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Vesting

General Express Trusts

-4 Forms of Settlor Formation of the trust:

- 1) Donor may simply declare himself the trustee of the property and continues to hold legal title to the property, however it is now held for the benefit of the beneficiary (donor gives equitable estate in the asset to the donee and continues to retain legal title to it)
- 2) Donor appoints a 3rd person as trustee of the property and directs him to hold the trust asset for the named beneficiary
- 3) The 3 trust parties deal with each other contractually in order to set up a trust which covers agreed types of property
- 4) An incomplete gift of an asset is later perfected by transfer of title in that property through some en passant method of conveyance (*Strong v Bird* ; *Hilliard v Lostchuk*)

-Express trust involves 2 stages:

- 1) Expression of intention by the settlor to create a trust in favour of a beneficiary using a named trustee who is to receive identified trust asset
- 2) Handing over the identified trust asset to the trustee - settlor needs to vest the trustee fully with legal title in the property that becomes the subject of the Trust

*this step is irrelevant where the trust is created by a settlor's personal declaration of trust

-In BC/Manitoba - no trust must be in writing

*in Ontario if the trust deals with land there must be a written memorial of it

The Vesting Basics

-A completely constituted trust is one where title in the trust asset has been conveyed to the trustee and is under his control and administration, or where the circumstances are such that he can exact that control by law (i.e. specific performance)

*no vesting = the beneficiary cannot sue the trustee for the property because the beneficiary cannot force the trustee to give something he does not have

Vesting in Personal Declaration of Trust

General

-*Elliot and Glynn* show us that the simple act of declaring that a trust has been formed by the settlor is enough to create a valid trust

*interesting because it seems to circumnavigate the common-law rule that in order to perfect a gift it needs to be more than a promise to give but there actually must be a transfer of the property to the donee

-PAVS - this is an exception to the rule "equity follows the law" because common-law rule of gifting (which is what is practically occurring in these situations) says that you have to do more than declaring an intention

Elliot (Litigation Guardian of) v Elliott Estate - 2008 - OSC

Facts

-J made provision for children in her will, deliberately omitting her dependant disabled daughter B

*intention is to provide for B by separate arrangement with children and a GIC account

-Litigation guardian claimed that there was a trust by J during her lifetime in respect of the GIC account so that it did not form a part of the estate

Issue

-Can an express trust be constituted by declaration?

Ratio

-An express trust can be constituted by a simple declaration of oneself as trustee

*formed by the declaration of a settlor that she is continuing to own the property, but henceforth she assumes the role of trustee and holds title for the enjoyment of the declared beneficiary

*no physical transfer is needed because the settlor is already the owner, declaration means that the owner is thereafter divested of title in equity in favour of the beneficiary

Glynn v Federal Commissioner of Taxation - 1964 - AUS

Facts

- Tax authority wanted to include 1600 shares as part of G's estate which would be subject to tax
- However, the shares were subject to a trust created by the father for the sons a long time earlier, and the trust had never been communicated to either sons
- *directors of company had approved the transfers in the minutes of the register
- *dividends had not been paid to sons but had been used by the settlor to support his sons

Issue

-Does the intention to create an express trust by declaration have to be communicated to the beneficiaries?

Ratio

- Trust had been constituted upon the intention of the settlor despite this intention not being communicated by him to the sons, and despite the father appropriating the sums
- *both of these things supported an intention by the father to create a trust for the sons to support them that they did not know about
- ***I would say that it is important that when he appropriated the money, he did so to look after his sons - If he had used it on himself this probably would have been a contrary intention***

Vesting Where There is No Formal Property Transfer

General

- Equity follows the law - trust cannot be properly constituted until the title to the property is transferred to the trustee, as is the case in the common law rule of gifts
- *CL wants clear proof of gift - not just producing a document that says that, the person in control must have divested themselves from control of the object
- Note that the kind of property that is being transferred is important because the specific rules of transfer for the property type will dictate whether the property has been transferred and consequently whether there is a valid trust

Shares

General

- Re Rose/ Ratner* = while equity will not perfect an imperfect gift at law, where the donor has done everything he personally is able to do legally, in the ordinary course of business, and thereby lost control over the property, equity deems conveyance as substantially satisfied and so it will treat this almost perfected transfer as complete constitution
- *in this circumstance it will assist a volunteer and deem the gift to the trustee perfected

Milroy v Lord - 1862

Facts

- Settlor failed to register the trustee as the owner of the shares in the company
- Trustee dies

Issue

-Did the trustee hold the shares in trust for the beneficiary, or did the trust fail (resulting trust for Settlor)

Ratio

- There had not been a proper transfer of the shares to the trustee because shares were never registered in the trustee's name, so there had not been an effective gift to the beneficiary
- PAVS: Interesting because for 9-10 years trustee used the shares in the bank for beneficiary's benefit, but court still found no trust for lack of vesting
- *Court ruled these gifts as discrete gifts, independent gifts where title to the dividends went into beneficiary's name directly

Ratner v LH Ratner Construction Ltd. - 2010 - BCCA

Facts

-D transferred shares to his mother for tax purposes with the understanding that at some time in the future the shares would be returned to him

*income from the shares belonged to mom, she used them for medical care

-Later, D comes back and convinces mom to gift shares back to him - Mom later cancels the gift

Issue

-Was the re-gifting of the shares back to the son a valid gift

Ratio

-Shares needed to be conveyed to D in order to perfect the gift and vest him with title, which had not happened as the name in the share register of the company had not been changed

*Verbal understanding to re-convey the shares given to the mother was unenforceable as an unlawful restraint, and the re-gifting of the shares to D could therefore be revoked

Re Rose - 1952

Facts

-R executed 2 transfers for his wife and son

*transferor dies after effecting the transfer, not registered yet

Issue

-When did the beneficiaries receive the shares?

Ratio

-Shares were transferred on the date of execution, not the date of registration in the Company's books

-Decisive point in deciding whether something has vested is whether the settlor has relinquished control over the thing

*at this time the transferor had done everything in his power to effect the transfer of the shares, all that remained was for the actual registration to be administered by the officers and employees of the company

-ie at the time of transfer he became a trustee of the shares for his wife and son

Property

Mordo v Nitting - 2006 - BCSC

Ratio

-Execution of a Form A transfer combined with the handing of this transfer to the trustee was sufficient to vest title in the trustee even without formal registration of title in the LTO

*if the transferor intends to transfer the property, the transfer will be complete when the transferor has relinquished control of the property and put the transferee in a position to complete the transfer

Carson v Wilson - 1960 - OCA

Ratio

-Where a transfer is formally incomplete, a key factor the court will examine in completing it is the transferors intention to be immediately and unconditionally bound, and the transferors relinquishment of control of the property by putting the transferee in a position to complete the conveyance

Vesting in Case of Contractual Agreement of Trust

-A contract establishing an express trust between a settlor and the beneficiary promising transfer of property at a future date is constituted when the beneficiary can enforce the contract (i.e. when they have a binding contract)

*In the event that a contract is not preformed, the remedy of specific performance in a validly constituted contract will allow a trust to be properly constituted where the defaulting promisor is declared to be a constructive trustee holding title for the promisee

-Law is less clear where the contract is between the settlor and the trustee, and the beneficiary is not a party to the transaction

*becomes even less clear if the settlor does not have the property, but is bound by the contract to acquire it

-open question whether the beneficiary can sue the settlor for failure to convey the property to the trustee, or if he can sue the trustee for failing to sue the settlor requiring conveyance

*PAVS - trust becomes effective when it can be shown that the settlor/donor is legal obligated to fulfill the contract

- this would be where the settlor has followed the CL rules for effective gift making and is immediately and unconditionally bound
- Thus title is taken to have vested where the settlor/donor is bound under an enforceable contract to deliver the property because equity gives pre-eminence to the enforceable intention of the parties and considers it enough to accomplish the act

Vesting - Incomplete Gift that Later is Perfected

Approach to Strong Rule

- Rule in Strong - If a gift has been made but not completed, but is later completed in an unintended way, it may still result in an effective gift
- Just think: 1) Was there an attempt at a transfer of ownership before the death to the beneficiary that was invalid because of a formality? 2) Is the beneficiary of the gift the executor of the estate? 3) If yes, then the transfer has been completed and thus it is a valid gift/trust as the property has vested in the hands of the donee/beneficiary

Strong v Bird - 1874

Facts

- D borrows 1K which he agrees to repay through reductions in SD's rent
- *SD forgives the debt after \$200 is repaid; no formal release of debt = not legally binding
- SD dies, heirs claim for debt repayment; D becomes executor of the estate

Issue

- Was gift effective after D was given charge over SD's property as executor?

Ratio

- RULE: If an inter vivos gift is imperfect solely due to the fact that the transfer to the intended donee is incomplete, the incomplete gift will be perfected if and when the donee subsequently acquires title to the property (as executor of the estate of the deceased donor)
- *rule applies to both real and personal property
- Here, intended gift of the balance of the debt became perfect upon the death of SD and the acquisition of SD's property (debts and assets) by the D in his capacity as executor
- *Reasoning: if a person is made executor of an estate, the deceased likely intended to free the executor from unpaid debts
- PAVS - Rule does not apply to a promise (without consideration) to give property at a later date in the future.

Hilliard v Lostchuk - 1993 - OPC

Facts

- J owned farm, gave it to 2 children to subdivide parcels respectively
- *3rd child is left out, but he lives with J, works the land, and had improved the buildings owned by J.
- J attempts to give C3 his own subdivision of land and applies to the Town for rezoning and severance of part of her land
- *this approved after J had died; C3 was appointed executor of the estate

Issue

- Can this gift be perfected by rule in *Strong*

Ratio

- Strong* rule applies - said the gift was perfected when the property, as it was zoned, passed into C3's hands as executor of the estate, thereby perfecting the gift

Really Random - Seemingly Useless Points of Note

- 1) A volunteer at law may enforce a covenant under seal. Presumably this would be true in equity as well, including enforcements against the trustee who had received title because of the common law effect of sealed covenants.

2) *Re Gardner* - states that a secret trust is valid even where the beneficiary pre-deceases the testator in such a manner that the testator intended trustee had not been appointed at the date of the beneficiary's death
 *this goes against the normal rule that where the beneficiary pre-deceases the testator, the gift lapses

-Pavs thinks this was wrongly decided

3) Equitable estoppel could also give effect to a trust according to legal rules governing representations that create expectations and expenditures

*ex. As cohabiting partner, I promise you the house registered in my name, and as a result, you will spend enormous time and energy fixing it, and vast sums improving it; however, I do not follow through with my promise. Then a constructive trust is formed for presumably the house.

The 3 Certainties (Sex, Drugs, and Rock n' Roll)

Certainty of Intention

General

-Settlor must intend that the person to whom legal title is transferred will hold the property as a trustee

*different from the intention to gift the property to the 3rd party with the expression of a hope or desire that the transferee will use some of the property to help another person

-Usual way to make this intention of trust is to use a document with the heading Deed of Trust, Trust Settlement, or Trust Agreement

*can also be a less formal document where the words "in trust" clearly appertain to the property in question and directed to a person who is identified expressly or by necessary implication as the trustee

-helps to have imperative language when giving directions to the trustee about future dealings with the property

-However, the word trust need not be used at all in order to establish a trust relationship

**Re Kayford* - 1975 HC - "well settled that a trust can be created without using the word "trust" or "confidence" or the like - the question is whether in substance a sufficient intention to create a trust has been manifested"

-equity looks to substance over form - you just have to indicate the imperative responsibility that the holder of legal title has to act for the benefit of another with regard to the transfer of legal title

-Words like "I wish" "I hope" "I request" (precatory words) cause courts to look at the ordinary meaning of those utterances and how they are operating in the context of the whole document

**Re Adams and Kensington Vestry* - no trust was created where the instrument declared property "unto and to the absolute use of my wife in full confidence that she will do what is right as to the disposal thereof between my children" - wife got absolute title to the property - no trust

-2 overall considerations of whether an intention to form a trust is present:

1) Whether the document(s) reflect an intent to form a trust with obligations placed upon the title holder to act only to benefit another; or

2) Whether title transfer is motivated by an out-and-out gift combined with words that merely intimate a hope or exhortation that the transferee use the gift property in some way to help another named individual

*in these cases the strength of the request will be important (as to whether or not it is a trust)

*there is usually a presumption in favour of gift, especially in family-type trusts

Hayman v Nicoll - SCC - 1944

Facts

-L died and left money to daughter "in full confidence that she will dispose it in accordance with the wishes L had expressed to her"

-Daughter dies - residuary legatees of L's estate argued that the daughter's estate was impressed with a trust in respect of the property she got from L because of the wording of the will

Issue

-Whether the words "in accordance with the wishes I have expressed to her" imposed a trust on the daughter with respect to the money she had received from L

Ratio

-SCC - no trust - the phrase "in full confidence" no longer signalled trust as it previously had, and that in modern parlance it indicated a moral expectation of compliance with wishes

*a settler's words must signify a clear intention to establish a trust - there is need for a clear signal that the property given to the transferee must be used for a beneficiary and not personally
 -PAV - have to look at all the circumstances involved when deciding the intention to make a trust

Royal Bank v Eastern Trust Co - PEISC - 1951

Facts

-C owed money to RBC - agreed to assign RBC rentals from an apartment building he owned in the settlement of his debt
 -C sold the property to his friend S - had 60 days to arrange mortgage and repay the taxes/insurance premiums/debt; if he failed to do this in 60 days than S could dispose of his property at public auction

Issue

-Did the language in the memorandum between C and RBC establish a certainty of intention so as to place RBC as a secured creditor of C?

