certain beneficiaries, in accordance with the terms of the trust.

The label "discretionary trust" has no fixed meaning.[5] It is a description of a subset (comprising very probably the vast majority) of express trusts in which certain dispositive discretions are conferred on the trustee:[6] she may have the power to determine the type or extent of trust property to be distributed to each beneficiary and she may often be entitled to determine which of the beneficiaries will receive a disposition. Such trusts have become very common in modern practice and usually contain a wide range of other powers vested in the trustee, settlor or protector. While these other powers are usually non-dispositive, they are nevertheless significant because of the degree of control they confer on their donee. Such powers may include: powers to appoint and remove trustees and/or beneficiaries; powers to direct trustees to act; powers to veto trustees' decisions; and powers of revocation.

A critical factor in the trust construct is the content of the obligation that the trustee owes in relation to the trust property and how such an obligation is enforced. It was common in the past to talk of the beneficiary having an equitable interest in the trust property but, that is now the subject of much controversy and one in respect of which the broadening effect of the *McPhail v Doulton* and *Re Denley* decisions has had profound impact.

Two broad paradigms have been used to conceptualise the trust. First, the trust can be conceived of as a mechanism of creating property rights. This view entails that fundamental to a trust is that a trustee holds property belonging beneficially to another. The express trust is a structured transfer of property from the settlor to the beneficiaries, achieved by means that are unavailable at common law.[7] It has strong similarities to a donation of property and, as such, the terms of the trust are not a matter of agreement between the donor (the settlor) and donee

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3 M Leeming, "'Chameleon-hued Words': A Note on Discretionary Trusts (2015) 89 ALJ 371.

4 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (8th ed, LexisNexis, Australia, 2016) at [1-01].

5 *Fischer v Nemske Pty Ltd* [2016] HCA 11 at [118] per Gordon J; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 per curiam.

6 In many cases, these discretions are conferred on persons who are not trustees. For the purposes of this article we do not venture into the complexities to which such analysis would necessarily lead.

7 J Penner, "Exemptions" in Peter Birks and Arianna Pretto (eds) *Breach of Trust* (Hart Publishing, Oxford, 2002) 241 at 261.

(the trustee),[8] but rather are terms that run with the property thus binding successors in title to that property, save for bona fide purchasers of the legal title without notice of the rights of the equitable property holders. The property conception requires that there must be trust property and that there must be a separation between the legal and equitable ownership of that trust property.[9] The focus of the trust is the property with which it is concerned and the split ownership of it, and the (mainly proprietary) obligations that consequently arise to effect that split ownership. The obligations of the trustee under this proprietary model are, in theoretical terms, obligations *in rem*. This is not to say that personal or *in personam* obligations do not arise, but they are largely ancillary to the obligations *in rem*. The correlative property rights of the beneficiaries also give rise to *commensurate personal rights in equity*.[10]

The second popular paradigm of the trust is that it is *primarily* concerned with personal obligations that happen to be mediated through property. The trust property is the trustee's own, but is subject to obligations on the trustee owed to the beneficiary that by their very nature will have effects on the practical extent of her rights to the property. As stated by Parkinson, a proponent of the obligation-based view:[11]

> [I]t is incorrect to think of trusts always in terms of legal and equitable ownership. Rather, the core idea of the private express trust lies in the notion of equitable obligations in relation to property, which in most cases will also give to beneficiaries *commensurate property rights in equity*.

Under this model, the concern is with the obligations with which the trustee must comply and, because these obligations are generally considered to be voluntarily undertaken,[12] the trust is more appropriately seen as a consensual arrangement. It is a negotiated relationship, or a deal, between the settlor and trustee that affects the trustee's relationship with a third party, the beneficiary, in respect of access to the trust property.[13]

The debate is an old one that is reignited periodically in academic scholarship.[14] It is less often the subject of direct judicial deliberation but it has significant implications for many of the rules and doctrines of trust law.[15] It also has important practical consequences: whether a

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8 The intended trustee may, of course, refuse the trusteeship, but this is not fatal to the existence of the trust. Indeed, it supports the suggestion that agreement is not key to the existence of a trust.

9 D Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can BR 219; P Parkinson, "Reconceptualising the Express Trust" (2002) 61 CLJ 657 at 658.

10 For a discussion of the theory of property rights, and how such rights are enforced and are conceptually related to rights *in personam*, see RB Grantham and CEF Rickett, "Property Rights as a Significant Legal Event" [2003] CLJ 717.

11 P Parkinson, "Reconceptualising the Express Trust" (2002) 61 CLJ 657 at 663 (emphasis added). See also L Smith, "Trust and Patrimony" (2009) 28 ETPJ 332. See also (for the argument that the trust is a dual faceted doctrine because it is both *in personam* and *in rem*) CEF Rickett, "The Classification of Trusts" (1999) 18 NZULR 305: the type of trust in question determines whether the focus is on the duties owed by the trustee or on the property rights of the beneficiary – in non-express trusts (resulting and constructive) the focus is on property rights; whereas in an express trust the focus is on the obligations owed by the trustee to the beneficiary, with the ownership of the trust property being a secondary consideration (these obligations are referenced to property, so that there is no denial that property plays a key role in the express trust arrangement, but obligations are their paramount feature).

12 See, for example, *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [87] per Tipping J.

13 J Langbein, "The Contractarian Basis of the Law of Trusts" (1996) 105 Yale LJ 625.

14 For example, see P Parkinson, "Reconceptualising the Express Trust" (2002) 61 CLJ 657; P Jaffey, "Explaining the Trust" (2015) 131 LQR 377.

15 See further, J Palmer, "Theories of the trust and what they might mean for beneficiary rights to information" [2010] NZLR 541.

beneficiary has a property interest in the trust assets can be relevant to liability for tax;[16] to identifying the appropriate jurisdiction in cross-border claims;[17] and to claims against beneficiaries made most often by spouses and creditors in the absence of any enabling legislation.[18]

One obvious and fundamental dimension of the debate whether the express trust is fundamentally a property construct or an obligational concept is: what exactly is the nature of a beneficiary's interest (or right) in the trust property?[19] The answer to that question is both a consequence of the position taken in the more general debate and a component part of that debate itself. Whether the view is taken that a trust is a contract or a gift, once the trust is duly constituted and the property is in the legal ownership of the trustee (whether by transfer or by its nature as the settlor's own property at the time of the trust's declaration), do the beneficiaries acquire property rights in equity in respect of those assets? Is it correct to say that express trusts create rights *in rem*?[20] Or does the beneficiary really only acquire personal rights effectively to enforce the obligations of the trustee?[21] In other words, while it is often loosely stated that the trust's greatest asset is its notion of split ownership, does that split occur in rights *in rem* in respect of the same asset generated by the dual systems of Common Law and Equity, or of rights in or over the trustee's rights? If the latter, can one talk about property at all, or is the trust really merely a complex web of obligational relationships?

If the true nature of the beneficiaries' rights is already contestable, a trust that is discretionary only adds further to the puzzle. Where the trust is a discretionary one (where the trustee has a duty to distribute in some form but a power preserving for him a discretion as to how and to whom to distribute trust assets), in what sense can it be said that the beneficiaries have rights *in rem*? It is often said that no discretionary beneficiary (i.e. someone who might or might not be chosen by the trustee at the latter's discretion to receive a distribution of the trust assets) has a claim *to own* the trust property – at best he can say "I hope or expect to get something when the discretion is exercised". That is appealing at a superficial level, but it does not help us answer a question that must be answered. The trust fund is held by the trustee *as trustee*. The trustee has rights *in rem* in the fund but her particular rights do not extend to the beneficial part of any rights *in rem* since such an extension would be inconsistent with her role as trustee. For example, unlike the non-trustee legal owner, the trustee owner cannot possess the trust property, in the sense that a full owner can. Her role as legal owner is ultimately (subject to potential delay under the terms of the trust) to transfer the trust property to those entitled to it and in the meantime to manage it in such a way that she will be able to execute the transfer when the time comes (she can be said to possess the trust property only in that limited way). But if neither the beneficiaries nor the trustee is able to claim as of right the benefit of the property, then where exactly is the beneficial ownership?

Three possibilities seem to present themselves. *First*, it can be argued that there is no beneficial ownership. This is the view favoured by Smith, McFarlane and Stevens, all of whom advocate

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16 *Baker v Archer-Shee* [1927] AC 844*; Gartside v Inland Revenue Commissioners* [1968] AC 553.

17 *Webb v Webb* Case C-294/92 [1994] 3 WLR 801.

18 *Walker v Walker* [2007] 2 NZLR 261.

19 H Stone, "The Nature of the Rights of the Cestui que Trust" (1917) 17 Col LRev 467 at 479.

20 As seems to be the orthodox understanding – see for example the entire tenor of their Lordships' speeches in *Foskett v McKeown* [2001] AC 102 and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705 per Lord Browne-Wilkinson. See also R Nolan, "Equitable Property" (2006) 122 LQR 232.