Ratio

-CT - no certainty of intention because the circumstances under which RBC had comported itself throughout the execution of the contract were inconsistent with it being properly characterized as a beneficiary
 *RBC had taken ct proceedings in which it had treated S as a debtor and not a trustee of assets to which it was a beneficiary
 Overall - An express trust may be created without the use of any technical expressions, but the intention to create a trust must be indicated with reasonable certainty or must be inferred with reasonable certainty from the context

Certainty of Subject Matter

General

-Test for certainty - The provisions in the trust dealing with the assets must be of "sufficient exactness" so that: (certainty of items + certainty of beneficiaries share in items)
 1) the beneficial interest in the specified property making up the trust can be ascertained;
 2) it enables the things that are to make up the trust assets may also be ascertained
 -If there is no stipulation to the beneficiaries shares, the court can assume from intention, etc.
 -Trust document can set out the particular items of property, or the document can set out a method for their ascertainment and the articulation of that method, where used, must also be reasonably precise
 *in the case of a formula describing the beneficiaries entitlement - the instrument must, with sufficient exactness, set out a method by which the property that is subject to the trust can be identified
 -If uncertainty relates to the quantum of the beneficial interest, the trust fails and the transferee holds on a resulting trust for the settlor/testator

Institute of Public Service Canada v Canada (AG) - SCC - 2012

Facts

-GOC puts money in the consolidated revenue fund to meet pension obligations
 *fund fluctuates as property is moved in and out of the fund
 -Service people found their revenue line in the pension fund and claimed that the government was holding it on trust for them - try and call for it

Issue

-Was the trust property sufficiently ascertained so as to allow the pensioners to call for the trust?

Ratio

-Basically the pensioners are saying "debts are assets in the hands of creditors", the government owes us a debt in the form of pensions = there can be a trust for the debt
 -Employee contributions were not required to be placed in a specially created trust fund, but in the Consolidated Revenue Fund at the credit of the Receiver General
 *Since the superannuation accounts constituted by legislation do not contain assets, there can be no trust so the rules of express trusts were not available to the Institute
 This isn't property, just a record that changes over time - only rights that service people have is under the pension contract - and those rights are property and can be enforced

Re Beardmore Trusts - OHC - 1951

Facts

-Inter vivos trust to take effect upon the settlor's death providing trustee was to hold 3/5ths of the settlor's net estate for the wife for life or until remarriage, with the remainder to the two children

Issue

-Is subject matter uncertain?

Ratio

-Wait and see approach as to what the assets will be when the trust becomes effective is not allowed

*you must know what the assets are from the outset - can't ascertain the assets upon death, must be known when the trust is created

-PAVS: Not clear why this should be the case; more important that the certainty of subject matter should be at the key date when the beneficiaries are entitled to payment

Re Golay - 1965 - CHD

Facts

-Executors had been directed to let B enjoy one of T's flats during her lifetime and receive a reasonable income from T's other properties

Issue

-Is "reasonable income" and uncertain formula?

Ratio

-Formula was not uncertain - as long as the settlor/testator has given sufficient indication of his intention to provide an effective determinant of what he intends so that the court, in applying that determinant, can give effect to the testator's intention

*Reasonable income was intended to mean what was objectively reasonable

Sprange v Barnard- 1789 - CHD

Facts

-T left annuity to husband "for his sole use and at his death the remaining part of what is left that he does not want for his own wants and use be divided between" other beneficiaries

Issue

-Is this formula uncertain?

Ratio

-No trust arose - at the outset of the settlement we do not know what the beneficiaries would get because we do not know what the husband would spend in his lifetime

-PAVS: Doesn't like this because he doesn't believe that, on a policy basis, uncertainty at the time of creating the trust, which has its subjects identifiable at death, is a good reason to invalidate a trust

*easy enough to see whether or not property from the annuity is left for the beneficiaries on the trustee's death

-trusts of income from property are not ascertainable at the outset but can still be valid trusts

Notional Floating Trust

-Despite *Beardmore* and *Sprange*, many assert that a "floating trust" should be viewed as constituting a valid trust

**Burke* seems to say that a floating trust can be a trust

-could also be read to say that once the trust is declared there doesn't need to be immediate vesting, their can be vesting on the ascertaining of the property

*PAVS - problematic because trust would not be constituted, so the beneficiaries can't call for the property

-PAVS says that potentially valid floating trust - settlor transfers money to a trustee on terms that the trustee may use as much of it as he wants during his lifetime, but on his death must leave the balance as trust to a named beneficiary

Burke v Hudson's Bay Co. - SCC - 2010

Facts

-Dealt with employee/beneficiary entitlement to surplus monies (constantly fluctuating sum in pension fund)

*different from *Public Service* because it was a defined pensioners fund where they could know what their obligations were at any time

-Pensioners call for the trust

Issue

-Is their certainty of subject matter?

Ratio

-Money is on trust, but they cannot call for it because the only time you can know when there is a surplus is where the whole fund is called for

-Rothstein explained the interest of the beneficiary as "floating equity" which may or may not crystallize

*floating equity in the trust property is a means of protecting the beneficiaries in the pension plan "not by giving them equitable interests, but by ensuring the due administration of assets" by the trustees

-Explanation of how this keeps within the principle of certainty: entitlement to surplus on termination is analogous to the entitlement of a residuary beneficiary for 3 reasons:

- a) the vesting of the actual surplus in the employees is contingent on the plan terminating;
- b) vesting is contingent on there being an actual surplus once the liabilities are satisfied;
- c) vesting is contingent on the employees surviving the date of the termination of the trust

Certainty of Objects

General

-When determining whether there is sufficient certainty of objects, you must pay attention to the type of appointing mechanism that is being used

*there are 3 main types - can be determined by reviewing the wording used in the trust instrument

1) Fixed Trust - settlor fixes the beneficiaries as well as the income or benefits they are to receive from the trustee

*objects must be identified in the trust instrument with enough precision such that the beneficiary can be identified by name

*if there are multiple beneficiaries identified as a class, then the class description should be precise enough to enable each member of the class to be completely listed by name

-Problems occur when you refer to a large, fluctuating group of people (the residents of Whistler) or if you just refer to a person nondescriptly (Sid)

*note that if it's "my children" that will usually be certain

2) Trust Power - trustee is given a discretion to choose from the class of beneficiaries enumerated by the settlor/testator to whom in the class he should distribute income

*test for certainty in these situations: whether one can say with certainty, and without an extremely burdensome task, that a given beneficiary is or is not a member of the class of beneficiaries

-this is clearly a lower threshold than the "complete list" test in the fixed trust

3) Power Simplex - gives the trustee (and/or donee of the power) the discretion whether to distribute from the trust assets and to whom among the class

*same test as the trust power for certainty of objects

-however, evidential uncertainty and administrative unworkability (the second stage of the trust power analysis) will form less of a problem with these types of trusts

-Note that for Trust Power and Power Simplex, the trust instrument may also assign this power to another person (donee of the power of appointment)

*Trust instrument must still outline with certainty who falls within the class of objects such that they can be selected to enjoy the benefit of the trust administration

-Conceptual uncertainty v Evidential Uncertainty:

*Conceptual uncertainty occurs when the words used by the settlor (which constitute the criteria for identifying or selecting beneficiaries) are inexact, thus making it unclear who the intended recipient of the quotable estate in the trust property ought to be

*Evidential uncertainty occurs where the definition of the group or class of potential beneficiaries is clear, but there is insufficient factual information to apply the settlor's definition to those who may fall within the defined group (i.e. "to the residents of Greater Vancouver")

Trusts and Powers Distinguished

-Power - referable to that authority of discretion bestowed on a person to dispose of property that is not his, that is, property to which he does not possess legal title

*in regard to a trust - when there is a power of appointment, this allows the donee of appointment the ability to exercise his discretion and bestow trust property upon a beneficiary, even though the trust property is in the hands (legally) of the trustee

-However, trustees may also be given the power to appoint, even though they have legal title (they do not have equitable title, and this is what they appoint)

*where the trustee has the power to appoint - it is important to note whether the trustee is acting under a mandatory trust, or whether he has the discretion to even make an appointment at all

- "trust to appoint" = must appoint

- "power to appoint" = may select

Trust Power v Power Simpliciter

-Trust power = the trustee is required to exercise discretion in selecting beneficiaries from a class, and/or determine the quantum of interest that the beneficiaries selected from that class will receive

*bound by duty of fiduciary relationship

-Power Simpliciter = trustee may choose to give trust income to described beneficiary (or choose one or more recipients from a described class of beneficiaries) but only if the trustee considers this necessary

*there may or may not be a fiduciary duty on the trustee - PAVS seems to indicate that the decision to distribute or not distribute must only be made on rational and defensible grounds

-Fixed Trust - Must distribute the trust property as directed in the instrument to the beneficiaries as defined by name or class

-Trust powers can be distinguished by reviewing the wording of the terms of the appointment provisions laid out in the trust document

*basically you are looking for whether the wording is permissive or mandatory

*also looking for gift-over provisions that indicate that the settlor's intention was to create a power, through the implication that he contemplated that an appointment may never be made, and so the donee of the power was clearly intended only to consider appointing a beneficiary from the class to receive trust income

*look for wording that indicates whether the beneficiaries have an interest in the trust property

-if they do not have a property interest, then it's probably power simpliciter because at most the donee of the power merely has a duty to consider whether an appointment should be made

Re Manisty's Settlement - 1974 - CHD

Facts

-Specific provision said that anyone in the world may be appointed except the "settlor, his wife, any person or corporation who added property to the settlement and the wife of any such person"

-Existing beneficiaries challenged trustees appointment

*Argued that the intermediate power of appointment in a trust settlement was invalid for a lack of certainty

Issue

-Is this power of appointment too wide so as to be uncertain?

Ratio

-Power cannot be deemed uncertain merely because the ambit is too wide

*permissible for the settlor to repose considerations of whom to appoint within the absolute discretion of the trustees

-Beneficiaries can call on trustees to exercise their consideration, but cannot compel them to exercise it, nor can they claim a breach of trust if they refuse to confer benefits

*court may be persuaded to intervene if the trustees act capriciously (irrational, perverse or irrelevant to the sensibility expected to a trustee)

-trustees will make their decision based on all the terms of the trust settlement, the surrounding circumstances, and their individual knowledge, acquired or inherited

- An intermediate trust is used where the Settlor wants to allow the trustee to add anyone they may have forgotten, except for a certain class of individuals

*Settlors may use an intermediate power to obviate anyone they may have forgotten in their settlement of the trust

Re Hay's Settlement Trusts - 1981 - CHD

Case outlines the differences between a trust power and a power, even though the test for certainty of objects is the same

-While a discretionary trust may be invalidated because of the lack of evidential clarity rendering the trust administratively unworkable, this can rarely, if ever be the case with a trust containing a power simpliciter

*evidential certainty - having access to enough information to administer the trust given a wide range of objects

-This is because the trustee can just use his absolute discretion to decide which beneficiary to administer to = this makes it administratively workable

Classification of Powers

-General power - donee can appoint anyone including himself

-Special Power - donee can appoint only one person in or from a named specified class of objects

*requirement of specificity (in terms of who may be appointed, or the class of appointed) does not require as detail, given the power holder's overall discretion around choosing a person to whom a distribution should be made

-Intermediate power - donee can appoint anyone at all, except a person or class as proscribed by the donor in the instrument

Tests for Certainty of Objects

(Historic) IRC v Broadway Cottages Trust - 1955 - CA

-List-certainty test is the appropriate test to determine the certainty of expression for identification of objects in any kind of trust, including both fixed and trust power trusts

(Historic) Re Gestetner's Settlement - 1953 - CHD

-List-certainty test was rejected as inappropriate where the trustee had the power of appointment to choose who would be the objects

*used individual ascertainability test to determine whether there was certainty of objects in trusts with powers of appointment

-certainty of objects if the power enabled the trustee to deem that a particular candidate under consideration is or is not a member of the class of objects set out by the settlor/testator in the instrument

(Historic) Re Gulbenkian's Settlements - 1970 - HL

-Court affirmed that the appropriate test to assess clarity of expression for trust powers is the complete list test for fixed trusts as endorsed in *Broadway Cottages*

-Confined the application of the individual ascertainability test solely to powers simpliciter

*re-affirmed that the power is valid if it can be said, with certainty, whether any given individual is or is not a member of the class, and does not fail simply because it is impossible to ascertain every member of the class

Baden (No. 1) - HL - 1970

Facts

-Pertained to a discretionary trust for a large class comprising of employees and ex-employees of a large company and their dependents and relatives

*trust instrument gave absolute discretion to the trustee to grant the net income of the fund to the beneficiaries

Issue

-What is the appropriate test for certainty of objects for trust powers?