21 IJ Hardingham and R Baxt, *Discretionary Trusts* (2nd ed, Butterworths, Sydney, 1984), [607]; D Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 LQR 96.

that it is more accurate to say that the beneficiary acquires rights over the rights in respect of the property which the trustee holds.[22] So, while some of the content which ownership implies belongs to the beneficiary, the beneficiary does not own the property. Yet, this seems to give rise as a creation of equity to the very thing which equity claims to abhor and which the doctrine of resulting trust was developed to prevent – a vacuum in the beneficial ownership. As Penner has argued, just because the beneficiary may not have possession (in either a full or limited manner) does not mean he has no proprietary interest. There are other more important aspects of title, the powers to transfer; confer rights in; dispose of; to realise the value of; that are all held for the benefit of the beneficiaries.[23] The beneficiary, Penner says, must have rights in these powers of title otherwise the trust construct is rendered incoherent. *Secondly*, it might be that the beneficial ownership exists but is suspended as it were, until the trustee's discretion is exercised.[24] The beneficiaries acquire some sort of floating rights *in rem*. This seems at first sight a defensible approach given that equity acknowledges suspension of beneficial ownership in some of its cuter corrective doctrines such as secret trusts and mutual wills,[25] but on reflection suspended ownership looks somewhat at odds with the more central ownership doctrines of express trusts of which discretionary trusts are a subset. *Thirdly*, perhaps the beneficial ownership is held by the whole body of discretionary beneficiaries collectively. If this third view is taken, then it is entirely possible to argue that even in the case of a discretionary trust the beneficiaries acquire vested rights *in rem* at the point of the trust's creation.[26] However, there has been some judicial and academic rejection of this view.[27] In modern times, it is made difficult to sustain because of the softening of the certainty of objects test from the all individuals or list certainty test articulated most forcefully by the English Court

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[22] L Smith, "Trust and Patrimony" (2008) 38 RGD 379; B McFarlane and R Stevens, "The Nature of Equitable Property" (2010) 4 J Eq 1.

[23] J Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest Under a Trust" (2014) 27 Can J of Law and Juris 473. See also T Cutts, "The nature of 'equitable property': A functional analysis" (2012) 6 J Eq 44.

[24] P Pettit, *Equity and the Law of Trusts* (12th ed, OUP, 2012) at 80.

[25] See for example C Rickett, "A Rare Case of Mutual Wills and its Implications" (1982) 2 Adel LR 178; C Rickett, "Mutual Wills, Restitution and Constructive Trusts – Again" [1996] Conv 136; C Rickett, "Thoughts on Secret Trusts From New Zealand" [1996] Conv 302. The mutual wills "floating trust" has recently received recognition in an obiter dictum in New Zealand: see *Chambers v Chambers* [2015] NZHC 583 at para [122].

[26] In J Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest Under a Trust" (2014) 27 Can J of Law and Juris 473, Penner comes close to suggesting this, although he is not expressly addressing this point, when he states (at 490 with our emphasis) of the trust beneficiaries' rights: "… [T]he beneficiaries are not mere claimants in respect of the trust assets whose claims the trustee might conceivably discharge so as to become the unencumbered legal owner himself. That is not the correct way to understand the trust beneficiaries' rights. They are, *collectively*, the beneficial owners of the trust assets." Indeed, later at 495-496 Penner concludes his argument about the nature of a beneficiary's beneficial interest with a statement that "the discretionary trust [is] perfectly compatible with the concept of 'beneficial interest' …." His point essentially is that beneficial interests are not possessory interests (at 495): "[I]t is not essential to a trust, or to the conception of a beneficial interest under a trust, that any object has any immediate, vested interests in the trust assets. … [A]ll beneficial interests under trusts…are essentially future interests in the sense that they require the trustee to exercise his power of transfer to transfer the legal title to trust assets to the objects … The essential point to notice here is that the trustee can hold trust assets not to his own benefit yet at the same time so that the benefit will enure only to the benefit of others on a future, contingent basis. Those future and contingent interests absorb all the benefit the assets have. Thus it is a mistake to confine the notion of beneficial interest to *presently* vested or indefeasible interests."

[27] *Sainsbury v Inland Revenue Commissioners* [1970] Ch 712 at 725 per Ungoed-Thomas J; M Leeming, "'Chameleon-hued Words': A Note on Discretionary Trusts (2015) 89 ALJ 371. There are hints of this type of thinking in the early cases that applied the rule in *Saunders v Vautier* to discretionary trusts, as discussed in the text below at note 30 and following: see *Re Smith* [1928] Ch 915.

of Appeal in *IRC v Broadway Cottages Trust*[28] to the criterion certainty or any individual test adopted by the House of Lords in *McPhail v Doulton*,[29] as discussed more fully below.

One dimension of orthodox trust law that might usefully be referenced here in the context of the potential rights *in rem* of discretionary trust beneficiaries is the applicability and role of the rule in *Saunders v Vautier*,[30] which as is well known permits *all* the beneficiaries of a trust where they are identified and *sui iuris* to call for the transfer to themselves of the trust assets, thus bringing the trust to an end. The rule is sometimes said to be a requirement for the validity of express trusts.[31] This rule caused no difficulty of application to fixed trusts where the beneficiaries were all identified and where the various proprietary interests were clearly established. However, what of discretionary trusts? In *Re Smith*,[32] Romer J held, citing an earlier Court of Appeal decision *Re Nelson*,[33] that the rule could be applied to discretionary trusts. It must be recalled that the context in which Romer J made his decision was that discretionary trusts required for their validity list certainty. That is very evident as the background to his Lordship's reasoning:[34]

> What is to happen where the trustees have a discretion whether they will apply the whole or only a portion of the fund for the benefit of one person, but are obliged to apply the rest of the fund, so far as not applied for the benefit of the first named person, to or for the benefit of a second named person? There, two people together are the sole objects of the discretionary trust and, between them, are entitled to have the whole fund applied to them for their benefit. It has been laid down in [*Re Nelson*] that, in such a case as that *you treat all the people put together just as though they formed one person, for whose benefit the trustees were directed to apply the whole of the particular fund. ... as forming together an individual for whose benefit a fund has to be applied by the trustees without any discretion as to the amount to be applied*.

The proprietary basis of the rule in *Saunders v Vautier* was therefore capable of being maintained for discretionary trusts under a pretence that all the identified discretionary objects were seen as one person owning the entire fund. This of course required a list of those beneficiaries. What would be the result once discretionary trusts did not require list certainty? At this point it is instructive to reference a recent decision of the New South Wales Supreme Court, *Miskelly v Arnheim*.[35] Hamilton J identified a two-part exposition of the rule in *Saunders v Vautier* which His Honour referenced back to an earlier decision of the New South Wales Supreme Court in *Sir Moses Montefiore Jewish Home v Howell & Co (No 7) Pty Ltd*[36] and a decision of the High Court of Australia, *CPT Custodian Pty Ltd v Commissioner of State*

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[28] [1955] Ch 20.
[29] [1971] AC 424.
[30] (1841) 4 Beav 115.
[31] In referencing the well-known dicta of Sir William Grant MR in *Morice v Bishop of Durham* (1804) 9 Ves Jun 399, 404-5, Underhill and Hayton suggest that along with requirements of control and execution by the court, certainty of objects and existence of a human beneficiary, the rule in *Saunders v Vautier* (1841) 4 Beav 115 must be applicable: see D Hayton, P Matthews and C Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (LexisNexis, 18th ed, 2010) 164-165 ([8.146]).
[32] [1928] Ch 915.
[33] Reported as a note after *Re Smitth* at [1928] Ch 920 but decided in 1918.
[34] [1928] Ch 915 at 918-919 (emphasis added).
[35] [2008] NSWSC 1075.
[36] [1984] 2 NSWLR 406.

Revenue of the State of Victoria.[37] Hamilton J first stated the traditional proprietary understanding of *Saunders v Vautier*:[38]

> … an adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation.

We do not need for our purposes to venture into a discussion of the facts of *Miskelly*, but note that Hamilton J stated that this traditional rationale applied on the facts before him. However, in the event it did not, his Honour stated that the same result would be achieved by application of what he called the "second basis" of the *Saunders v Vautier* rule, or "the *Montefiore* principle",[39] as approved by the High Court of Australia in *CPT Custodian Pty Ltd*.[40] It is his Honour's description of this second basis that is of interest:[41]

> The second basis does not proceed on the basis of a proprietary right. It proceeds quite explicitly on the basis that there is no proprietary right. In the words of Kearney J [in *Montefiore*], it applies where "the individual right of each object is in the nature of an equitable chose in action creating the entitlement to require the trustee to deal with the distributable funds in accordance with due and proper administration of the trust."

This reformulation of the rule in *Saunders v Vautier* (still including but extending beyond holders of proprietary rights in the entire trust fund to those entitled to demand due administration of the trust) has two obvious consequences: first, it can overcome the hurdle for discretionary trusts caused by the clear proprietary basis of *Saunders v Vautier* in the context of a move away from list certainty, and, second, it reveals an embracing of the obligational view of trusts by retaining the rule in *Saunders v Vautier* but by repositioning it away from its traditional proprietary or *in rem* base to an obligational or *in personam* base.

For the purpose of this article, the important conclusion at this point is that an express trust, even in its discretionary iteration, creates rights in the beneficiaries. The intention of this article is not to add yet another voice attempting an answer to the property versus obligation debate. It is rather to note the contribution of recent developments in the law of discretionary trusts to this debate. These developments are a central part of the transformation we suggest is under way in the law of trusts. It should go without saying that the articulation of the true nature of a beneficiary's interest tells us a great deal about what exactly a trust is.

B) The Requirement of Beneficiary Certainty

The first development concerns one of the three certainties rules said to be required for the formation of a valid trust, certainty of the objects or beneficiaries of the trust. For the trustee to perform the trust and, where necessary, the court to execute or supervise the trust, the objects intended to benefit from the property must be know with sufficient certainty.

The change

[37] (2005) 224 CLR 98.
[38] [2008] NSWSC 1075 at para [32]
[39] At paras [38]-[39].
[40] *CPT Custodian Pty Ltd v Commissioner of State Revenue of the State of Victoria* (2005) 224 CLR 98.
[41] At para [39].

The House of Lords' decision in *McPhail v Doulton*,[42] requiring identification of some, but not necessarily all, objects of a discretionary trust by use of the "is/is not a member of the class of beneficiaries" test, instead of a "complete list of all members of the class of beneficiaries" test was somewhat of a surprise. Although dissatisfaction with the list certainty rule had already been voiced in trust litigation,[43] the House had as recently as two years earlier affirmed the complete list test and the distinction drawn between objects certainty for the purpose of trust powers on the one hand and of mere powers on the other.[44]

While mere powers required only that it must be possible to determine whether any person is or is not an object within the class description used in articulating the scope of the power,[45] trust powers were treated differently because of their imperative nature. Although the trustee may be empowered to choose when and/or to whom to distribute property, he is nevertheless obliged to consider the exercise of the power and to perform the trust. Where the trust is not performed or the trustee fails in her duty to perform, the court will enforce the trust in order to give effect to the intention of the settlor that the beneficiaries would benefit. It follows then, "that, in order to be valid, a trust must be one which the court can control and execute".[46]

In the case of a mere power, there is no obligation on the donee to exercise the power. If the donee defaults in the exercise of the power, the court will not exercise the power but rather the property devolves back to the donor.[47] That the donor did not impress upon the donee a duty to exercise the power and distribute the property is taken to mean that the donor did not necessarily intend the objects of the power to take the property. For that reason, the court's execution is not needed and so neither is a complete list of the objects. It is sufficient that it is possible to determine whether any person is or is not an object within the scope of the power so as to be able to determine that the actual exercise of the power is either *intra vires* or *ultra vires*.[48]

Prior to *McPhail v Doulton*, the list certainty rule was applied to discretionary trusts on the basis of the following reasoning: given, first, that property had been settled on trust for the objects such that the court must ensure the trust is executed;[49] and, second, that the court cannot substitute its own discretion for that conferred on the trustee; then the only means available to the court to execute the trust is to divide the trust property equally among the beneficiaries, consistent with the maxim that equity is equality.[50] Equal distribution required a complete list of the beneficiaries.

The reasoning was itself internally logical[51] but central to the logic was the notion that the court's supervisory jurisdiction could only be exercised by equal division. This was rejected by Lord Wilberforce in *McPhail v Doulton*, with whom Lord Reid and Viscount Dilhorne

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42 *McPhail v Doulton* [1971] AC 424.
43 *Inland Revenue Commissioners v Broadway Cottages Trust* [1955] Ch 20.
44 *Re Gulbenkian's Settlement Trusts* [1970] AC 508 (decided in 1968).
45 *In re Gestetner Settlement* [1953] Ch 672.
46 *Inland Revenue Commissioners v Broadway Cottages Trust* [1955] Ch 20 at 30 per Jenkins LJ.
47 *McPhail v Doulton* [1971] AC 424 at 444 per Lord Guest.
48 *In re Gestetner Settlement* [1953] Ch 672; *Inland Revenue Commissioners v Broadway Cottages Trust* [1955] Ch 20.
49 *Morice v Bishop of Durham* (1805) 10 Ves 522 at 539-540 per Lord Eldon.
50 *Re Gulbenkian's Settlement Trusts* [1970] AC 508 at 524-525 per Lord Upjohn, with whom Lords Hodson and Guest concurred.
51 J Hopkins, "Certain Uncertainties of Trusts and Powers" (1971) 29 CLJ 68 at 70.

concurred. While equal division may be sensible in, for example, some family trusts with limited beneficiaries, it was, his Lordship said, "surely the last thing the settlor ever intended"[52] in a discretionary trust of the type before the House on that occasion. There, the settlor had established a trust over company shares for the benefit of the staff of the company, their relatives and dependents. Equal division among so many would likely have produced little benefit to each and would thus have defeated the settlor's intent from the outset.

His Lordship relied on past authorities that showed that the court had not always ordered equal division,[53] albeit that equal division had become the settled practice by the 19th Century.[54] While there had been a strong presumption in favour of equal division even in the 17th Century, it had hardened into a rule in Lord Eldon's era.[55] The earlier cases were, for the most part, instances of family trusts that had come to be seen as exceptions to the rule. Lord Guest, dissenting in *McPhail v Doulton*, explained these cases as exceptional not because they permitted the court to exercise its own discretion but because on the facts there was sufficient guidance available to the court to order an unequal distribution that was consistent with the particular intention of the settlor.[56] Ironically, what had originally been a presumption to give effect to intention had hardened into a rule of equal division and, as commentators have noted, the requirement of list certainty to which it had given rise was having the reverse effect, of violating settlors' intention because powers were being struck down altogether for lack of certainty of objects.[57]

What is perhaps most noteworthy about Lord Wilberforce's rejection of the list certainty test for discretionary trusts is his clear concern that equity should be flexible enough to give effect to settlor intention in the context of contemporary trust practice. His Lordship spoke pointedly of the need for equity to adapt to the modern trust for employees and to "its practical and commercial character".[58] In summarizing the court's jurisdiction to execute trusts, the starting point is the settlor's intention:[59]

> [T]he court, if called upon to execute the trust power, will do so in a manner best calculated to give effect to the settlor's or testator's intentions. It may do so by appointing new trustees, or by authorising persons or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear by itself directing the trustees so to distribute.

The minority's concern with settlor intention was also evident, albeit that it led to the opposite conclusion. For Lord Guest, to distribute only among known objects when not all beneficiaries are ascertainable "is to take a narrower class than the settlor has directed and so to conflict with

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52 *McPhail v Doulton* [1971] AC 424 at 451.

53 *Mosely v Mosley* (1673) Fin 53; *Clarke v Turner* (1694) FreeCh 198; *Warburton v Warburton* (1702) 4 Bro PC 1; *Harding v Glyn* (1739) 1 Atk 469; *Richardson v Chapman* (1760) 7 Bro PC 318.

54 *Kemp v Kemp* (1801) 5 Ves Jr 849*; Brown v Higgs* (1800) 4 Ves 708; 5 Ves 495; (1803) 8 Ves 561; *Morice v Bishop of Durham* 10 Ves Jr 522.

55 G Alexander, "The Transformation of Trusts as a Legal Category, 1800-1914" (1987) 5 Law & Hist Rev 304, at 334.

56 *McPhail v Doulton* [1971] AC 424 at 445.

57 G Alexander, "The Transformation of Trusts as a Legal Category, 1800-1914" (1987) 5 Law & Hist Rev 304, at 335; Hopkins J (1970) 28 CLJ 206 at 210.

58 *McPhail v Doulton* [1971] AC 424 at 452.

59 *McPhail v Doulton* [1971] AC 424 at 457.

his intention".[60] Any policy concern to permit such trusts as these because of their value to employees and the wider community should be met, his Lordship said, by legislation and not judicial reform.[61]

The effect

The decision in *McPhail v Doulton*,[62] requiring identification of some,[63] but not necessarily all, objects of the trust by use of the "is/is not a beneficiary" test, instead of a "complete list of the beneficiaries" test is important for its contribution to the wider question of the nature of the trust. The effect is to move the trust further away from a proprietary conception to an obligational one. If beneficiaries do not need to be ascertained at the time the trust is created, it is difficult to argue that discretionary beneficiaries have any proprietary interest in the trust property at all arising as a result of the formation of the trust. This consequence cannot be avoided by suggesting that the certainty test is aimed to meet only an enforceability requirement rather than to identify property owners. One has to ask whether the right to enforce can be met by something less than ownership. It may in fact be a paradoxical consequence of *McPhail v Doulton* (and of *Re Denley* discussed further below) that we are moving exactly to that position.

Some may argue that this was already clear from tax cases decided before *McPhail v Doulton* where the courts had rejected the notion of discretionary beneficiaries having a proprietary interest. [64] Such cases are regularly cited as authority for the proposition that discretionary beneficiaries have merely a hope or expectation and no right to any specific trust property unless and until an appointment of such is made to them. While they may certainly be treated as an indication that the courts were moving towards an obligational model, those cases were concerned with identifying taxable interests, rather than proprietary interests per se.[65] As Lord Wilberforce said in *Gartside v IRC*:[66]

> No doubt in a certain sense a beneficiary under a discretionary trust has an 'interest': the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity…But that does not mean that he as an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the necessary quality of definable extent which must exist before it is taxed.

The signs were there but the question did not need to be answered decisively when discretionary trusts at that stage still required that all the beneficiaries could be listed with certainty. Indeed, it could be said that an earlier suggestion of a challenge to the proprietary

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[60] *McPhail v Doulton* [1971] AC 424 at 446. This point is exacerbated by the introduction by Lord Wilberforce of his "administratively unworkable" limitation criterion, at 457.

[61] *McPhail v Doulton* [1971] AC 424 at 446.

[62] *McPhail v Doulton* [1971] AC 424 (HL).

[63] An earlier version of the test that required identification of any one beneficiary employed in *Re Gulbenkian's Settlement Trusts* [1970] AC 508 was rejected by the Court of Appeal in favour of identification of *some* of the beneficiaries in *Re Baden's Deed Trusts (No 2)* [1973] Ch 9.

[64] *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC) at 713; *Gartside v Inland Revenue Commissioners* [1968] AC 553 (HL) at 606 per Lord Reid; *Sainsbury v IRC* [1970] Ch 712.

[65] D Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can BR 219.

[66] [1968] 1 All ER 121 at 134.

conception of the beneficiary's right lay in the relations cases mentioned above. And, as has been seen, until *McPhail v Doulton* those cases were treated as exceptions to the principle of equal division. The beneficiary's entitlement to an equal share on the default of the trustee's exercise of power supported the claim that a beneficiary had some sort of interest in the trust property.