Decision

-Rejected earlier decision in *Re Gulbenkian's*, the individual ascertainability test should be extended to trust power trusts, leaving the complete list test applicable to fixed trusts only

-Suggested that the difference between trust powers and powers simpliciter were matters of degree and not substance, and thus that the tests for the two should be the same

*trustee must diligently investigate who is in the class, ascertain the needs of the various groups in the class, and distribute accordingly - doesn't need to know the whole list to do his job

*also, equal division is not necessarily the intention of the settlor, especially in large trusts - where practicality is the name of the game

-For large trusts, if the trustee is not acting correctly with discretionary power, the court could administer the trust properly by appointing a new trustee - wouldn't need to know the whole class to properly administrate

*where the class was small, the court could order equal division

Re Baden's (No.2) - 1972 - CA

Same facts as the previous Baden Case

Issue

-Is the "relative" an administratively unworkable class in the is/is not test?

Ratio

-It was argued that you can't really say with certainty whether someone was not a relative, so you couldn't say with certainty who was a relative

-**Stamp LJ** - said that there would be sufficient certainty in the class if there is sufficient clarity on both definition of the class and sufficient factual information to be able to say who is and who is not a member

*middle class of potential beneficiaries of whom it is uncertain whether they meet the class is intolerable

-here the trust was valid because it could be determined on the wording who was meant as a dependent or relative

-**Sachs LJ** - required only conceptual certainty - if there was insufficient evidence of whether a given person fell into the classes established by the trust, this persons claim would fail (not the trust)

*by this reasoning the categories of relatives, descendants were acceptable

-**Megaw LJ** - would tolerate a substantial number of "no's" provided that there were a large number of "yesses"

*ie - a high level of evidential uncertainty could void the trust because of the difficulty of identifying the objects

Case certifies that the is/isnot test is the right test for trust powers and discretionary trusts

-however, no certain agreement on what is to be done given evidential uncertainty (between Stamp's and Sach's Test)

Formalities

Transfer of the Equitable Interest Settlor/Testator to Beneficiary

-Concern is that formalities demarcating equitable/legal interest can be used to commit fraud

*maxim "equity focuses on intent rather than form" is usually employed by courts to defuse fraudsters who hide behind and misuse legal requirements

-PAVS: The tension between the desire for formality, and the need for flexibility, has lead some jurisdictions to legislate out of formalities

*ex. BC does not require written transfers in order to enforce inter vivos equitable estates in land

Transmission of Property by Testamentary Disposition

-WESA 37 - To be valid, a will must be: (A) in writing; (B) signed at the end by the will maker, signature must be in presence of 2 or more witnesses present at the same time; (C) signed by 2 or more witnesses in the presence of the will maker

-WESA 40 - (1) Witnesses to will-maker's signature must be 19+; (2) Witness may take under will, but gift may be void if they act as a witness; (3) Will is not invalid only because a witness was, at the time signed by the will maker (or after), legally incapable of proving the will, unless the witness was not 19+ at time will was signed

-2 exemptions from full compliance with wills legislation: secret and half-secret trusts

*less important in BC today because of WESA 59 - i.e. ability to look at the intent of the testator demonstrated from outside evidence, rather than just enforce the will

WESA 59 - BRING THIS UP

(1) On application for rectification of a will, the court may order that the will be rectified if the court determines that the will fails to carry out the will-maker's intentions because of

- (a) an error arising from an accidental slip or omission
- (b) a misunderstanding of the will-maker's instructions, or
- (c) a failure to carry out the will-maker's instructions

(2) Extrinsic evidence, including evidence of the will-maker's intent, is admissible to prove the existence of a circumstance described in subsection (1)

(3) An application for rectification must be made no later than 180 days from the date the representation grant is issued unless the court grants leave to make an application after that date

Secret Trusts

General

-Draft a will with a named beneficiary; beneficiary agrees to hold the property as trustee and provide for the secret beneficiary according to the settlor's oral instructions

-Courts are wary about allowing a named beneficiary to use the formality requirements to commit fraud on the secret beneficiary (i.e. named beneficiary says "No-one told me about the trust, I'm keeping this")

*willing to forgo the statutory formalities because they want to give effect to an arrangement that was created before the will was settled - they want to give intention to the settlor

-PAVS - a little like the floating trust - not a trust when it is created, but becomes a trust when the property falls into the hands of the beneficiary under the will

-Test for validity of secret trusts: Before the death of the testator, the will beneficiary has knowledge that he is taking under the will as a trustee and not personally as an ordinary heir or legatee (applicant must establish this through evidence)

*if there is no will, the test operates under the assumption that the beneficiary under intestate succession knows that he is holding on trust for the secret beneficiary

Requirements for an Operative Secret Trust

1) T must intend that the B named in the will is to hold the legacy on trust for the SB

-*Ottaway* - T leaves bungalow, 1.5k, and half the residue to W on the understanding that if W survived T she would leave the bungalow to S

*on death W leaves bungalow and half estate to N, and half estate to S

*S successfully sues for bungalow, was unsuccessful suing for the 1.5k/half residue because there was no intention demonstrated by T that he intended S to have this on trust

*PAVS - thinks that if he had been successful in claiming 1.5K/residue this would have been difficult practically as the court would have to decide if there were restrictions on W's spending

-would be easier if T created life estate for W for lifetime with remainder to S, and give W the power to encroach on the capital during her lifetime

2) During T's lifetime, must communicate to B that T intends B to receive T's property on T's death as trustee in a trust for SB, as the real beneficiary; and

3) B's acceptance of or acquiescence to this proposal

-Limitations:

- 1) If B has not promised T that he will act as trustee for SB, then B will take
 - 2) If, before T dies, B has promised T that he will act as trustee, but B only learns of SB's identity after T's death, then B will hold on a resulting trust for T's estate
- **Re Boyes* - T had solicitor draft a will appointing B "absolutely"; B was told that he was acting as trustee for C who the T would later identify; T dies but after death papers were discovered of undelivered letters to B indicating the identity of C; trust failed

Re Gardiner - 1923 - CHD

Facts

-Secret trust where the testator survived the beneficiary not named in the will

Issue

-Does this gift fail because of the secret beneficiary not being alive at the time of the will?

Ratio

-Interest of the deceased beneficiary was not forfeited because her interest was in an existing trust, and the beneficiary's interest had vested at the date of the secret arrangement

*this implied that the secret trust was valid without formal vesting - which made secret trusts a very easy way to get around wills legislation

-PAVS - *Re Gardiner* is wrongly decided

*if we take *Gardiner* as wrongly decided, this leaves the problem of the tension between courts insisting on the formality of wills, while simultaneously giving effect to honest and mistaken non-compliance with them

-One way to eliminate this issue is to find vesting where there has been substantive, though not exact compliance, with formality requirements

Half-Secret Trust

Requirements for Half-Secret Trust

-Where the will states that the beneficiary is receiving the property on trust for someone else who shall not be named

*by definition half-secret trusts cannot be formed on intestacy, given the need to designate formally that the beneficiary is holding on trust for a secret beneficiary

-Requirements:

1) Before will is made, A must communicate to B that he is to hold the property on trust for C

2) Before the will is made, A must communicate to B the identity of C; and

*difference: In fully secret trust, identity of C must just be communicated before A dies

3) Named Trustee in the will must indicate his acceptance before or at the time that the will is made

Blackwell v Blackwell - 1929 - HL

Facts

-T's wife and son contested a gift in T's will of 12K to five friends to be held on trust and paid out "to such person or persons indicated by me to them"

-At time of drafting will, T instructed one trustee verbally and communicated to the others - wrote the information that specified the name and address of a certain lady and her son as beneficiaries

Issue

-Did the "certain lady and her son" satisfy the test for half-secret trusts

Ratio

-T's wife and son were saying that there was no trust, and as such the estate would be held on constructive trust by the five friends for the estate (wife and son)

-CT: allowed parole evidence to serve as proof of the identity of the beneficiary mentioned in the will because the evidence did not serve to vary the will, but merely gave effect to the T's intent

*thought invalidating the intent of the testator would be unfair

-Basically say that the equitable thing to do is enforce the trust because it is in-line with the T's wants, and there is clearly evidence of an intention to give it to these 2 beneficiaries

Revocation by Settlor

General

-Generally - without a revocation power (of if the settlor is the sole beneficiary) in the trust instrument reserving the settlor rights to exercise some control over the trust assets, once the assets have been placed in the fund, the settlor cannot interfere with them

*he has disposed of them and they have been conveyed out of his control

-*Shmidt v Air Products of Canada* - Settlor can reserve any powers to itself that it wishes provided the reservation is made at the time the trust is created

*may choose to maintain the right to appoint trustees, change the beneficiaries, withdraw trust property

*amendment means change - not cancellation, which is connoted by the word revocation

Bill v Cureton - 1835 - ENG

Facts

-P creates a trust; trustees were to invest property and pay P the dividends for life, with the remainder to her husband for life, and the remainder to the children for life

*P never married and had no children, sought to terminate the trust

Issue

-Can the Settlor call for the trust?

Ratio

-Cannot bring the trust to an end because of the interests of the possible future spouse, or the chance of later having children as contemplated by the trust

*it was clearly the intent of the trust to make provisions for those prospects

-PAVS - case demonstrates the principle that once the trust had been established, the settlor falls out of the picture

*not the sole beneficiary, so couldn't call for the trust herself, couldn't collaborate with the other beneficiaries to call for the end of the trust (as they were special)

Nolan v Kerry (Canada) Inc. - 2009 - SCC

Issue

-Can an employer use the surplus of a defined benefit pension plan to fund its contribution obligations toward a defined contribution pension plan

Ratio

-No - this is breach of trust

*when the DC plan was created the employees ceased to be members of a single plan

-employees in the DC plan are not beneficiaries of the DB trust, and any amendment that would purport to designate them as such would contravene the provisions and principles of the trust

*employer can not remove pension contributions held in trust unless a power of revocation has been expressly included in the trust at the time of its inception

Metropolitan Toronto Pension Plan v Toronto City - 2003 - OCA

Facts

-Metro council passes bylaw that established contributory, defined benefit plan in which the administration of the plan was vested in board of trustees who were responsible of investment in the fund

*Metro Council was given power to amend the plan as long as the change did not recover any contributions made by it to the fund nor reduced the accumulated benefits that accrued to the members

-Metro passed a by-law downloading the costs of the administration of the trust to the trust (by allowing city to recover amounts spent on the trust for its administration)

Issue

-Did this by-law constitute an amendment, or a revocation?

Ratio

-Right of city to recover administration costs, in essence, required the trustees to pay trust monies towards administrative services that the City will provide for the plan

*by doing this, the City was exercising control over the trust found that had been transferred irrevocably to the trustees

-City cannot dictate to the Trustees the manner in which they are to use trust funds, absent a specific power to do so being reserved at the time the trust was created

*the amending power, even worded broadly, does not imply a power to revoke,

-Amendment means change, not cancellation - which is connoted by the words revoke (*Shmidt*)

Resulting Trusts

General

-2 broad categories:

1) Presumed Resulting Trust - Resulting trust that arises where there has been a gratuitous transfer of title to trust assets from an express trust that has failed or is only partially fulfilled

*Ex. S transfers property to T gratuitously - presumed but rebuttable trust

2) Automatic Resulting Trust = Surplus trust assets from an express trust that has failed or is only partially fulfilled

*Ex. S transfers property to T on express trust for B, but the trust fails to take or the trust does not exhaust all of the available beneficial interests in the trust property

-The implication of the court depends on cultural assumptions - how we would predict how an intention was - can always be deflected by actual facts

*Ct assumes between the parties involved a common intention

Unjust Enrichment vs. Resulting Trusts

-Canadian courts have traditionally accepted the implied intention of the transferor to give up legal title in the property does not necessarily also extend to the disposition of equitable title

*equitable title is to be retained unless there is contrary evidence inferred from the acts of the transferor that the conveyance includes equitable title too

-Recent discourse questions the basis for the imposition of a resulting trust based on presumed intention

*say that in most cases this is better supported by the theory of unjust enrichment

-this was conceived in *Re Vandervell's* - basis for resulting trust does not depend so much on an assumption that the grantor intends the beneficial interest to remain with him, rather the resulting back of equitable title operates automatically because in all circumstances of gratuitous transfers, and in the absence of clear evidence to the contrary, not to do so would give the transferee a beneficial interest greater than the one intended, which would result in unjust enrichment of the gratuitous transferee

*questioned in *Westdeutsche* - argued against unjust enrichment as too wide a framework that would extend the transferor's proprietary interests to the assets of a bankrupt transferee, with the effect of preferring the claim of gratuitous transferor over other creditor's interests in the insolvent estate

-PAVS: seems to think that he has a point - in some circumstances this could be seen as a gratuitous transferor benefitting from his own mistakes

*PAVS - unjust enrichment is probably a better way to look at it - not fabricating common intention based on the court's assumptions

-SCC has rejected unjust enrichment consistently

**Nishi v Rascal Trucking* - Rothstein said that there was no reason to depart from the longstanding doctrine of resulting trust" despite the commentary suggesting that the doctrine of unjust enrichment may fit better

-Have also rejected the common intention resulting trust (as attempted by Ritchie in *Minority of Pettkus* - found and implied trust, constructed a common intention in the parties cohabiting)

*Cromwell ruled this out in *Kerr* (mentioned above)

Automatic Resulting Trusts

-Arise from a gap in the equitable title of property - property would appear ownerless, so equity assigns title to someone with the most acceptable claim to it

-4 main situations resulting in automatic resulting trusts:

1) Transfer of legal title to trustees in a trust that turns out to be void

2) Transfer of legal title in property to a trustee without disposing fully of the equitable interest in it

- 3) Transfer of property to another with a specific limitation which has not occurred - "Quitclose trust"
- 4) Surplus of funds after a trust-purpose has been achieved

Transfer to Trustees by Trust that Turns Out to be Void

IRC v Broadway Cottages Trust - 1955 - CHD

Facts

- T's were to apply income for the benefit of a large and fluctuating class of objects
- Under complete list test, it was not possible to draw up a list of all the objects in this discretionary trust (historic)

Issue

- What to do if trust fails for certainty of objects?