The ability of settlors post-*McPhail v Doulton* to settle property on trust without specifying the discretionary beneficiaries is evidence that the concern of a trust, at least since *McPhail v Doulton*, is not that particular property is held for particular beneficiaries. It is not necessary that an equitable proprietary right be vested in a beneficiary for a trust to exist. As a matter of practice, the replacement of list certainty with a broader test of ascertainability appears to have contributed to a significant expansion of the use of *inter vivos* discretionary trusts. In the cases in which the debate over object certainty played out, the trusts were all for the benefit of large classes of employees and related parties. The desirability of such trusts was plain. Discretionary trusts are now very common tools of wealth management across a range of contexts: private family trusts, superannuation schemes and trusts for a variety of commercial purposes.

C) The Requirement of a Human Beneficiary

The second rule to have undergone significant change in relation to express trusts is the requirement that the beneficiary be human.[67] This rule is closely related to certainty of objects and reflects the need for there to be someone who can seek performance of the trust from the court and in whose favour performance can be ordered.[68] Without such a person, the court's role of supervision and execution of trusts would be extremely difficult to fulfil and the institution of the trust would be jeopardized.[69] So, in *Morice v Bishop of Durham*,[70] Sir William Grant MR stated that every valid trust must have 'somebody, in whose favour the Court can decree performance'.[71] While the validity of charitable purpose trusts are not denied on this ground because they are enforceable by the Attorney-General in a constitutional role as protector of charities, the rule has operated to prohibit all but a very small and eclectic group of private purpose trusts.[72] "A purpose or object cannot sue."[73]

The change

It should be noted that at the time *Re Denley*[74] was decided the true rationale of the human beneficiary principle was not clear. While its application was clearly most forcefully felt in respect of the invalidation of private purpose trusts, simply to suggest that this was because all express trusts require a human beneficiary was to overlook an ambiguity. That ambiguity was simply this: did the principle require a person who had rights *in rem* in the trust assets, in which case there could ipso facto be no valid private purpose trusts, unless the court was prepared in some cases to turn a blind eye to the requirement?; *or* did the principle require a person whom

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67 *Bowman v Secular Society* [1917] AC 406 at 441 per Lord Parker; *Re Wood* [1949] 1 Ch 498 at 501 per Harman J.

68 *Re Astor's Settlement Trusts* [1952] Ch 534. See also Stuart Pryke, 'Of Protectors and Enforcers' (2010) 16 *Trusts & Trustees* 64, 67.

69 *Re Endacott* [1960] Ch 232 at 246 per Lord Evershed MR.

70 (1804) 9 Ves 399; 32 ER 656.

71 *Morice v Bishop of Durham* (1804) 9 Ves 399, 404; 32 ER 656, 658.

72 *Re Astor's Settlement Trusts* [1952] Ch 534.

73 *Leahy v Attorney-General (NSW)* [1959] AC 457 at 479 per Viscount Simonds. See also *Re Recher's Will Trusts* [1972] Ch 526.

74 *Re Denley's Trust Deed* [1969] 1 Ch 373.

the court would regard as involved with the trust closely enough to be a proper person to enforce it and thereby provide an adequate level of control? The answer to that ambiguity would obviously define the limits of the human beneficiary principle. Therein lies the true importance of *Re Denley* where (Reginald) Goff J pointed out that the concern with the rule is not that the trust cannot be for a purpose per se (that is to say that the human beneficiary principle requires a human beneficial owner of the trust property), but that there must be someone with *locus standi* to apply to the court to enforce the trust (that is the human beneficiary principle requires an enforcer to be identified).[75] Adopting a broad interpretation of beneficiary, his Lordship said:[76]

> Where, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle.

In that case, land had been settled on trust to be maintained and used as a recreation or sports ground "primarily for the benefit of the employees of the company".[77] There was no remainder-man or direct residuary legatee who could be said to fulfil the rule of enforcer.[78] Nevertheless, the trust was held not to be void for uncertainty nor to have offended against the beneficiary principle given that the employees would have sufficient standing to seek the court's enforcement where necessary.

In 2006, Lawrence Collins J rejected *Re Denley*[79] on the basis that Goff J incorrectly equated the human beneficiary principle with the question of enforcement instead of equitable ownership. With respect, his Lordship's rejection is, however, not a critique of Goff J's reasoning but merely a restatement of a different conclusion to the question at the heart of *Re Denley*. The conclusion of Goff J in favour of the enforcer understanding of the human beneficiary principle strengthens the proposition that express trusts are inherently obligational. The factual beneficiary test as articulated and applied in *Re Denley* is not an illegitimate interpretation within a proprietary conception of the express trust, but rather is consistent with the idea that express trusts are inherently obligational.

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75 *Re Denley's Trust Deed* [1969] 1 Ch 373 at 383.

76 *Re Denley's Trust Deed* [1969] 1 Ch 373 at 383-384.

77 The relevant clause also stated the sports ground was "secondarily for the benefit of such other person or persons (if any) as the trustees may allow to use". This part of the clause would not have satisfied the list certainty rule applicable at the time to determine the validity of the trust power but it was interpreted by his Lordship to be a mere power that therefore did not fail for uncertainty, at 386-387.

78 This way of finding an enforcer looks odd. The person most interested in the trust's failure can hardly be said without some sleight of thought to be the best or obvious person to ensure enforcement. This was however the reasoning applied in many of the earlier cases where private purpose trusts were upheld as valid even where there was no direct human beneficial owner.

79 *Re Horley Town Football Club* [2006] EWHC 2386.

The approach of Goff J has been subsequently applied in several cases[80] although acceptance has not been universal.[81] It was explained by Vinelott J in *Re Grant's Will Trusts*[82] as a trust not for a purpose but for defined beneficiaries, the employees.[83] However, as the editor of *Moffat* has argued, there is a distinction between a trust with a dispositive discretion conferred on the trustee and a trust such as this where the discretion is as to how the purpose will be achieved.[84] Moreover, it is unlikely that the factual beneficiaries of a private purpose trust would have the same ability to invoke *Saunders v Vautier*[85] and call for distribution of the property to themselves.

The effect

Prior to *Re Denley*, it was well accepted that in most cases an express trust must be for the benefit of a human beneficiary. The range of express trusts that were upheld without there being a human beneficiary was limited. Such trusts included those for the maintenance of graves or monuments;[86] for the provision of care of animals following the owner's death;[87] and other miscellaneous instances.[88] In many off-shore jursidictions, statutory regimes have been adopted to enable non-charitable purpose trusts to be enforced.[89] It may have been thought that the peculiar history of the law of charitable trusts, the isolated exceptional cases and the perceived need for legislative interventions in some jurisdictions reveals the dominant hold of the property model of trusts.

The beneficiary principle was not undermined or rejected by Goff J. The concern of the beneficiary principle was clearly understood by his Lordship to be the enforcement of the trust. *Re Denley* merely recognised that *locus standi* to enforce the trustee's obligations ought not to be unnecessarily limited but could extend to people who derive a benefit from the performance of the trust, notwithstanding that none of them have any right *in rem* in the trust property.[90] It is thus more accurately understood as the enforcer principle.[91] The work done by Goff J in

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[80] See, for example *Re Lipinski's Will Trusts* [1976] 1 Ch 235; in *Re Northern Developments (Holdings)* (Unreported, Megarry VC, 6 October 1978); *Grender v Dresden* [2009] EWHC 214; [2009] WTLR 379; *Keewatin Tribal Council v Thompson (City)* [1989] 5 WWR 202; *Peace Hills Trust Company v Canada Deposit Insurance Corp* [2008] 7 WWR 372; *Sacks v Gridiger* (1991) 22 NSWLR 502; *Yeomans v Yeomans* [2006] 1 Qd R 390.

[81] *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491; *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54; *Lines v Lines* [2003] SASC 173; *Tidex v Trustees Executors and Agency Co Ltd* [1971] 2 NSWLR 453, 465. See also J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (8th ed, LexisNexis, Australia, 2016) at [10-08], [11.04].

[82] [1979] 3 All ER 559 at 368. See for discussion of this case CEF Rickett, "Unincorporated Associations and Their Dissolution" [1980] CLJ 88, 105-106.

[83] In support of this view, see P Matthews, 'The New Trust: Obligations without Rights?' in A Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996), ch 1; P Millett, (1985) 101 LQR 269.

[84] J Garton, *Moffat's Trusts Law* (6th ed, CUP, 2015), 285-286.

[85] (1841) 4 Beav 115. For discussion of the rule in *Saunders v Vautier* see text above at note 30 and following. The fact that the rule in *Saunders v Vautier* could not be applied to the facts of a case like *Rd Denley* prompted Lawrence Collins J in *Re Horley Town Football Club* [2006] EWHC 2386 to characterise Goff J's reasoning as "an unsafe basis for decision" at [131]. See also D Waters, 'Non-Charitable Purpose Trusts in Common Law Canada' (2008) 28 *Estates, Trusts & Pensions Journal* 16.

[86] *Re Hooper* [1932] 1 Ch 38; *Re Budge (Deceased), Ex parte Pascoe* [1942] NZLR 350.

[87] *Re Dean* (1889) 41 Ch D 552; *Pettingall v Pettingall* (1842) 11 LJ Ch 176.

[88] Such as a trust for the promotion of fox-hunting: *Re Thompson* [1934] Ch 342.

[89] See, for example, Trusts (Special Provisions) Amendment Act 1998 (Bermuda).

[90] D Waters, 'Non-Charitable Purpose Trusts in Common Law Canada' (2008) 28 *Estates, Trusts & Pensions Journal* 16, 48.

[91] D Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117 *Law Quarterly Review* 96, 100. See also P Baxendale-Walker, *Purpose Trusts* (Butterworths, 1999).

Denley was to elaborate the rationale for the human beneficiary principle. The articulation of the human beneficiary principle in *Re Denley* to recognise enforcement beyond the traditional proprietary beneficiary-only model can be seen as giving further support to the obligational-based approach to trusts on the basis that the trustee's obligations are meaningless unless they can be enforced *in personam* without having to rely on a right *in rem* as the basis for the enforcement action.[92] It is not fatal to the trust that there is no direct beneficiary who relies on a right *in rem*. Hence it is not necessary, for a trust to exist, that there be an equitable property right vested in a beneficiary. It appears clear now that trust property can be beneficially ownerless[93] and trustee obligations enforced by virtue of something other than the beneficiary holding a right *in rem* in the trust property. Perhaps this right could be loosely described as a right to due administration of the trust?

III. The Legacy

In both *McPhail v Doulton* and *Re Denley*, the court shows itself to be concerned with its ability to enforce trusts. This concern has two aspects: first, in order for the court's jurisdiction to apply, there must exist someone with sufficient standing able to make an application requesting that the court's attention be focused on the particular trust; and, second, in order for the court with jurisdiction to achieve any meaningful outcome, the court must be able to execute the trust upon the trustee's failure to do so despite the discretionary nature of the trustee's power.[94] The effect of *McPhail v Doulton* and *Re Denley* is significantly to expand the court's capacity in both respects[95] and to provide validation to an increasing number of trusts that would not have been effective otherwise than by virtue of the revolution wrought by those cases.

An important consequence, whether deliberate or not, of this more flexible approach is the strong support provided for the obligation-based model of the express trust. For some commentators, this was very much to be welcomed. Harris referred to the old rules as "a distilled dogma of property law that equitable ownership is after all ownership and must be located somewhere"[96] and as creating an unnecessary assumption "that trustees must owe an active duty to a defined class of rightholders".[97] The discretionary trust's popularity in modern times has been significant, no doubt encouraged by the shift *from* the trust as a form of proprietary interest held by the beneficiary *to* the trust as an obligation owed by the trustee against whom the beneficiary has rights, albeit not proprietary ones. The obligational construct is far more attractive to a settlor who does not necessarily want the beneficiaries (or their creditors) to consider themselves donee owners of the trust property.

This raises the question whether this apparent endorsement of the obligational view of the trust has had any effect on modern trust law and practice. In our view, there are two particular areas in which the legacy of the changes discussed in Part II above is vividly revealed: the question of a discretionary beneficiary's access to trust information; and, more recently (and controversially), the legitimacy or otherwise of trusts where very wide powers are conferred on the trustee or vested in someone other than the trustee. Both issues give rise to important

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92 J Goodwin, 'Purpose Trusts: Doctrine and Policy' (2013) 24 *King's Law Journal* 102, 102.

93 J Penner, "Purposes and Rights in the Common Law of Trusts" (2014) 48 RJTUM 579 at 583. See the discussion in the text at note 19 and following above.

94 J Harris, (1970) 33 MLR 686 at 690-691.

95 J Hopkins, "Certain Uncertainties of Trusts and Powers" (1971) 29 CLJ 68 at 100.

96 J Harris, "Trust, Power and Duty" (1971) 87 LQR 31 at 47.

97 J Harris, (1970) 33 MLR 686 at 688

questions about the nature of the trust and of the trustee's accountability. It will become clear that the way in which the beneficiary's interest is understood is vital to resolving questions that arise in the context of these two issues.

In discussing these issues, reference will be made to some recent New Zealand decisions that provide good illustrations of the implications of moving away from the proprietary conception of the trust. New Zealand trust cases provide interesting sources for consideration because the rate of trust use in New Zealand is very high[98] and there are less statutory interventions or "look through" provisions than is common in other equivalent jurisdictions. For example, in relation to matrimonial property division disputes, there is no general statutory discretion for courts to include discretionary beneficial interests as property subject to division as is otherwise the case in Australia and the United Kingdom where the parties' financial resources are construed broadly.[99] While trusts for commercial activities are also common, they are often less complicated than those in other jurisdictions because of lighter regulation and fewer cross-border issues. For these reasons, disputes involving trusts arise fairly frequently in New Zealand and are often resolved by direct recourse to questions of fundamental trust principle.

A) Access to Trust Information

As discretionary trusts have increased in number and their scope has broadened, so too has the number of discretionary beneficiaries seeking access to trust infromation. Traditionally, beneficiaries with fixed interests in the trust fund were considered to have a proprietary right to any documents pertaining to the fund on the basis that all trust documents are trust property.[100] This right did not extend to discretionary beneficiaries,[101] although some cases had suggested that all beneficiaries, whether having fixed or discretionary interests, should be entitled to see the accounts.[102]

However, in more recent times, what was previously understood as the right of a fixed beneficiary only has been reconceptualised by the Privy Council in *Schmidt v Rosewood Trust Ltd* (*Schmidt*)[103] as an aspect of the court's inherent supervisory jurisdiction over the administration of trusts. The Board ruled that a proprietary right was neither sufficient nor necessary to give rise to a right to trust documents. In so doing, it extended to discretionary beneficiaries an ability to access such documents at the discretion of the court in order to enable them to hold the trustee accountable. Lord Walker indicated, however, that the nature of the beneficiary's discretionary interest might make it difficult to persuade the court to grant access:

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98 In its *Review of Trust Law in New Zealand* the New Zealand Law Commission reported that New Zealand had a significantly higher rate of trust usage per capita than Australia, Canada and England: NZ Law Commission *Review of Trust Law in New Zealand: Some issues with the use of trusts in New Zealand* (NZLC IP20, 2010) at 7-9. Some may suggest that treating New Zealand cases as harbingers of doctrinal issues relevant to the doctrines of trust law is to overlook the point that these cases are "really" about policy and controlling the pernicious use of the trust concept. This is, with respect, a counsel of despair based upon a rather narrow conception of relevant authorities.

99 Family Law Act 1975 (Cth), ss 79(4) and 75(2)(b); *Kennon v Spry* [2008] 251 ALR 257; *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053; *Kan Lai Kwan v Poon Lok To Otto* (2014) 17 HKCFAR 414.

100 *O'Rourke v Darbyshire* [1920] AC 581 (HL); *Murphy v Murphy* [1999] 1 WLR 282 (Ch). Although, cf Campbell who argues the earlier cases do not support a proprietary analysis because any specific beneficiary's right was considered to depend on the particular circumstances, not on a strict property right per se; see J Campbell "Access by trust beneficiaries to trustees' documents, information and reasons" (2009) 3 J Eq 97 at 117ff.

101 *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587; *Chaine Nickson v Bank of Ireland* [1976] IR 393.

102 *Armitage v Nurse* [1998] Ch 241 at 261 and 263.

103 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.

"In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief."[104]

The *Schmidt* approach justifies disclosure as an exercise of judicial discretion under the auspices of the court's supervisory role, consistent with the general approach taken in other contexts in *McPhail v Doulton* and *Re Denley*. The Board expressly rejected the proprietary nature of the fixed trust beneficiary's right as a justification for access to trust documents.[105] The resulting uncertainty this created for fixed trust beneficiaries has been criticised in a New South Wales decision.[106]

Uncertainty has been far more evident in discretionary trusts. In *Breakspear v Ackland*,[107] the English High Court was concerned with the issue of disclosure of a settlor's letter of wishes in the context of a discretionary family trust. The settlor had signed a wishes letter to the effect that he wanted the trustees to exercise their discretionary power to appoint his third wife as a beneficiary of the trust upon his death. The wife was duly appointed and when the settlor's children learned later of the trust, they requested disclosure of the letter. The trustees considered it to be non-disclosable. Briggs J agreed that the letter was prima face non-disclosable given its confidential nature arising from its function, which was to assist in the confidential deliberation process of the trustees' exercise of discretionary dispositive powers. However, his Lordship then proceeded to consider whether the Court ought to exercise its overriding discretion. His Lordship suggested that only very special circumstances should justify overriding confidentiality, such as evidence of bad faith on the part of the trustee; or where the trustees would soon seek the court's sanction for a proposed final distribution of the trust property, which would necessitate disclosure of the letter in those proceedings. The present case fell within the latter exception and his Lordship accordingly allowed the claim for disclosure.

In *Foreman v Kingstone*,[108] the New Zealand High Court was faced with a request from the plaintiff beneficiaries for disclosure of various trust documents: financial statements relating to the trust; details and accounts relating to any winding up and/or distribution or settlement, including to whom such were made; full information as to the amount and state of trust property; names of all previous and present trustees and dates of appointments and retirement, including relevant copies of deeds; and any memoranda of wishes. Potter J ordered disclosure (apart from information relating to the trustees' reasons for exercising their discretion) on the basis that there were "no circumstances which should persuade the Court to override the fundamental rights of the plaintiffs as beneficiaries to the extent of the orders made to

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[104] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [67].

[105] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [52], relying on Kirby P's statement in his dissenting judgment in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (CA) at 421–422 that a proprietary right is neither sufficient nor necessary to give rise to a right to trust documents.