Ratio

- Trust was declared invalid; as a result the trustees continued to hold legal title for the settlor on automatic resulting trust that replaced the invalid express trust
- *PAVS - could also be cast as unjust enrichment

Re Ames Settlement - 1946 - CHD

- Transfer of the settlor's estate to trustees under a void marriage settlement was held to be resulting trust
- *money, which was in the trustee's name, was found to beneficially belong to the settlor because it had been paid on consideration that had failed (void marriage settlement)

Transfer to Trustee Without Disposing Fully of the Equitable Interest

Overview

- Pension Cases Issue - Does surplus in pension fund, after paying out beneficiaries, belong to settlor on automatic resulting trust, or does it belong to the beneficiaries
- 2 part test from *Air Products*
 - 1) Examine the language of pension plan to determine if it is trust or contract
 - *examine the original pension plans of pre-merger companies if 2 companies have merged their pension plans
 - *this is a certainty of intention issue: look for words "trust agreement" "trustee" trust fund"
 - 2) To determine whether surplus goes to settlor on automatic result trust, consider:
 - i) intent of the parties as evidenced by the words of pension plan
 - *clause which states fund is to "exclusively benefit" beneficiary = surplus goes to beneficiary
 - precludes argument that trust purpose is exhausted once beneficiary receives payout on grounds that the purpose is to benefit beneficiary entirely
 - ii) by definition, defined contribution plans cannot have a surplus, so leftover amount goes to beneficiary
- Note: Unilateral amendment to pension fund allowing settlor to distribute surplus to itself is an attempt to revoke trust
- For exam: possibility of surplus going to settlor on automatic resulting trust where: (i) defined benefits pension plan; (ii) language of trust indicates this; (iii) not intent for full amount to benefit beneficiaries

Re West - 1900 - CHD

Facts

- S left property on trust for sale, proceeds of which would go towards paying off debts and legacies
- T's fully performed the trust, then claimed the surplus for their personal benefit

Issue

- Are proceeds of trust held on resulting trust for the Settlor?

Ratio

- Where proceeds from an estate are not full exhausted, trustees will continue to hold legal title but do not acquire the equitable estate unless it has been specifically disposed to them to hold for themselves individually and beneficially
- *if not, they hold the legal estate on resulting trust for the settlor or heirs/next of kin (in the case of testamentary disposition)

King v Denison

-Distilled 2 types of transfer modes:

- 1) gift of assets personally but from which existing debts must first be discharged
- 2) gift that is subject to certain purpose, otherwise described as a trust

*where case falls under 2, the whole legal interest is given for the purpose of satisfying the trusts expressed, and if those trusts do not in their execution exhaust the whole then the beneficial interest that is not exhausted belongs to the heir

PAVS: Commercial cases may be more complicated

Schmidt v Air Products Canada - 1994 - SCC

Facts

-AP dissolves and there is \$9 million surplus from pension plan

-AP claims this sum was theirs due to an automatic resulting trust as AP was payor of the pension plan

Issue

-Who is entitled to the pension surplus?

Ratio

-Analysis to determine whether Settlor is entitled to pension surplus:

- 1) Determine whether pension is a trust or a contract in nature - do this by looking at the agreement
- 2) If trust, is there automatic resulting trust in surplus?

*Ct suggests that where the employer contributes and Automatic Resulting Trust is found, prefers view that employer and employee both become beneficiaries w/ proportional rights to surplus

-this will be reversed upon proof that the employee intended to part w/money once it was contributed to the fund

-In this case - court looked at pension plans - did not find that there was an Automatic Resulting Trust in favour of Air Products

*intent of parties was exclusive benefit of the employees

-AP attempts to argue that the purpose of the trust had already been fulfilled by paying out employees - but Ct says that a defined contribution pension cannot ever have a surplus because the object is to use the money for the benefit of the employee

Quistclose Trust

Overview

-Arises where lender loans money to borrower to be used only for a certain purpose, but instead the loan ends up in the hands of a 3rd party who had notice that a specific purpose attached to the loan

*in this case the loan is held on automatic resulting trust for the lender (preferring lender over creditors)

-*Twinsectra* - Not enough for lender to simply suggest a purpose

*Test - did parties intend the loan to be at the free disposal of the recipient? If yes, then Automatic Resulting Trust fails

*in this case - lawyers undertaking that loan moneys utilized solely for acquisition of property sufficed

-In all cases where courts found a Quistclose, money went into separate account - this suggests that the borrower never intended to be owner of fund

-*Twinsectra* - Where a Qtrust if found, a fiduciary duty is imposed on borrower and lender retains equitable title to loan from the outset of the loan, not only upon failure to pursue the purpose

*Policy - Applies even if parties did not subjectively intend to create a trust - automatic resulting trust operates on basis of assumed intention

Quistclose - UK - HL

Facts

-Q lent money to RR subject to express condition that the money was used to pay dividends

-Loan was paid into separate account with B - B knew the specific purpose of the loan

-R went bankrupt, didn't pay dividend, B tried to claim loan money to pay off debt owed to them by R

Issue

-Could B use money to fulfill debts that R owed B?

Ratio

-Since B had notice of the nature of the loan, and the specific purpose of loan was identified by Q, Q had equitable title to the loan money on automatic resulting trust

*it is important the the money was paid into a separate account, and B had the notice of purpose of money

*lender who gets back equitable title due to automatic resulting trust has priority over claims from other creditors

-this is important if borrower actually spends the loan money, as would have to pay the equitable lender first

*PAVS - interesting because loan is not a fiduciary relationship, but the court constructs a fiduciary duty around the purpose of the loan, and when this purpose is contradicted

Twinsectra - HL - 2002

Facts

-Y takes loan from T for purpose of investing in real estate

-T required solicitors undertaking from Y's solicitor, Y's solicitor signs agreement stating that the loan moneys will be utilized solely for the acquisition of property

-Y applies 35% of the money to other expenses

Issue

-Did loan create Qtrust?

Ratio

-Fundamental question is whether the parties intended the loan to be at the free disposal of the recipient

-here, money is lent for a specific purpose, fiduciary duty on borrower is created

*not necessary for this purpose to be stated in the contract - here it is stated in solicitors undertaking

-Ct rejected Y's argument that there was not intention to make trust

*this is irrelevant because assumed intention is the basis for resulting trust, only important thing is intention to enter into lending agreement

-Again note - money here was paid into separate account (solicitors account)

-In Q trust, lender has equitable title from the outset of the loan, not only when the purpose fails

Westar Mining - BCCA - 2003

Facts

-W and P had JV to invest in mines

-W goes bankrupt, P had not contributed its share of operating expenses

-W and P settle - P deposits 1.6 million in W bank account in return for parties absolving each other of liability

-Suppliers and employees of mine argue that this money was paid with special purpose to go toward operating expenses which included salaries

-creditors of W argued that this money should be used to pay debts owed to them

Issue

-Was this money paid with intention of being used for a specific purpose?

Ratio

-CT - JV showed that deposit would not become property of W, had to be used for operating expenses

*W was required, and did segregate funds into different account - evidence that they never intended to be owners of fund

Surplus of funds after trust purpose achieved

Smaller Cases/ General Approach

-Easy if there are no members left in the organization - goes to the crown

-*British Red Cross Balkan Fund* - Funds raised by public subscriptions for assistance of wounded veterans - war ends, purpose achieved, surplus in hands of trustee

*Where funds raised for particular purpose and purpose is achieved, funds may be held on Automatic Resulting Trust for donors where all individual donors are known

-*Gillingham Fund* - Fund raised by street donations, so not possible to locate all individual contributions

*where donors are not all known, fund paid into court and donors can apply to Ct to receive share

*once the money has remained in trust for a while and people stop claiming it - gets paid to the crown

Re West Sussex Constabulary Fund

Facts

-Constabulary has fund, then policing gets nationalized and there is no more purpose for the money

Issue

-Where does the money go?

Ratio

-Looks at how the enterprise got the money, to figure out who it goes to when the enterprise raps up:

- 1) Collection boxes: givers intend to part with the money = bona vacantia = crown
 - 2) Legacies/Major Donations = if purpose of donation has been achieved, surplus is held on resulting trust for donee
 - 3) Contributions from members - if it comes from the members, then it is held on resulting trust for members (determined on breakup by contract between members)
 - 4) If it comes from donations for street entertainment, raffles, etc. - this is contractual = bona vacantia = crown
- Club monies are held on trust for the membership's club purposes
- *who they owe the money in their accounts when the organization winds up can be determined by the contract that binds the organization together
- *if it is not - have to look to other methods (*Hanchett*)

Hanchett - Stamford v AG UK - HC - 2008

Facts

- Funds raised by unincorporated association for purpose of ending animal cruelty in entertainment industry
- Only one member surviving w/ 2.5 million dollar surplus
- Survivor wants to wind up association, declare herself trustee of the surplus, and transfer funds to charity
- *AG argues that funds belonged to the crown under the *Gillingham Rule*

Issue

-Who does the surplus belong to?

Ratio

- Association is not a charity, and the relationship between members in the association is contractual, not statutory
- 3 ways gifts/donations can be made to unincorporated group:
 - 1) Gift to members as joint tenants = each member can sever his/her share and leave association (ct says this is problematic from a practical standpoint as every time someone left they would have claim to pro rata portion of funds)
 - 2) Gift to members not as joint tenants according to contractual obligations under association
 - *contract law allows members to bring society to an end and the club money belongs to current members
 - 3) Gift held in trust for purposes that the club conceived
 - *Ct rejected this approach here because trust would be void since it would be a non-charity special purpose trust so this is unlikely the intention of the club
- CT chooses option 2, even though contractual obligations can be amended to allow members to take their own share of funds, unless rules of association prevent this
 - *if there is no contract - imply a contract
- Where fund raised by unincorporated association that is wound up by last surviving member, surplus distributed according to members' contractual obligations arising from the rules of the association
 - *this applies even if the surviving member can unilaterally amend rules to allow themselves to take the fund (despite *Re Bucks*)
 - ***PAVS - this decision flies in the face of *Re Bucks Constabulary* - which says that you can't have a club with only 1 member = Bona Vacante**

Presumed Resulting Trust

Voluntary Transfer of Property to Another

Summary

- Voluntary transfer of property to another is subject to evidence showing intent to make out-and-out gift (*Standing*)
- Presumption of resulting trust rebutted if evidence shows “intention that transferor would not hold beneficial interest or that transferee would hold beneficial interest” (*Nishi*)
- **Nishi* - Gratuitous transfer of money advanced by one party to another on promise that it was “without any conditions or requirement, and these instructions are irrevocable” enough to rebut PRT
- Time for judging intent of transferor is time of transfer, evidence arising subsequent to transfer is admissible (but only useful if it indicates intent at time of transfer) (*Nishi*)
- In the context of joint accounts:
 - *Provision from sole contributor that non-contributor can withdraw money to take care of sole contributor does not rebut PRT (*Niles, Russell*)
 - *standard form contract with bank allowing other co-tenant to use money & creating right of survivorship is not, per se, sufficient evidence for rebuttal of PRT because purpose is to absolve bank of liability (*Niles*)
 - *declaration by sole contributor to give balance to non-contributor on death rebuts PRT (*Russell*) even if non-contributor is expressly prohibited from withdrawing money during contributor’s lifetime (*Young*)
 - such declarations can bypass Will formalities because case law has treated equitable title to joint bank accounts differently (*Young*)
- In rebutting PRT, onus on transferee; when rebutting presumption of advancement, onus on transferor
- In *Nishi* - SCC rejected idea of using unjust enrichment to replace PRT on grounds that PRT provides certainty (as opposed to 3-part unjust enrichment test), and rejected idea that rebutting the PRT places too many restrictions on what constitutes a gift
- POLICY - *Pecore* - Rothstein provides courts with guide where evidence regarding testators intent is missing or unpersuasive
- *Says that in proving the intent of the transferor, 5 main types of evidence are available:
 - 1) Acts or statements of either party, whether before or after the transfer
 - 2) Fact that the transferor had granted power of attorney to the transferee
 - 3) The fact that the transferor had continued to control the property after the transfer
 - 4) The extent to which the transferor paid capital gains tax on a transfer, or paid taxes that became due after the transfer
 - 5) Bank documents (in the case of joint accounts)

Re Vinogradoff - 1935

Facts

- G transfers stock into joint account with GD
- *GD never paid shit, G receives dividends
- On G’s death, bequeathed her interest to 3rd party

Issue

- Does GD have title to the shares?

Ratio

- G holds stocks beneficially - presumption not rebutted - 3rd party owned entire interest in the stocks

Standing v Bowring - 1885 - UK

Facts

- P gave shares to both herself and D, D does not know about the gift
- *names are registered in the appropriate books
- P has a change of heart, tries to make herself sole owner of shares

Issue

- Does D hold shares on resulting trust

Ratio

-Presumption of Resulting Trust rebutted because there is clear evidence that P intended beneficial ownership to go to D (as an out and out gift)

Nishi v Rascal Trucking Ltd - 2013 - SCC

Facts

- R wants to purchase property but does not have enough money
- *offers to assist N to purchase property by providing part of the purchase funds
- R advanced money “without any conditions or requirements”
- N became owner of the property
- R claims that it has a partial interest because it advanced money without any consideration from N; N held part of the purchase money on resulting trust

Issue

- 1) Is unjust enrichment/PRT the right way to handle this?
- 2) Is there a RT here?
- 3) Is there enough evidence to rebut presumption of resulting trust?

Ratio

Issue 1: There are arguments for abandoning resulting trust

- 1) Use unjust enrichment - Ct says that Presumption of resulting trust provides more certainty
- 2) Critics say that PRT places too many restrictions on what constitutes a gift
- *Ct rejects - type of transaction evidenced here on the facts can actually still be a gift

Issue 2: Is there a resulting trust here?

*yes - R's contribution was made without consideration, and R and N are not related so there is no presumption of advancement

Issue 3: Can you rebut it?

- *yes - contribution stated to be made without any conditions or requirements, and these instructions are irrevocable - therefore this is a gift
- Test for rebuttal - “whether transferor intended to make a gift”
- *or “is the intention that transferor would not hold beneficial interest/transferee would hold beneficial interest”
- Appropriate time for judging intent is at the time of transfer
- *evidence that arises subsequent to transfer is admissible, but relevant time for intent is still transfer time

Niles v Lake - 1947 - SCC

Facts

- Joint Bank account operated by 2 sisters
- *S1 was sole contributor, s2 made withdrawals to take care of S1
- S1 dies, s2 inherits joint account as joint tenant
- Estate argues that s2 held on resulting trust
- Bank standard form contract stated account was joint tenancy, not tenancy in common

Issue

-Is there a RT? Is it rebutted?

Ratio

-Contract is not enough by itself, as the true purpose of the contract was to protect the bank from liability in the event that the bank paid out to one account holder and the other one complained about it

*therefore, S2 held on PRT for S1's estate

Key factor here is that the document was for the banks benefit - not designed primarily to deal with the relationship between the sisters - not enough to rebut PRT

Russell v Scott - 1936 - Aus

Facts

- Jt account between testatrix and nephew
- T says the purpose of the jt account was so the nephew could make withdrawals in order to take care of her
- Soon after creating the account - T told solicitor she wanted nephew to get \$ when she died

Issue

-Is oral statement enough to rebut PRT

Ratio

-PRT rebutted because to T's declaration for money to go legally and beneficially to nephew

Note - transaction was shielded by court from Wills Act, even though testamentary

*Young v Sealey - 1949 - UK**Facts*

-It account with sole contributor, declaration for money to go to co-owner after death

*also stated that the co-owner would have no beneficial rights during her lifetime, but that co-owner would receive all \$ in account once SC died

Issue

-PRT? Rebutted? Wills Act violation?

Ratio

-Transaction does violate Wills Act - however, CT says that jt survivor still able to take \$ as this practice has been entrenched through time

PAVS - difference between *Young* and *Russell* is that in *Young* it was absolutely clear that the JT survivor was only to get the money on death; not as clear in *Russell*

*Sawdon Estate v Watch Tower Bible Society of Canada - 2012 - OCA**Facts*

-Sawdon dies, watch tower bible society is heir

*before he dies, Sawdon creates joint bank accounts with his children

-Bible society argues resulting trust

Issue

-Does late transfer rebut PRT?

Ratio

-Money goes to the children because money was a gift before he died

*evidence showed deceased was aware of the effect of the right of survivorship provisions in the joint accounts, and indicated that he had wanted the money in the bank account to pass to his children outside of the estate

PAVS - clearer than *Young* in that evidence appears to have disclosed an immediate gift of the beneficial interest to his sons so that although made close in time to his death, was actually not a testamentary disposition*

-interesting because deceased had 3 children that he did not make joint account holders; however, in opening the account with 2 of his sons, the deceased had an undertaking from them that they would hold their interest as bare trustees for themselves and their siblings

Presumption of Advancement*General*

-Effect of presumption of advancement is that, as the transferee, the beneficiary has legal as well as beneficial ownership without the need to rebut a presumed resulting trust

*onus shifts to the transferor who must show an intention to exclude the operation of the presumption

-Traditionally the presumption of advancement only operated for transfers from father to son, of husband to wife

-Today - the presumption in regards to transfer from husband to wife has been abolished in many jurisdictions

*in the same vein, *Pecore* and *Madsen Estate* have now confined the operation of the presumption of gifts to children to children who are minors or adult-dependent children

*Presumption of Advancement in the Matrimonial Context*General

-BC has not statutorily banned the presumption of advancement from husband to wife

*however, broad powers given to CT's in BC in matrimonial disputes have sidelined this presumption

Mehta Estate v Mehta Estate - 1933- MCA*Facts*

- Husband, wife, and children were killed in Air India
- Husband's will bequeathed his property to his wife for life, with remainder to the children
- *problem is that the wife has died intestate
- Great deal of estate was purchased out of the husband's employment income and then, for ITA reasons, was given to the wife
- Husband's heirs claim half-interest in those assets on the grounds of a presumed resulting trust
- *wife's heirs claimed title to all the assets in her name on the grounds of presumption of advancement

Issue

- Does the presumption of advancement operate?

Ratio

- CA - Presumption of advancement at common-law extends to wives in all common-law provinces
- *lacks the vigour it used to have, but will still have applications in certain cases
- In this case - not simple matrimonial action because of exceptional circumstances
- *parties are unable to testify to their intention - so presumption gains significance
- *also gains significance in "traditional" marriages where husband is major provider for the family, and mother's role is homemaker and mother
- Here - it is completely understandable that a loving husband should put assets in the name of his wife with the intent they should be hers as gifts
- Thus - presumption of advancement operates

Presumption of Advancement in the Parent-Child Context

Pecore v Pecore - SCC - 2007

Facts

- F gratuitously transfers bulk of his assets into joint accounts he held with his daughter P - because she was special to him over other children
- F dies, each child received a specific bequest, while P and M were entitled to the residue of the estate
- *P also redeemed the balance of the joint accounts based on her right of survivorship
- P and M divorce - M claims that P held the joint account funds on resulting trust for her father's estate

Issue

- Does the Presumption of Advancement still operate in Canada?

Ratio

- SCC: decided to preserve the presumption of resulting trust, and the presumption of advancement for children (but modified this presumption)

Majority

- Modifications:

- 1) Presumption applies to gifts from mothers to minor children (so it applied equally to both parents)
 - 2) Presumption would operate only in respect of minor children for whom there is a legal obligation to support
- *financially independent children living on their own are not subject to the presumption
 - Rothstein - difficult to ascertain what dependent children means - especially in the case of joint bank accounts used for financial caregiving
 - *falls on the surviving jt account holder to prove that the transferor intended to give them the right of survivorship in the joint account
 - Here, presumption of advancement was not available to P because she was an adult
 - *however, evidence made it clear that M gave P right of survivorship for the accounts because of the special bond they shared, and P's circumstances
 - IE evidence rebutted resulting trust to demonstrate out-and-out gift

Concurrence

- Abella - doesn't understand why modification should be the basis for drastically curtailing the scope of the presumption so as to eliminate its application to dependent children, and confine it only to minors
- *dependent is clear enough for the purpose of determining a class of objects
- *usually jt bank accounts are used for dependent children, or it can be a device to ensure survivorship rights under a jt which could be rebutted in cases where this was not the case
- PAVS: Abella's position is preferable because it would allow the presumption to operate in situations that fit the archetypal fact pattern, and are supported by evidence of parental intention to bequeath the benefits of JT to the surviving child

Rebutting the Presumption of Advancement (Onus on the Transferor)

Timing and Relevance

General

-Not all courts scrupulously follow *Shepherd Rule*

**Lavelle* - it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement

-self-serving statements or conduct of a transferor carry little weight, but not necessarily none

*this statement was endorsed by *Pecore*

Shepherd v Cartwright - HL

Facts

-1936 - F allotted shares to 3 children without their knowledge

*receipts were placed in their respective accounts

-Shares were controlled by the F who, 5 years later, directed the children to sign withdrawals

*children did not understand the significance of their signing

-F used proceeds for himself - loses all the money and dies

-Children make a claim against the estate for the amount that he had taken from them

-Estate argues that the presumption of advancement had been rebutted because the children were ignorant as to the allotment

*also argued that the shares had not actually been given to them because the father later redeemed them for himself, and they were then of negligible value

Issue

-Does withdrawal evidence rebuttal of presumption of advancement?

Ratio

-HL: affirmed that the presumed resulting trust applied where there are purchases in the name of another, but found that it would have yielded to the presumption of advancement where the purchase of property is made by a father in his child's name

*So then the question becomes - by what evidence can the presumption be rebutted?

-acts/declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence whether for or against the party who did the act or made the declaration

-subsequent declarations are admissible as evidence only against the party who made them, and not in his favour

-Here - father's act of making his children sign over the shares after the gift was made may well suggest that he never intended a beneficial gift to them from the outset

*however, evidence occurred long after the gift, so it could not be used to show that he had never really intended a beneficial gift - inadmissible to rebut the presumption of advancement

-Thus presumption of advancement prevades

Admissibility and Illegality

General

-Issue is:

1) Should a transferor be allowed to rely on the presumed resulting trust?

2) Can a transferor rebut the presumption of advancement by adducing evidence of the impropriety (where applicable)?

3) If not, is the complicit transferee allowed to keep legal and equitable title because the evidence to rebut the presumption of advancement is excluded from the court's consideration?

*less of an issue because of the restricted scope of the presumption of advancement

1) Original Strict Approach - Scheuerman/Foster

-Court refuse to have anything to do with the tainted transaction - just leave the title situation as is (unless declaration of Locus Poenitentiae)

Scheuerman v Scheuerman - 1916 - SCC

Facts

- Husband conveyed house to wife in order to protect the property against claims by creditors
- W agreed to hold title until creditors went away
- Long before husband paid debt, W had sold the house
- H argued that there was a PRT

Issue

- Can Husband use evidence of malfeasant intentions to rebut presumption of advancement?

Ratio

Majority

- Enforced Par Delictum approach - wife kept proceeds
- *to allow evidence of illegal motive or intent for the purpose of explaining the transaction would enable the plaintiff to prosecute without clean hands
 - mere intent to defraud was enough to soil one's hands
 - *mistaken belief about creditors attacking was not enough to cleanse hands
- PAVS - this rule leaves the transferee with a windfall, which the court allowed despite the wife's complicity

Minority

- Intent alone is not enough to bar evidence of the actual intent where no creditors were actually prejudiced
- *this view is later accepted in *Goodfriend*

Foster v Foster - 1978 - BCSC

Facts

- F transferred 4 properties to children to avoid a potential creditor (his wife)
- Once illicit arrangement was no longer necessary, F demanded title to be retransferred
- Defendant refused - asserted presumption of advancement applied here
- *opposed the admissibility of evidence that would rebut the presumption, arguing illegality of purpose in that her father had made the transfer to avoid a creditor

Issue

- Should court allow father's evidence?

Ratio

- Evidence concerning the agreement to reconvey cannot be used to rebut the presumption of advancement in favour of the defendant
- *PAVS - given *Pecore* - this approach will very rarely produce outcomes similar to this case

Exception to the Strict Rule - Goodfriend v Goodfriend - SCC - 1971

Facts

- FG persuaded MG to transfer a farm into her name because she feared MC would sue MG for alienation of affections (this is not a real tort, so this obviously never happened)
- FG left MG - MG asserts he still has title to the farm through resulting trust
- FG said that she had legal and equitable title through presumption of advancement
- *argued that evidence rebutting presumption of advancement was illicit, so by *Scheuerman* it was inadmissible

Issue

- Was the evidence allowable

Ratio

- CT: evidence of motive regarding unenforceable debt did not sufficiently taint the evidence so as to render it inadmissible for the purposes of rebutting the presumption
- **Tones down the previous approach where the improper motive had failed to materialize in any actual threat to the transferors property - because putative asset exposure had become safe or it had never been at the risk of a third party creditor ab initio**

Side-Stepping Approach - Szoke, Gorog, and Tinsley

- Court intervenes to help transferor, by ordering the retransfer of title, by applying the presumption of resulting trust without considering any potentially tainted rebutting evidence

David v Szoke - BCSC - 1973

Facts

- Couple begin cohabitation, after years of living together, pool money to buy a house as joint owners - D does a lot of work on the house
- *in the meantime gets convicted of impaired driving
- S initiated plan for D to transfer interest in the house to her so that if D caused a collision and was found to be at fault house would not be vulnerable
- S later leaves D

Issue

- Can D use evidence of malfeasant intention to rebut Presumption of Advancement

Ratio

- CT: evidence clearly showed that D did not intend to make gift to S; further, there was no actual creditors at the time of transfer
- *gave effect to the presumed resulting trust without basing their decision on the evidence of the parties' unlawful intent

*Gorog v Kiss - OCA - 1977**Facts*

- P transferred farm he owned with K in order to put it beyond the reach of G who had sued him
- G was successful in his action against P and recovered debt without need to execute on the farm
- K refused to reconvey farm

Issue

- Can court look at evidence?