[106] *McDonald v Ellis* (2007) 72 NSWLR 605, where Bryson AJ held that the beneficiary with a vested interest in trust property has a right to information about the trust. The *Schmidt* rule is "not a better rule, because it introduces discretion and promotes resistance and debate in substitution for a rule which is relatively concrete" at [51]. However, it is noted that the *Schmidt* rule was accepted by the same court in an earlier decision involving fixed trust beneficiaries; see *Avanes v Marshall*(2007) 68 NSWLR 595 at [15] per Gzell J. For criticism of the *Schmidt* rule in this context, see further G Dawson "A fork in the road for access to trust documents" (2009) 3 J Eq 39. In response to this argument of uncertainty, see J Campbell "Access by trust beneficiaries to trustees' documents, information and reasons" (2009) 3 J Eq 97, who shows that prior to the *Schmidt* rule, there was necessarily some element of uncertainty given that the right of fixed beneficiaries to trust information was not in fact an absolute right.

[107] *Breakspear v Ackland* [2008] 3 WLR 698 (Ch).

[108] *Foreman v Kingstone* [2004] 1 NZLR 841.

disclose".[109] Her Honour also indicated a preliminary view that any memoranda of wishes should also be disclosed.

What is interesting about these two decisions is that both purported to follow *Schmidt* and yet they took different and rather polarised approaches. The English Court in *Breakspear* appeared to adopt a starting point that, if information relates to the confidential trustee deliberation process, then it will not be disclosed in the absence of special circumstances.[110] The New Zealand Court in *Foreman* started from the position that the beneficiary had a fundamental right to information, but that it was not absolute, being subject to the court's discretion to deny access in special circumstances. However, both cases are consistent on framing the question of disclosure as an issue of enforcement of the trust that ensures the trustee's accountability, albeit tempered by concerns for confidentiality. Proprietary reasoning has given way, it can be concluded, to reasoning based on obligation and enforcement.

The issue has now been authoritatively re-examined by the New Zealand Supreme Court in *Erceg v Erceg*.[111] The plaintiff appellant was a discretionary beneficiary and residuary beneficiary of trusts settled by his late brother. The trusts were wound up and the property distributed while the plaintiff was a bankrupt. He received nothing. Following his discharge from bankruptcy (but without the annulment of the bankruptcy), he sought copies of various trust documentation, which the trustees refused to give him. In the intermediate appeal by the plaintiff appellant, the New Zealand Court of Appeal had perhaps unwittingly, departed to some extent from both the property and obligational conceptions of the trust.[112] The Court had rejected an argument made by the trustees that the right to information was a right in relation to trust property that had therefore passed to the Official Assignee on bankruptcy and could not be enforced by the plaintiff. Instead, Wild J, giving the judgment of that Court, said it was the plaintiff's status as beneficiary "that entitles the [plaintiff] to have the trustees' duties to beneficiaries enforced, and to that end to request disclosure of trust documents by the trustees".[113] Status was not the same thing as property:[114]

> Upon our straightforward approach, it is unnecessary to consider whether a beneficiary's right to seek disclosure from the trustees is "property". It is still more unnecessary to consider whether the appellant's rights as a final and discretionary beneficiary of the Trusts were "property": having beneficiary status is not itself property, even if some of the rights that come with that status are.

The Court clearly accepted that the question of disclosure of trust information was not concerned with whether or not a discretionary beneficiary has a property interest per se in the

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[109] *Foreman v Kingstone* [2004] 1 NZLR 841 at [100]. Potter J ruled that an additional general request for copies of communications between trustees and advisers could not be granted without further clarification of the content of such documents so as to ensure that information pertaining to trustees' reasons or other such confidential matters would not be disclosed. The statement of claim was not sufficiently detailed on these points.

[110] It is acknowledged that Briggs J stated in *Breakspear* at [73]: "There are no fixed rules, and the trustees need not approach the question with any pre-disposition towards disclosure or non-disclosure. All relevant circumstances must be taken into account …." Nevertheless, the judgment shows overall a presumption by the court in favour of confidentiality.

[111] [2017] NZSC 28.

[112] [2016] NZLR 622.

[113] [2016] NZLR 622 at [14].

[114] [2016] NZLR 622 at [17].

trust assets or trust information.[115] Instead, disclosure was an "exercise of discretion in discharge of the fiduciary duty a trustee owes a beneficiary".[116] In so exercising the discretion, there was no presumptive response either in favour of or against it,[117] and the list of considerations articulated in *Schmidt v Rosewood* was adopted[118] in addition to the settlor's wishes and the context of the application for disclosure.[119] Much of the Court's analysis appears to be consistent with *Schmidt* and subsequent cases, but the categorization of disclosure as a discretion on the part of the trustee was, it is arguable, of considerable concern. It is clear and needs stressing that this was not simply a case of loose nomenclature because the Court limited its ability to review a trustee's decision on disclosure to the grounds for review of trustees' exercises of discretionary powers, such as the decision-maker having erred in law or fact, or having considered irrelevant considerations.[120] This seems, it is suggested, to confuse power with duty. It is the trustee's duty to be accountable to the beneficiary and the disclosure of information is a valid and often effective means of performing that duty.[121] Disclosure is not a mere power vested in the trustee, and therefore cannot be characterised as an absolute discretion held by the trustee, and accessible by a court on the simple basis whether the terms of the power have been exceeded or not by its exercise or non-exercise. Power and duty are completely different legal conceptions that need to be distinguished.

Before we venture to comment on the Supreme Court's take on the matter, we add a few comments of our own, consistent with the general theme of this article. It seems to us that the beneficiary's request to access trust information can be evaluated using the same reasoning employed by the courts in *McPhail v Doulton* and *Re Denley*. In order for the court's supervisory and enforcement jurisdiction to be meaningful, it relies upon parties to the trust seeking the court's direction where necessary. And that relies upon such parties having the ability to determine whether they reasonably believe the trust is being properly performed or not, for whatever reason. But such applications cannot be made frivolously. A reasonable suspicion that a trustee is not performing the trust appropriately will not normally be established without the beneficiary having had access to certain trust information to enliven or perhaps verify her suspicion. Trustee accountability and trust enforcement are per se likely to require some extent of disclosure. The wishes of the settlor and trustee for privacy and confidentiality must be assessed against the importance of accountability. The Court of Appeal's judgment in *Erceg* was, on the whole, consistent with this approach but comments that would appear to analyse the trustee's decision as an exercise of a discretion, arising it would seem out of a mere power are unfortunate and problematic.

When a proprietary analysis of the trust is overtaken by an obligational analysis, it can encourage too great a fluidity in the trust construct. The trust comes to be seen as quasi-contractual where much of the say as to its substance and form is not located at a point in time when the trust was created but rather continues to lie with the settlor and the trustee, as if the trust were a fluid relationship with changing and evolving legal consequences. However, an alignment to obligation should not mean that the content of the obligation is determined entirely

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[115] [2016] NZLR 622 at [26].
[116] [2016] NZLR 622 at [26]. See also [28] and [29].
[117] [2016] NZLR 622 at [27].
[118] [2016] NZLR 622 at [30], including issues of commercial or personal confidentiality, the nature of the particular beneficiary's interests, the competing interests of other beneficiaries and third parties, whether disclosure in redacted form would be effective etc.
[119] [2016] NZLR 622 at [29], [30].
[120] [2016] NZLR 622 at [32].
[121] This is, of course, not to say that disclosure is always a necessary requirement of performance of the trust, nor is it ever on its own sufficient performance of the trust.

freely and autonomously. Central to the trust remains the notion that the trustee is not entitled to the benefit of the property. She is obligated to act as a careful custodian of the property for the benefit of the beneficiary. In order for the trust institution to have any doctrinal integrity or legal longevity as a facilitative device for dealing with property ownership, the beneficiary must be able to hold the trustee to account. Disclosure in aid of accountability is an issue of performance of the trust, not an exercise of discretion.

The Supreme Court appeared in its decision in *Erceg* to have been sensitive to the problem of characterizing the court's oversight of the choice of a trustee to disclose trust documents or not as a discretion. In a strong joint judgment delivered by O'Regan J, the Court was at pains to point out that "the Court's jurisdiction for the exercise of the supervisory jurisdiction is not limited to the grounds of review of a discretionary decision by the trustees."[122] The Court confirmed that the disclosure of documents was not founded on a proprietary basis, citing *Schmidt*[123] and that review of a trustee's decision about disclosure of trust documents was a matter of the court's inherent supervisory jurisdiction.[124] What did this mean? As the Court put it:[125]

> … the Court must exercise its jurisdiction as a court of equity, exercising its own judgment [sic] as to whether disclosure ought to be made at all and, if so, to what extent and on what conditions.

The Court later stated that:[126]

> We do not see the supervisory jurisdiction as discretionary; it is better seen as a jurisdiction. [It then referred to an earlier paragraph ([50]) that stated 'we think it is better seen as *a jurisdiction that must be exercised in accordance with principle, after careful assessment of the factors relevant* to the disclosure sought by the particular beneficiary".] For example, there will be little to debate about a case where the Court forms the view that disclosure of basic documents such as the trust deed and accounts is necessary to allow a beneficiary with a clear interest to hold the trustee to account and finds that no countervailing factor such as confidentiality arises. In such a case, it is hard to see how the Court could say it would, despite those factors, exercise its "discretion" to refuse a disclosure order in relation to those documents. Rather, the Court's obligation to intervene in its supervisory jurisdiction would be engaged. *In less clear cut cases, however, the decision will require consideration of a wide range of factors. We see such consideration as involving assessment and judgment* [sic].

The remainder of the Supreme Court's judgment consisted of, we must assume, an application of principle resulting in an exercise of assessment and judgement through consideration of a range of factors. The Court examined the facts under a set of ten subheadings: documents that

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[122] [2017] NZSC 28 at [18].