Ratio

- Order granted for re-conveyance - resulting trust in P's favour could not and should not be subverted by evidence of unlawful intent
- *presumption of advancement doesn't apply because this is sister and brother

*Tinsley v Milligan - HL - 1993**Facts*

- T and M were lesbians - presumption of advancement doesn't apply (at this time?)
- During cohabitation couple purchased a house
- *title registered only in T's name, even though both had contributed to purchase and had common intention to own the property as a tenancy in common
 - purpose of this registration was to enable M to fraudulently obtain social security benefits that were used by both of them
- M came clean and reported the scheme to the department
- T and M break up - T attempts to evict M
- *M asserted beneficial title under presumed resulting trust which occurred because of her contributions to the purchase price

Issue

- Can she use the evidence?

*Ratio*Majority

- Even in the case of illegality, a person could succeed in recovering the property if the case could be pled without need to rely on the illegality
- *here, M successfully established her interest in the house without relying on the illegal purpose

Dissent

- Applied *Scheuerman* - once court is aware of illegality it will assist neither party
- *registered owner will keep title despite being a co-conspirator

Locus Poenitentiae Approach - Tribe v Soiseth - BCSC - 2006

- Exemption operates to allow the inclusion of ordinary excluded evidence to preserve the opportunity to rebut the presumption
- Applies when:
 - 1) parties never actually carry out their illegal scheme;
 - 2) repent of their wrongdoing (transferor withdraws from the scheme)
- *applies whether parties withdraw from the scheme because they had a change of heart or because as matters turned out, full execution of the scheme became unnecessary

Tribe v Soiseth - BCSC - 2006 (Pre-Pecore)

Facts

- T and S move to Vancouver, marry the next year and move into a condominium
- *Condo purchased by T's parents for 465K, registered in T's name
 - mortgage registered in name of RBC, second mortgage in favour of T's parents
 - T also signed option for parents to purchase the property for \$10, option registered but never exercised
- T and S divorce - T wants to exclude the condominium from her assets so she seeks a declaration that she had no beneficial interest in the condominium - parents had equitable title
- *claimed that property had only been registered in her name in order to avoid capital gains on disposition because she would be able to claim it as her principal residence

Issue

- Can she use evidence of tax avoidance to rebut presumption of advancement (pre-pecore)

Ratio

- S says that the presumption of advancement operates to give T both equitable and legal title in the absence of evidence to the contrary
- *as this was an illegal scheme to defraud ITA, evidence of contrary intention is inadmissible
- CT is willing to hear evidence if father made a declaration under rules of *locus Poenitentiae*
- *while Mr. T may have arranged affairs to avail himself of a capital gains exemption, neither he nor his daughter have claimed the exemption
 - so he can repent from the scheme and give evidence of his true intention of registering the property in his daughters name so as to rebut the presumption of advancement and recover the property

Proportionate Harm Approach - Nelson v Nelson - 1995 - AUS

Facts

- Mom provided purchase price for a house that was conveyed into the names of her son and daughter
- *transfer was done in order to enable mom to claim subsidy, Mom intended to retain equitable title as the beneficiary
- Mom called son and daughter to reconvey the title to her
- *daughter said she would but subject to her retaining beneficial interest under a legally non-rebuttable presumption of advancement

Issue

- Could Mom use intent to rebut presumption of advancement

Ratio

- Presumption of advancement operates, but it is rebutted despite need to use illegal intention to rebut this
- Ct's should look at exclusionary evidence rules through modern lens by balancing the adverse consequences of granting relief against the adverse consequences of refusing relief
- *if illegality is to preclude effective enforcement, is the purpose of the scheme an "affront to public conscience"?
 - 2 criteria:
 - 1) Proportionality - consequences to the P of losing the case because of the application of the exclusionary rule; and
 - 2) Civil sanction of evidentiary exclusion must further the purpose of the statute and not willy-nilly impose further sanctions for the unlawful conduct
 - *Ct should review statute to see what sanctions are contemplated and its frame of reference
 - if the statute does not over-penalize, neither should the courts
- In this case - losing the home would have obvious and serious consequences
- *ct then asks whether the statute intended non-enforceability of rights in all circumstances, or whether the scope was limited according to the seriousness of the conduct, having regard to the protection of the objects and policies of the statute
 - in this case - the act did not contemplate penalties beyond those set out in the statute
 - *allowed evidence to rebut the presumption of advancement
- *PAVS - no Canadian court has endorsed this approach*

The Beneficiary

Roles of Trustee and Beneficiary are Separate and Distinct

Schalit v Nadler - 1933 - ENG

Facts

- Beneficiary is a corporation with shares wholly owned by the trustee
- Beneficiary Corp endeavoured to collect rent from subtenant of property in which it had title has beneficiary
- *problem is this action is the exercise of a real right that lies with the legal owner of the property (trustee)

Issue

- Could Beneficiary Corporation bring action to collect rent

Ratio

- CT: Action to collect rent was invalid as the corp had effectively usurped the power reserved for the trustee
- **Also shows that even if beneficiary is wholly owned by trustee - still needs to be separate**

Re Bagot's Settlement - 1984 - CHD

Facts

- Sole beneficiary in trust of real property sought to manage the rental arrangements
- *did this because she believed that she could collect the rents in a less costly arrangement

Issue

- Whether a beneficiary can demand possession as of right for the purpose of rent collection

Ratio

- No this would contradict the structure of a trust
- *however, court permitted beneficiary to act as agent of the trustee for the collection of rents as it was a way of reducing expenses
- Note - as agent, should she act contrary to her own interests, she could be discharged of duties
- **Case demonstrates some flexibility in the roles of beneficiary and trustee**
- ***PAVS: significant here that trustees had no objections to her managing rent collection, just were concerned that she was too young (24) to do it - court disagreed with this justification***

What does the beneficiary actually own?

Overview

Question: 1) Does the beneficiary have a real right of beneficial ownership in each item or things that makes up the trust?; or

2) Are the beneficiary's rights more personal than real; is he merely entitled to expect that the trustee will properly administer the trust fund as a whole?

-The beneficiary's ownership rights to the trust fund are real in the sense that the beneficiary is the equitable owner of each and every individual item of property that makes up a trust fund (beneficiary's holding will take priority over other interests)

*however, where an equitable estate involves large numbers of differing and ever changing assets, holding equitable title may also be understood as a set of obligations impressed upon the trustee to lawfully and properly administer as a single corpus

-PAVS - where there is a discretionary trust - the personal equitable ownership characterization is more desirable; when the beneficiary is a sole beneficiary, probably the real characterization fits better

-However, where you choose the personal equitable ownership characterization, there are some issues that need to be worked out:

1) Beneficiary's ability to terminate the trust and acquire outright title in the property

2) Beneficiary's in rem right to trace the individual items of misappropriated trust property in that fund

*PAVS - no doctrinal reason why beneficiary's in rem rights must in all circumstances be referable to actual things constituting the trust - trust fund as a whole could be subject of tracing

-i.e. in case of large pension - Beneficiary (if whole trust was called for by all beneficiaries) could trace contributions (not a great example but gets to the point)

-*Baker v Archer-Shee* - Compelling case in respect of complex family trusts and business trusts for the personal characterization

*argument focused on the quality of the beneficiary's rights - trust fund does not belong to the beneficiary, and the income from the fund does not accrue to him instantaneously nor directly

Overall - characterization is going to depend on the specific facts and powers of the trust, as well as the property in the trust - look at these and make arguments

Baker v Archer-Shee - 1927 - HL

Facts

- AS is beneficiary in a trust comprising of several properties in NY (she lives in London)
- Trustee was in NY, held income in NY
- UK tax authorities try and tax the fund on the basis that stocks, share, or rents owned outside UK were included in list of taxable possessions, regardless of whether income was earned or received in UK

Issue

- Was AS the owner of NY trust properties for the purpose of taxation?

Ratio

-AS argues that holding equitable title to trust properties meant that all she owned was the cluster of personal rights enforceable against the trustee should he fail to properly administer the trust fund = trustee was the legal owner and manager of those properties

*PAVS - AS is arguing that her ownership was limited to a real right to the income earned from the properties, did not own equitable title to each of them individually

-CT - ruled that the beneficiary held equitable title to each of the items comprising the trust fund

Leading case on the difference between the 2 characterizations

Archer-Shee v Garland - 1931 - HL

Facts

- Re-litigates with regard to further assessments

Ratio

-The characterization of the beneficiary's equitable interest in *Baker* was correct under NY law,

*however, while the rule in *Baker* was correct - the court acknowledged several considerations in favour of AS's argument that might lead to equitable ownership better being characterized as personal:

- 1) Where the trustee has exclusive power to dispose of the assets or properties in the trust fund and can unilaterally extinguish the legal title in each item by lawful exercise of his power as trustee
- 2) Where to characterize the beneficiary's ownership as holding equitable title in each of the individual items of the trust fund has the effect of situating ownership in items that often fluctuate quickly and constantly (ex. pension plan)

Sub-Beneficiaries

General

-Where a sub trust occurs:

- 1) Trustee remains trustee with legal title
- 2) Beneficiary 1 no longer has beneficial title, Beneficiary 2 does
- 3) Beneficiary 1 has bare equitable title because Beneficiary 2 is exclusively entitled to the benefits of the property

-*Timpson's Executors v Yerbury* - sets out 4 different methods for disposing of an equitable interest in property

- 1) Entitled party can assign it to 3rd party directly
- 2) Can direct trustees to hold the property in trust for 3rd party
- 3) Can contract for valuable consideration to assign the equitable interest to him
- 4) Can declare himself to be a trustee for him of such interest

Formalities - s.36 Law and Equity Act

-S. 36 of the Law and Equity Act enables a sub-beneficiary to enforce his interest against a trustee, even though there is no privity of contract between him and the trustee

*compliance with this legislation requires:

- 1) Assignment from the beneficiary to the sub to be in writing, signed by the beneficiary

2) Express written notice of the assignment be given to the trustee

-Non-compliance with section 36 constitutes the transfer as an equitable assignment, and the assignor is subject to the common-law rules and requirements (i.e. you have to get the assignor to sue the trustee in your stead due to privity of contract)

-Alternatively the assignor could establish the sub-trust such that he will act as trustee for the assignee

*assignor becomes the trustee of the equitable chose, uses his equitable interest for the benefit of the assignee beneficiary

*PAVS seems to indicate that this doesn't require the formalities in s.36 as it is not an assignment, just a declaration of personal trust

-PAVS - thinks its better to just ask the trustee to hold the trust assets for the assignees benefit

The Protective Trust

-Protective trust = 2 trusts:

1) Settlor transfers assets to a trustee, giving a determinable life interest in favour of the principal beneficiary, under terms or transfer providing that,

2) Upon the occurrence of the determining event, the trust property is *ipso jure* to be held on a second trust, which is often a discretionary trust in favour of a class of objects

-Protective trust = Beneficiary's right to the income will be terminated where he shall have committed, or does, or attempts to do, or suffers to be done any act or thing whereby if the said income were payable to him absolutely he would or might be deprived of the right to receive the same or any part thereof

*after the defined events and circumstances have occurred, the capital and income under the trust is shifted onto a new set of beneficiaries

-Typical determining events - when the principal beneficiary attempts to assign his equitable estate to another party, change his interest, or goes bankrupt

-It is important that the determining event is not attached to the disposal of a trust property - as in this case the trust would fail due to those events being undue restraints on alienation

*by contrast, restraints couched as determinable interests are permitted as it defines the scope of the limitation, as opposed to placing a condition on an already-defined fee estate

-Important for the first gift to be a determinable life interest because:

1) Historically determinable interests that determine upon alienation were not void, where conditions that barred or restricted alienation were void;

2) Condition subsequent will be strictly construed and, if uncertain, will be struck down leaving the gift effective without the condition - thwarting the settlor's plan for the protective trust;

3) Settlor cannot use protective trusts to transfer property for himself - against public policy.

Termination of the Trust by the Beneficiary

Termination Basics

Saunders v Vautier - 1840 - ENG

Facts

-Stock bequeathed on trust to V

-Trustee was to accumulate the income until V turned 25, after which he would receive the capital and accumulated income of the trust assets

-V turns age of majority - calls for the trust

Issue

-Can V call for the trust despite the trust document?

Ratio

-On the date of the settlement, the trust vested in V (equitable interest in the capital and future accumulated income)

*the age condition served to postpone enjoyment of the capital and income, not the interest of entitlement

-Thus, V could rightly call for the trust upon attaining age of majority - giving him legal right to the trust asset

*voided the postponement on the right of enjoyment by the beneficiary past the age of majority

***PAVS - situation would have been different if the age contingency had suspended vesting of the interest as well as its enjoyment

*beneficiary is allowed to ignore a condition that speaks to the vesting of enjoyment, but not if the contingency or condition speaks to the vesting of the proprietary interest in the trust

-this interest must be fulfilled in order to give him a vested interest in the trust assets***

Rule in Saunders

-Rule = Where a legacy is directed to be accumulated for a certain period, or where payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge

-Basis for the rule:

1) *Saunders* promotes attitude regarding the concept of ownership and freedom in furtherance of maximizing the owner's use, enjoyment, and disposition of interests in property

*economically, promotes free transferability of property which is conducive for the better and more efficient usage of the property

-This policy objective is furthered when courts interpret clauses in trust instruments in favour of early vesting of the interest

2) Courts have a general desire to treat adults as autonomous agents, fully able to care for themselves, so the courts are reluctant to allow testators/settlers to dictate using the imperative of a will

3) Where there is an absolute vested gift payable at a future event with a direction in the meantime to accumulate the income and pay it with the capital later is, in effect, a trust for accumulation in which only the beneficiary has an interest which he can put to an end as it is exclusively for his beneficiary

4) The beneficiary's interest is absolute, in that there is no-one else who has any beneficial claim to the property

*this reality should be effective in re-establishing connection with the legal title

-Since equitable title lay in the beneficiaries - *Saunders* suggests they should decide how they wanted to enjoy the property

5) Rule is really concerned with accumulations of income in perpetuity or over a period that is so long as to be against public policy due to being outside of effective commercial circulation

-PAVS - what constitutes a vested or contingent interest will depend on the interpretation of the will trust or grant

*courts are inclined towards an interpretation that favours early vesting in the interest - so that a condition will more likely be construed as a reference to the vesting of possession or enjoyment

-Waters principles:

1) If there are multiple beneficiaries they all must agree to call for the end of the trust

2) Beneficiary(s) cannot be under a disability

3) Beneficiary(s) must own all the rights of enjoyment in the trust property

-*Buschau v Rogers Communications* - Rule also applies to discretionary trusts

*all the potential objects of the trustee's discretion may join together and require that the trust property be handed over to them

-where class is so broad that all potential members cannot be ascertained, rule cannot be invoked

-where class is not closed, class cannot claim an immediate entitlement to that income so long as there exists a possibility that another member of the class could come into existence before a reasonable time for the distribution of the accrued income has elapsed

Vesting in Interest? Postponement of Enjoyment

General

-PAVS - This issue is a matter of construction

*if construing the terms reveals that the vesting of the interest is contingent on the happening of some future event, then the rule does not operate

*presence of a gift-over may indicate that the interest itself is intended to be contingent; absence of a gift over indicates an interest that is intended to be vested

Re Lysiak - 1975 - OJ

Facts

-T bequeathes estate to wife and son living in Ukraine

*clause postponed distribution of the residue by the trustees until they were satisfied that the beneficiaries were free from the oppressive regime that they lived under during T's life

Issue

-Does this postpone vesting in interest or enjoyment?

Ratio

-Clause does not hinder the immediate vesting of the equitable interest in the beneficiaries - was a limitation on enjoyment

*here testator intended to give his executors the right to postpone the distribution of his estate until they were satisfied that the beneficiaries would receive the benefits without interference

-CT viewed the clause as repugnant, and struck it out as semantically uncertain

Re Chodak - 1975 - OJ*Facts*

-T bequeathed the whole of his estate to trustees for the benefit of children of his siblings living in the USSR

*trustee was given wide discretion on distributing among the beneficiaries - money was to be spent on sending parcels

-Trustees sought instruction on the validity of the discretionary trust because all the beneficiaries had agreed to calling in the trust

Issue

-Could the beneficiaries call for the trust? Were they vested in interest?

Ratio

-Trustees discretion was invalid because the testator attempted to do the impossible - bequeath an interest absolutely to his nephews and then restrict their right to enjoyment

*restriction took the form of the trustee's discretionary powers

-CT held that the nephews had acquired an immediately vested interest on the testator's death, albeit the mode was in the trustees discretion

*court ordered equal division of the trust assets

*Saunders Application - Discretionary Trusts w/Successive Equitable Interests*Re Smith v Aspinall - 1928 - CHD*Facts*

-T gave trustees 1/4 estate, with absolute discretion to pay the estate's income for the maintenance of A and/or all or any of her children for A's life, with the remainder to the children

-A, 2 living children, and representative of her deceased child, acted together to assign the beneficial interest for the purpose of securing a mortgage

Issue

-Could they use *Saunders* to assign trust?

Ratio

-Sole objects of the trust were collectively entitled to assign their interests to the mortgagee

*mortgagee was entitled to demand payment from the trustees until the mortgage was discharged

***Re Smith* - holds that if all the objects entitled to both the income and capital: 1) act in unison and 2) are capable; then they can terminate the trust or the direct trustee in a discretionary trust**

-following this they can deal with the property as they please

Good way of thinking about this: if all beneficiary's act together; it's like they are one beneficiary for whom the settlor directed the trustees to use the trust assets for

*Limits on the Scope of application of the Rule: Pensions*General

-PAVS - should approach the *Saunders* rule with caution when dealing with commercial cases

**Buschau* - *Saunders* rule does not apply to traditional pension funds, may apply to small pension plans, but suggests that it's not a great fit

-Pension Plans usually clearly state that it is the employer who may amend and terminate the plan, but it is the expectation of the employer that the plan will continue indefinitely

*thus, there could be no reasonable expectation on the part of the members of the plan that it could be terminated/varied by the members

-Further, there is usually legislation that governs how these trusts can be wound up, it goes against the purpose of the trust

-In these situations courts put more emphasis on characterizing the pension as a contractual arrangement as opposed to a trust

-*RE AEG Unit Trust* - gives a situation in which a court allowed beneficiaries of a unit trust to unilaterally call for the winding up of this trust, despite this trust being contractually governed with provisions regarding how the trust is to be modified or brought to an end

*this decision has been criticized on the grounds that there is a difference between trusts set up as gifts where settlor controls may overreach what is permissible by law, and situations where a contract mechanizes wind-up of the trust, distribution mechanisms, etc.

-these critics say that *Saunders* should only apply in gift trusts, and should not apply to contractual situations where no gifts are involved and where the mutual rights under a contract, not the unilateral wish of a donor, are in question.

Buschau v Rogers Communications Inc - 2006 - SCC

Facts

-B was one of 112 employees subject to define benefit pension plan

*plan had a large actuarial surplus - which Rogers had attempted to reap through different means

-Employees attempted a number of different schemes to fight this - including calling for the payment of the plan

Issue

-Could employees use *Saunders* to collapse the plan

Ratio

-Can't collapse it, modern-day large pension plan does not contemplate this kind of activity

-PAVS - case engages another important issue - should the *Saunders* rule apply in cases of contractual trusts - probably not

*provisions of contracts should govern termination or modification unless the relationship is also subject to statutory regulation (which is the case in most pensions)

Saunders - Divisible Property

Rule

-Where property is divisible, and one or more of the beneficiaries are capable and absolutely entitled, they can individually call on the trustee to transfer to them their proportionate share of the property

*Easy when the trust property is money, difficult with shares, even more difficult with land

Where Division Effects Value of Trust Property

-Generally, division is permissible even if the value of the rest of the property suffers some minor reduction

*however, the operation of *Saunders* may be prevented by difficulties in dividing the trust property or by the hardships that dividing the trust property may impose on other beneficiaries

-*Re Sandeman's Will's Trusts* - sui juris beneficiaries have the right to terminate the trust in respect of their respective shares unless the termination of the trust for them unfairly impacts the trust and its property for the remaining beneficiaries

*specific circumstance was a call by sui juris beneficiaries that was permitted even though it meant the trustees would no longer have control of the company

*trust may be fragmented according to the shareholding-proportions of the individual beneficiaries

-*Lloyds Bank v Duker* - court refused a division where the reduction caused by the withdrawing beneficiary left too great a burden on the remaining beneficiaries

*as controlling shareholder of the released trust shares, applicant beneficiary would have had shares that the other beneficiaries held equitable title too; could control the company in a way that would hurt the other beneficiaries as he could structure a situation where he would appoint himself manager, pay himself salary, and collect dividends

*CT: said that they would terminate only after an agreement had been made to sell all the shares in the trust

-*Re Marshall* - no automatic entitlement to call for division where the trust property is land

Variation of Trusts

General

-Under the CL courts had very little authority to vary the terms of the trust, because this was seen as an infringement on the ability of a settlor to freely dispose of property

*generally ct.'s authority is confined to the trustee's management powers and does not allow it to make variations to the quantum or type of beneficiary interest under the trust

*ex. *Chapman* - ct declared that it had no power to authorize a variation of the terms of a trust even though all adults had assented, and the variations would benefit minors and unborn children

-4 narrow exceptions were developed to this rule

1) **Administrative terms** - can be varied if there is an unforeseen emergency such that the trust is threatened and the settlor could not have foreseen the circumstances

-Power is used to protect trust property in some way

2) **Maintenance jurisdiction** - allows court to direct payments to beneficiaries if they need money to live in a manner appropriate to trust expectations

3) **Conversion** - allows court to convert infant's trust property from realty to personalty and vice versa

4) **Compromise** - enables court to give approval for non-sui *juris* beneficiaries in any judicially sanctioned compromise of a dispute

-Powers were never expanded to authorize variations to the quantum or form of the interests of beneficiaries under the trust

*thus, courts do not have the inherent power, under CL, to vary dispositive powers in a settlement

-CL Workaround - beneficiaries use *Saunders* rule to terminate the trust and then resettle the assets on new trusts with varied terms

Trust Settlement and Variation Legislation

BC Trust and Settlement Variation Act

Court Approval of Variation

1. If property is held on trusts arising before or after this Act came into force under a will, settlement, or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of

(a) any person having directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting,

(b) any person whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of a specified description or a member of a specified class of persons,

(c) any person unborn, or

(d) any person in respect of an interest of the person that may arise by reason of a discretionary power given to anyone on the failure or determination of an existing interest that has not failed or determined, any arrangement proposed by any person, whether or not there is any other person beneficially interested who is capable of assenting to it, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts

Benefit to Parties Interested

2. The court must not approve an arrangement on behalf of a person coming within sections 1(a)(b)(c) unless the carrying out of it appears to be for the benefit of that person

General points to Note

1) "arrangement" means any proposal to vary or revoke the trust

2) although the Act provides "any person" can propose an arrangement, the person must have standing and cannot be an adult of full capacity in whom the entire trust is vested - at least one beneficiary must fall into categories a-d

3) Public trustee must receive notice in writing of the application where it involves persons who are not sui *juris*, and is entitled to appear and be heard in court

4) A legal life estate is regarded as a deemed trust, so the court is given powers to vary life estates where there are successive beneficiaries who are deemed to be incapable of consenting to the arrangement

The Scope of Trust and Settlement Variation Legislation

Discussion

- Increases the scope of the courts powers to vary trust deeds, enabling it to give consent to a beneficial arrangement that proposes to vary the terms of a trust on behalf of those who are unborn, legal incapable, or those who may be known but are unascertained at the time of the application to court seeking the approval of the proposed plan affecting all beneficiaries (present and future)
- 1(d) - court can give its assent to a proposed arrangement on behalf of persons whose interests arise through the exercise of a discretionary power
 - *often arises in the circumstances of a protective trust
- 1(b) poses difficult issues - group covers beneficiaries (ascertainable or not) whose identities are unknown, at the time of the application, because of the nature of the contingency referable to their future interest
 - *ex. in cases where trust says "remainder to B's children who survive A" - if B has 4 kids, and A is alive, the beneficiaries are ascertainable, but it is impossible to determine the exact identity of the true beneficiaries at the date of the application
- Main issues around this section is whether it includes persons who may be described in ordinary parlance as "unascertained" persons who are *sui juris* with property interest, but who cannot be located at the date of the application to court for consent to the proposed arrangement because they are missing?
 - *CT's appear to agree that 1(b) does not cover adults who are simply missing
- Arises in the case of pension plans where a majority of beneficiaries come to the court and apply to get the surplus from the plan, but are missing other capable adults (who are either holding out on the application, or who simply just cannot be found)
 - *BCCA in *Buschau* suggested that this was an inappropriate use of the courts section 1(b) power
 - missing pensioners have a real, contingent legal interest, and are adults, so the section 1(b) power should not be applied to these circumstances
 - section encompasses only those with a meaningful property interest - so under this description the power cannot be used to protect people who may be appointed by the beneficiary - pensioners have a real legal interest, but not a real property interest in the surplus until they have been distributed
 - *suggested that the phrase "interest" of those persons "who may become entitled" refers neither to persons with a mere hope of an interest, nor to those in a class of objects in a trust pursuant to a wide power of appointment as they do not hold a property interest in any real sense
- Re Middleton's Will's Trusts* - Following from words in *Buschau*, rejected the example of an heir presumptive as having a contingent interests in the estate or a living relation
- PAVS SUMMARY of 1(b) - applies to circumstances where:
 - 1) ascertained or unascertained persons have a property interest, that extends beyond speculation, of acquiring a financial interest; and
 - 2) these persons (ascertained or not) are eligible to acquire a defined property interest at the happening of some event, the outcome of which is unknown at the time of the application to court, but which is a property interest to which each member of the group "may become entitled" but only one actually will get the interest and will become identified as the fortunate recipient once the future contingent event has occurred

Re Seed's Will Trust - 1960 - ENG

Facts

- T created a protective trust in favour of the B1 for life with a remainder to be appointed by B1
- B1 applied to court for consent to an arrangement varying the trust so she could appoint herself as remainder