[123] [2017] NZSC 28 at [20], At para [67] the Court suggested that the authorities had used the term discretion as a counterpoint to the earlier idea that a beneficiary's claim to disclosure was dependent on the beneficiary's proprietary rights. "In using the term 'discretionary', the Courts were essentially expressing the view that the entitlement to make a claim for disclosure did not require a proprietary interest in the trust, so that discretionary beneficiaries and vested beneficiaries were both entitled to claim disclosure, and neither had a right or entitlement to receive an unredacted copy of every trust document."

[124] [2017] NZSC 28 at [18]-[19].

[125] [2017] NZSC 28 at [18],

[126] [2017] NZSC 28 at [68], (emphasis added) See also para [69]: "a matter of assessment and judgment [sic], not discretion".

were sought; the context for the request and the objective of the beneficiary making the request; the nature of the interest held by the beneficiary making the request; personal or commercial confidentiality; practical difficulty; disclosure of reasons; impact on other beneficiaries if disclosure is made; impact on settlor and third party; protecting confidentiality; and safeguards on use of the documentation. It is interesting to note that these factors were those which both the Privy Council in *Schmidt* and the Court of Appeal in *Erceg* itself had applied in exercising the discretion they thought they possessed. It has to be a matter for some thought: just how far apart are assessment and judgement from discretion, particularly if the task requires consideration of exactly the same factors? Can it really be suggested that the application of "discretion" in the earlier cases – no matter whether the motive was to move away from the proprietary base approach to claims for disclosure – is qualitatively different from the claimed application of principle through assessment and judgement that was supposedly going on in the Supreme Court in *Erceg*?

On its own facts and with respect, the decision in *Erceg* not to require disclosure was surely correct. In that sense, it was an easy case to disallow the beneficiary his claim to see the documents. It did not matter whether this was argued to be achieved through the exercise of discretion or by assessment and judgement. But caution is nevertheless advised that the trustee's own decision whether to disclose ought not to be seen as an exercise of discretion. The risk of an overly discretionary approach to disclosure of trust information, with fairly unreachable review thresholds, is that the ability of the beneficiary and hence of the court to enforce the trust is put at risk. The approach undermines the notions of obligation and accountability that are fundamental to the trust. If the trust conception, having already moved away from a proprietary model to an obligational one, is then to move further still to one primarily of discretion and power vested in the trustee, we must then face the question: is there still a trust present that a beneficiary is entitled to enforce?

B) Increasing Powers and Control

The notion that trust practice would develop (or perhaps disintegrate) into such a state is already occurring. Significant powers conferring control of important aspects of trust affairs are now commonly included in trust deeds. Such powers may be conferred on trustees or third parties (often called protectors or enforcers), or retained by settlors.[127] Such powers include powers of appointment and removal of trustees and/or beneficiaries and the limiting of trustee duties. In some jurisdictions, powers to direct trustees or to veto trustee decisions are also conferred. In New Zealand, the practice of retaining control by the settlor developed following the abolition of estate duty. Successive Estate and Gift Duties statutes had included in the scope of dutiable property any property over which the settlor reserved certain rights or powers that could be taken to mean he derived a benefit from the trust.[128] The practice of vesting wide discretion in trustees or in third party protectors or enforcers has increased as part and parcel of the modern flexibility of the discretionary trust and its capacity to serve the varied interests and desires of the settlor.

The evolution of the trust, away from the transfer of beneficial property rights to the granting of personal rights of enforceability, has made it possible for trust drafters to leave beneficiaries with what appears to be very little of substance at all. The increase in the number and scope of powers poses some fundamental questions about trusts that will need to be reconsidered.

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[127] C McKenzie, "Having and eating the cake: a global survey of settlor reserved power trusts" Part 1 (2007) 5 PCB 336; Part 2 (2007) 6 PCB 428.

[128] For example, a general power of appointment; see s 8 Estate and Gift Duties Act 1968 (NZ).

The practice of modern day drafting to vest "enormously wide discretions" in trustees was noted by Smith as a potential example of the misuse of trusts:[129]

> Imagine a trust in which no beneficiary has any right to anything at all, neither capital nor income; any disposition is in the discretion of the trustees. To take a more extreme version, imagine further that the trustees are free to add beneficiaries as they choose; and to delete beneficiaries as they see fit. They are free to settle the trust property on new trusts, with the beneficiaries that they select…. This arrangement may cause some people to wonder whether it is even a trust.

Such powers sit less readily within a proprietary conception of the trust, where beneficiaries are given equitable interests by a settlor at the time of formation of the trust and the trustee is appointed effectively to act as custodian. It is not obvious within such a framework that powers, to change the identity of the group of beneficiaries, to change trustees without constraint or justification, or to direct the custodial decisions of the trustee, are appropriate. However, if it is true that the trust is a relationship of obligation owed by trustee to beneficiary in relation to property which is held for the benefit of the latter, then the legitimacy of such powers retained by the settlor or vested in the trustee or a third party can be affirmed as long as the trustee's accountability to the beneficiary is not undermined by the existence and scope of the power. While it may be possible for a trust deed to reduce the trustee's accountability by limiting or exempting her from liability, courts recognise that a core of obligations must always be owed because, without any such core, there is nothing for which the trustee must be accountable to the beneficiary and therefore no trust relationship.[130] Although there is some debate as to the precise content of the core obligations,[131] the minimum necessary appears to be that the trustee must act honestly and in good faith in the performance of the trust.[132] As long as a purported power in the hands of any of the settlor, the trustee or a third party does not impinge on the trustee's duty and ability to act honestly and in good faith, it appears the trust is nevertheless valid.

Thus, close attention to the particular power in question is required. If the power were, for example, to excuse the trustee of any and all liability, the trustee's duty to the beneficiaries would not be an absolute requirement owed at all times to the beneficiary but rather would be subject to the discretion of the powerholder, such that no trust arose.[133] But, a power to add or remove beneficiaries, on the other hand, would not prevent or excuse the trustee from having to perform the trust honestly and in good faith.[134]

Where the power does not undermine the trustee's obligation to the beneficiary so that it cannot be said that there is no trust, any abuse of control can be dealt with as a breach of trust:[135]

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[129] L Smith, "Mistaking the Trust" (2010) 40 HKLJ 787 at 790.

[130] *Armitage v Nurse* [1998] Ch 241, 253 per Millett LJ; *Segelov v Ernst & Young Services Pty Ltd* [2015] NSWCA 156, 89 NSWLR 431 at [145].

[131] D Fox, "Non-excludable Trustee Duties" (2011) 17 Trusts and Trustees 17; Zhong Wei T, "The Irreducible Core Content of Modern Trust Law" (2009) 15 Trusts and Trustees 477; J Webb, "An ever-reducing core? Challenging the legal validity of offshore trusts" (2015) 21 Trusts and Trustees 476.

[132] *Spread Trustee Coy Ltd v Hutcheson* [2011] UKPC 13.

[133] *BQ v DQ* [2010] SC (Bda) 40 Civ (16 April 2010).

[134] *Financial Markets Authority v Hotchin* [2011] 3 NZLR 469 at [131] per Winkelman J.

[135] *Re the Esteem Settlement; Abacus (CI) Ltd and Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah* [2004] WTLR 1 at [122].

> …if trustees were to come under the control of a settlor so that they did not consider the matter in good faith in the way we have described but simply went along with the settlor's request because it was the settlor's request, such a decision would be reached in breach of their fiduciary duties and would be liable to be quashed.

But in relation to many contemporary powers, the difference between what is a considered and valid exercise of the power and what is wrongful acquiescence to a settlor's request is not easy to ascertain. This is because the obligation applicable to fiduciary powers is not to exercise the power in what the trustee or other fiduciary believes to be in the best interests of the objects, for such is not possible - the exercise of a discretionary power inevitably means that interests or expectations of at least one of the beneficiaries will be defeated. Instead, the duty on the holder of the power must be to exercise the power bona fide for the purpose for which the power was conferred upon him.[136] And determining that purpose effectively involves asking what the settlor would have wanted in any situation in which the power could be used.[137] Thus, the settlor's influence is not only permitted but invited. The result is to leave beneficiaries with very little at all. There is very little that a beneficiary can expect or is entitled to.

The use of a combination of powers within a discretionary trust that leaves the beneficiaries with very little of substance was the subject of recent consideration by the New Zealand Supreme Court last year. In *Clayton v Clayton*,[138] Mr Clayton owned land and buildings used in his business operations. He declared himself trustee of the property for the benefit of himself, his wife and his children as discretionary beneficiaries. The children were also the final beneficiaries. By the deed he was named "Principal Family Member" and, as such, was given the powers to appoint and remove trustees and to add and remove beneficiaries. As trustee, he had the power to appoint all of the income and capital to any of the discretionary beneficiaries. The deed expressly provided that, as trustee, he could exercise such power in his own favour; that he did not have to act impartially nor consider the interests of all beneficiaries; and that his powers could be exercised despite a conflict of interest. Following separation from her husband, Mrs Clayton argued that the trust assets were part of the pool of matrimonial or "relationship" property, over which she claimed a half-share. Ultimately, her claim was focused on two alternative grounds: either the trust should be ignored as a sham or as otherwise illusory, or Mr Clayton's powers should be treated as relationship property.

The Supreme Court held that Mr Clayton's powers were not fettered by any constraints, despite most of them being held in his capacity as trustee, and this enabled him to appoint property for his own benefit. Accordingly, "the combination of powers and entitlements of Mr Clayton as Principal Family Member, Trustee and Discretionary Beneficiary of the [trust] amount in effect to a general power of appointment in relation to the assets of the [trust]".[139] The Court then proceeded to treat the general power of appointment as property for the purpose of the relevant relationship property legislation,[140] the value of which was equal to the value of the trust assets.[141]

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[136] *De Manneville v Crompton* (1813) 1 Ves & B 354; *Re Londonderry's Trusts* [1964] 3 All ER 855; see further L Smith, "Fiduciary Relationships: ensuring the loyal exercise of judgement on behalf of another" (2014) 130 LQR 608.

[137] L Smith, "Mistaking the Trust" (2010) 40 HKLJ 787 at 791.

[138] [2016] NZSC 29.

[139] [2016] NZSC 29 at [68].

[140] [2016] NZSC 29 at [68], [79]; Property (Relationships) Act 1967 (NZ), s 2.

[141] [2016] NZSC 29 at [107].

Of course, property can be a very broadly construed construct.[142] Context and purpose are important. A similar outcome to that of *Clayton* was reached by the Privy Council in *TMSF v Merrill Lynch*,[143] from which the Court in *Clayton* drew support. That case concerned a controller of several companies and investment banks based in Turkey, Mr Demirel, who had misappropriated significant funds totalling approximately US$830m. Demirel had settled two discretionary trusts in the Cayman Islands, with assets of about US$24m. The beneficiaries were Demirel, his wife, and any children and remoter issue (of which there were none) and a charity as the residuary beneficiary. The trust deed contained a power of revocation in Demirel's favour:

> This Trust may be revoked, amended, varied or altered in any manner whatsoever from time to time and at any time by the Settlor by deed and delivered to the Trustees provided always that no such revocation, amendment, variation or alteration shall take effect until actual receipt of such instrument by the Trustees or with the written consent of the Trustees thereto if such revocation, amendment, variation or alteration would increase or extend the obligations, liabilities or responsibilities of the Trustees.

TMSF, acting essentially as receiver of the banks, successfully gained judgment in Turkey against Demirel personally for US$30m. It then secured judgment in the Cayman Islands to enforce the Turkish judgment. In addition, it sought to appoint receivers over the power to revoke and orders against Demirel to assign the power to the receivers in order to access the trust assets. TMSD's application was rejected at first instance on the ground that the power to revoke was not, in principle, property capable of being the subject of receivership and, on first appeal, that as a matter of policy the court should not allow receivership of a power of revocation in the absence of empowering legislation because it would enable one creditor to effectively jump the queue. In delivering the advice of the Privy Council, Lord Collins made clear that equity might at times consider the holder of a general power as owner "for all practical purposes".[144]

The Board held that Demirel's right of revocation could be regarded as tantamount to ownership and that the interests of justice required such an analysis "in order to make effective the judgment of the Cayman court recognizing and enforcing the Turkish judgment".[145] Clearly of importance was the absence of any duties attaching to the power which could thereby fetter Demirel's interest:[146]

> In the present case the power of revocation cannot be regarded in any sense as a fiduciary power, and the [trustee does] not suggest otherwise. The only discretion which Mr Demirel has is whether to exercise the power in his own favour. He owes no fiduciary duties. As has been explained, the powers of revocation are tantamount to ownership.

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[142] *Jones v Skinner* (1835) 5 LJ CH (NS) 87, 90 per Lord Langdale MR.

[143] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721.

[144] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 at [33].

[145] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 at [59].

[146] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 at [62].

Thus, according to the Privy Council, an absolute power of revocation (that is, unconstrained by any fiduciary or other procedural duties), held by a settlor who, along with his spouse, is the only discretionary beneficiary with any real prospect of benefit, can be said to be property for the purpose of receivership by a creditor (and only where this finding is not precluded by legislation).

The combination of the obligational conception of the trust and the increased use of broad powers raises important questions about the coherence of the trust construct. These cases show that courts accept that powers can be exercised to deny the beneficiaries any real substantial proprietary benefit without the trustee having breached its trust duties. If that is so, the trust is no longer operating for the benefit of the beneficiaries.

Perhaps the better response to cases such as *Clayton* is to enquire whether there really is sufficient intention for a trust to have been formed in the first place. The Supreme Court could have legitimately concluded that the trust property beneficially belonged to Mr Clayton by finding that no trust was intended, as a matter of substance. One could say that because the powers Mr Clayton conferred upon himself were so wide-ranging, important fiduciary duties were excluded, and he was the sole trustee, arguably there was little evidence of any meaningful accountability intended. Yet, the Supreme Court rejected such an approach, saying:[147]

> The fact that the trust deed gives Mr Clayton powers that amount, in effect, to a general power of appointment does not indicate that when entering into the [trust] deed, Mr Clayton in fact intended to create a structure different from that set out in the terms of the [trust] deed itself.

With respect, this seems an inherent contradiction that is perhaps caused by an approach to intention that is rather too formalistic. While Mr Clayton and his advisers could say they all intended to create something that took the apparent form of a trust, the actual content of the arrangement as intended and as created was not a trust at all. While the Supreme Court affirmed the validity of the trust, its finding that Mr Clayton's powers were unrestrained entirely undermined that ruling.

This is not to say that such trusts are shams or that sham must be argued. Sham trusts have been a popular topic in trust law in recent years but have been understood to involve an intention to disguise or conceal an alternative true intention.[148] In these cases of extensive powers, there is often no suggestion that the settlor was acting fraudulently as such. Indeed, the settlor wants a trust and he is advised to create one with broad powers. But if the "trust" he intends is one where the trustee does not have true powers of ownership over the property because those powers have effectively been retained by the settlor or conferred on a third party,[149] or the trustee has vast powers without accountability,[150] the result may be that there is neither a valid trust nor a sham trust, but rather no trust at all, for want of a genuine trust intention. So, given that Mr Clayton gave himself powers to remove discretionary beneficiaries and to appoint all income and capital to himself without being obliged to act impartially or to consider all beneficiaries, the existence of any intention on his part to create a trust must surely have been in doubt.

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147 [2016] NZSC 29 at [115].

148 *Hitch v Stone* [2001] STC 214 at 230; *In re Esteem Settlement* [2003] JLR 188 at 223; *MacKinnon v Regent Trust Co Ltd* [2005] WTLR 1367 at 1375; *Official Assignee v Wilson* [2008] 3 NZLR 45 at [38]-[39].

149 By means, for example, of powers to direct or veto trustee decisions.

150 By means, for example, of powers to remove beneficiaries and to appoint to oneself.

The increased use of discretions and powers should be subject to possible intervention on the basis that there is no real trust obligation owed by the trustee or that, despite the form of a trust, the substance of a trust was not intended by the would-be settlor. A careful analysis of the content of powers and duties conferred in any given discretionary trust is needed to ensure that a proper trust relationship has in fact been created. The modern discretionary trust has become captured by the push for flexibility and the advancement of a persisting settlor intent (where, unlike the orthodox position, the settlor does not drop away after formation, but in fact continues to speak into the life and essence of the trust).[151] While neither of these things is necessarily unwelcome, the trust construct cannot be endlessly malleable. There comes a point where it is executed before it has been given any semblance of effective life!

IV. Conclusion

The discretionary trust was once controlled by the list certainty test and the accompanying understanding of it as fundamentally a property-based institution. Developments in trusts law in the 1960s and 70s and continuing into day's modern practice have altered the focus to one of obligation. Trusts, many of which in contemporary practice are discretionary, have become institutions of *in personam* rights and duties. This has bred an expansion of discretions beyond the traditional discretions as to choice to distribute and choice of whom to distribute to, towards discretions as to whether to change the terms of the trust and to direct its operation. The latter flexibility treats the trust as if it were a type of long-term contract rather than a trust at all. Roles of trusteeship and beneficiaryship can be dispensed with with such ease that the roles appear to have no sustained meaning or content. We believe we are in the midst of a doctrinal revolution. Although it is perhaps too early to offer a definitive evaluation of the revolution, we suspect that the law of express trusts is becoming somewhat confused as courts are faced with ever-expanding trustee discretion and a corresponding narrowing of beneficiaries' rights.[152] Lord Wilberforce and Goff J may be surprised to be told that they were opening a Pandora's box, but open it they did.

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[151] A Hofri-Winogradow, "How Harmful is Trust Proliferation?" (July 10, 2015). Available at SSRN: http://ssrn.com/abstract=2629174; P O'Hagan, "The reluctant settlor – property, powers and pretences" (2011) 17 Trusts & Trustees 905; D Waters, "Settlor control – what kind of problem is it?" (2009) 15 Trusts and Trustees 12.

[152] Lionel Smith has made what we think is a very similar case to that made here: " Massively Discretionary Trusts" (March 14, 2017). Forthcoming in Current Legal Problems 2017. Available at SSRN: https://ssrn.com/abstract=2932933. Smith outlines the development of what he terms 'massively discretionary trusts', which are "trust structures in which the trustees' dispositive discretions do not merely qualify the beneficial interests, but effectively displace them, one might even say overwhelm them". These are "a kind of deformation of the trust device". In a characteristically careful and persuasive manner, Smith reveals what he calls the risks that are associated with such developments. He sees the development as a gradual evolution rather than a revolution, but like us predicts a serious problem: "This kind of gradual evolution may make it more difficult for judges to notice when a line has been crossed from what is acceptable to what is impossible. A common law trust with no beneficiaries is impossible. It is a violation of the beneficiary principle and a violation of the rule against non-charitable purpose trusts. A common law trust in which the trustees do not owe duties of accountability to the beneficiaries is also impossible. If you want people to hold property without being accountable to beneficiaries, then you don't want a trust. A trust in which the trustees are to be guided not by the interests of the beneficiaries but by the wishes of a person who is neither a beneficiary nor a trustee, is also impossible according to the common law. It is either a trust for that person, or a non-charitable purpose trust, and since the latter is impossible, it leads to a resulting trust. … Massive discretions can sometimes be a smokescreen to try to make possible the impossible. Courts must be vigilent."