Issue

- Can the court consent to this variation (1d)

Ratio

- Variation completely undermined the protective purpose behind the testator's intention - which was to create a protective trust for B1 which would pass on to a spouse/child if she couldn't take - in this case B1 didn't have one
- *testator's specific intent was not to vest B1 with absolute title so that she could use *Saunders* to call for the distribution

Benefit Under S.2

General

- While these cases are often brought about by tax considerations, benefit is not confined to financial benefit
- *PAVS - the fact that the legislators did not use “economic benefits” should mean that the benefit is wide and inclusive of a lot of constructions of the word benefit
- Russ v BC* - proper test to determine when it should exercise its discretion to consent on behalf of a person without capacity is the standard of a “prudent adviser”
- *PAVs doesn’t mind the Russ Test, but thinks that wide definition of benefit is preferable
- *court is not bound to preserve the basic intention of the settlor (questionable in light of *Re Harris*)
- Bentall* - uses fair bargain test but can’t be trusted because the court shouldn’t have even intervened there
- Re Tweedie Estate* - Paramount consideration is the possibility of the unborn realizing a financial benefit
- *where the likelihood is small, liberal interpretation should be given to the term benefit (i.e. non quantitative factors should be considered)
- PAVS - always remember that this will depend on arguments - council’s arguments are very important here

Re Burns Trust - 1970 - BCSC

Facts

- Settlor, with trustees consent, sought the court’s consent of unborn persons to an arrangement which would give the trustees investment powers to enable minimization of tax and succession duties that were not part of the settlement
- *needed powers because trustees didn’t have power to vary investment in the face of new tax legislation
- All living beneficiaries were *sui juris* and agreed to the arrangement

Issue

- Was variation in the “benefit” of the unborn children

Ratio

- Consent given - tax minimization and advancing financial interests of the beneficiaries is an appropriate benefit in a proposed arrangement

Re Westin’s Settlement - 1969 - ENG

Facts

- Wealthy settlor attempts to avoid UK capital gains tax by resettling trust to channel islands
- *needs ct to consent on behalf of under-age children

Issue

- Was variation in the “benefit” of the minor children

Ratio

- Denning: didn’t think it was good for the educational and social benefits of the children to uproot to the Channel Island
- *living in England was more beneficial to the children than money, as the capital gains tax wouldn’t have any significant effect on the lifestyle of the family

Re Remnant’s Settlements - 1970 - CHD

Facts

- Beneficiaries/children are not entitled to gain from the trust if they marry Catholics
- *one sister marry’s catholic
- Sisters go to court to get approval to vary the trust because children are minors

Issue

- What to do about a variation that benefits one child financially, while a harms another financially

Ratio

- Ct gives consent despite that it could be seen to be favouring the financial benefit to the catholic kids, at the expense of the other children
- *CT says that there are benefits to all children: 1) Family unity; 2) Kids gain more freedom to marry
- **Benefit of the act is not confined to financial benefit but includes benefit of any other kind**

Re Harris - 1974 - BCSC

Facts

- Mother sought variation of a trust under a will where her estranged husband (committed suicide) left a 5/8ths share to the eldest son, and a 1/8th share to the other three children
- *there was a gift-over to the children's children in the event anyone of them had died before age 21, yet leaving a child
- Mother proposed an arrangement where the beneficiaries held equal shares

Issue

- Similar Issue to *Re Remnants* - can non financial benefits be considered?

Ratio

- Arrangement refused because did not financially benefit the eldest son and his potential unborn children
- *accepted that considerations outside financial considerations should be taken into account; but found that the tradeoff of financial benefit for the eldest son was too high for quieting family problems
 - effect on family problems is uncertain and intangible, whereas the financial disbenefit could be measured; further, it was unlikely that the family conflict would have an effect on the eldest son's unborn children, whereas the financial re-alignment would
- **Seems that there would be a big financial hit to the child here, which weighed into the courts decision**

Bentall Corp v Canada Trust Co - 1996 - BCSC

Facts

- Application to vary a pension plan set up as a defined contribution carrying a 6.7 mill surplus
- B wanted 2 mill to go to members, 3 mill to go to Bentall, and 1.7 mill as a contribution holiday

Issue

- Is this a benefit?

Ratio

- Good bargain test should guide the court's decision as to whether to approve the arrangement
- *would a prudent adult, motivated by intelligent self-interest and sustained consideration of the expectancies and risks of the proposal being made be likely to accept
- Bentall proposal was a good bargain - court supplied the consent of future members who would benefit from any surplus when the plan is terminated
- *court gave weight to the fact that 97% approved the proposed arrangement by Bentall
- PAVS - note that this goes against the decision in *Buschau* -which says that the courts section 1(b) power should not be used for missing members of the plan as there interests are not contingent but certain (and they are adults with capacity)
- *in *Buschau* they also say that the future members have contingent interests in the surplus, not the defined benefit, which was separate from the ascertained interest in the defined benefit (which was what the court in *Bentall* was using to take jurisdiction and provide consent on behalf of the future interests)

The Trustee

Appointment, Retirement and Removal of Trustees

Appointment/ Retirement Basics

- Trust instrument usually sets out the appointment of trustee
- *significant requirement is that the trustee have legal capacity
- If the settlement is silent about the appointment of the trustee; the court has inherent CL powers of appointment (can appoint someone or public guardian)
- Trustee gains title and control of the trust assets through his identification in the trust instrument + vesting of trust assets with him
- Once selected, absent unforeseen circumstances, removal of the trustee will happen by death, retirement, or replacement
- *new trustee will be nominated using instructions from the trust or from trust legislation if the trust is not instructive
- When a trust is created with several trustees, they hold the position as joint tenants
- *this is that if one of the trustees dies, they survivors continue
- *personal representatives of the last survivor succeeds as trustee until replacement trustees are appointed

Decision Making/ Guardians

- Unanimity of the trustees in the exercise of their management powers is required for all decisions unless the trust deed provides otherwise and sets out majority vote decision making
- Where trusts are administered by large families or trust corporations, they will often establish a “guardian” who is familiar with the wishes of the settlor and can inform the trustees in this regard
- *trust will specify that on certain topics, the trustee will need the consent of the protector to exercise certain powers (ex appointing/removing beneficiaries)
- *can also be accomplished by a letter of wishes
- Note if a guardian is given too much power, they will be treated in law as a trustee (with all the obligations/liabilities)
- *alternatively, the settlement risks being interpreted as a gift to the guardian subject to conditions/limitations
- In tax context, protector does not change the domicile of the trust for the purpose of taxation

Legislative Framework for Appointment

Legislative Overview

- Purpose of trust legislation is to minimize applications to courts by installing a mechanism for appointments

27 - Power to appoint new trustees

(1) If a trustee, either original or substituted and whether appointed by any court or otherwise, is dead, remains out of BC for more than 12 months, wishes to be discharged from all or any of the trusts or powers reposed in or conferred on him or her, refuses or is unfit to act in them, or is incapable of acting in them, then the person nominated for the purpose of appointing new trustees by any instrument creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees for the time being, or the personal representatives of the last surviving or continuing trustee, may by writing appoint another person or persons to be a trustee or trustees in the place of the trustee who is dead, remains out of BC, wishes to be discharged, refuses, or is unfit or incapable

- However, BC Trust Legislation s. 31 still gives ultimate jurisdiction to the courts for trustee appointments

31 - If it is expedient to appoint a new trustee and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, it is lawful for the court to make an order appointing a new trustee or trustees, whether there is an existing trustee or not at the time of making the order, and either in substitution for or in addition to any existing trustees

- Where there is dispute over a statutory appointment of a trustee, the beneficiary, a co-trustee, and others with beneficial interest in the property all have standing to apply to the court

*basis for opposing appointment are; personal beneficiary's concerns, and settlor being concerned that the nominated persons might impede the execution of the trust

- In appointment of replacement trustees retransfer of the trust assets from the settlor to the replacement trustee would be an awkward formality

*consequently, **29-34** of the BC Statute gives the court wide power to order and deal with the vesting of trust properties in new trustees

- also states that if the person designated in a trust deed with the power to appoint trustees does so there does not have to be a formal conveyance or assignments

*this excludes mortgages and shares transferable by registration in a company's books

Re Tempest

- Established guiding principles to consider in the appointing of a replacement trustee:

- 1) The wishes of the settlor or testator, especially in respect of characteristics held by them to be desirable
- 2) Persons who do not have an axe to grind, neither towards the settlor, nor the beneficiaries;
- 3) Persons who will promote and not impede the execution of the trust

Retirement of Trustees

- Where there are 2 or more trustees, a trustee using a deed may declare a desire to be discharged (absent other instructions in the trust deed)

*declaration must be served on the other trustees and, if accepted, the retiring trustee will cease to be holding the assets in that capacity and will be divested of the trust property - remaining trustees will stay trustees

-Risk to retiring trustee if he does not follow deed declaration is that his resignation will be ineffectual and the retiree will retain liability for the trust assets and their proper administration

Removal of Trustees

General

- New trustee can be selected: a) by beneficiaries using *Saunders* power; b) by the instrument; c) legislation; d) courts inherent jurisdiction
- Where settlor has provided the circumstances under which trustee removal can occur, provisions of the instrument govern
- *often the power of removal is given to a designated person “guardian”
 - if too much non-fiduciary powers and rights are bestowed on him, the trust could be viewed as bogus and more appropriately characterized as an agency or some other relationship
- Failing a governing provision in the trust instrument - removal of a trustee should be dealt with according to provisions in trustee legislation, or general principles of equity

Removal of Trustees under the Trustee Legislation

- Court has jurisdiction to remove trustees if they become unfit (lose capacity, become bankrupt, etc.), or per the wishes of a majority of the beneficiaries
- 30** - Trustee or receiver appointed by any court may be removed and a trustee, trustees or receiver substituted in place of him or her, at any time on application to the court by any trust beneficiary who is not under legal disability, with the consent and approval of a majority in interest and number of the trust beneficiaries who are also not under legal disability
- *this section in combination with 27, and 31 (see above) allows the removal and re appointment by a court of trustees for reasons of incapacity or expediency

Judicial Removal of Trustees (Conroy/Consiglio Trusts/ Newton Trusts)

- Court’s inherent jurisdiction to remove trustees is not often used because of legislation above
- *where courts need to be dragged in, governing criterion that will guide them with regard to trustee removal are facts which disclose that the welfare of the beneficiaries interests are being put at risk

Conroy v Stokes - 1952 - BCCA

Facts

- TJ removed the trustees based on an application made by 2/5 beneficiaries
- *did not find misconduct or breach of the trust by the trustees but found that friction had developed between the 2 beneficiaries, the widow, and the trustees

Issue

- What are the criteria for removal of trustees

Ratio

- CA - applicable criterion for removal of trustees by the court is a “concern for the welfare of the beneficiaries”
- *requires an applicant to point to acts and omissions that impair the welfare of the beneficiaries by endangering trust property, lacking of capacity/honesty/fidelity
- Here - there was squabbling but no impairment of the assets as a result

Re Consiglio Trusts (No.1) - OCA - 1973

Facts

- Beneficiary brought an application in the context of domestic relations proceedings, which disclosed widespread misunderstandings among the trustees
- *gave rise to accusations and bitterness, making it virtually impossible for the trustees to agree on policies concerning the efficient management of the trust

Issue

Is trustee inability to work together sufficient ground for their removal?

Ratio

- Yes - Misconduct is not a prerequisite for a removal - it is enough when the continued administration of the trust (in regard to the interests of the beneficiary) become impossible or improbable because of trustee situation

Re Newton Trust - 2014 - BCSC

Facts

-Beneficiary of trust became trustee - disagreed on the management of the trust with one co-trustee, also was a dispute between them regarding appointment to a board

*when the other co-trustee dies, the applicant and co-trustee have a battle over who the replacement should be (Applicant put forth a good candidate, co-trustee put forward shit candidate)

-Became clear that petitioner and co-trustee could not work together, when other co-trustee was nominated the applicant and the new trustee excluded the co-trustee through majority vote decision

-Application to court to remove longstanding trustee

Issue

-Does this satisfy criteria for the removal of the trustee?

Ratio

-Yes - conflicts between co-trustees is a legitimate basis on which to remove a trustee where their relationship has become dysfunctional

*role of the court is to ensure that the trusts are being properly executed mindful always that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate

*where a trustee is asked to resign, and it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if it is because of a disagreement that prevents trustees from working in harmony, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign

-Here, the dismissed trustee's actions were mainly claiming fees and asserting rights of his trusteeship in ways which is co-trustees did not value

*animosity towards the petitioner was such that it created a setting for endangering the trust property

Trustees Rights, General Responsibilities and Powers

Overview

-Trustees have broad powers to advance the trust mandate of administration, but they are constrained by the obligations prescribed by law, including those duties that the settlor has set out in the trust instrument

-3 substantive duties of trustee:

1) To take and get control of the trust property

2) To protect the value of the trust fund through prudent investment decisions that are also compliant with other trustee obligations

3) To distribute income fairly according to the distribution requirements under the trust settlement

-Trustees have fiduciary obligations as well - which requires them not to put their personal interest in conflict with that of the beneficiary with regard to the trust asset

*where trustees cultivate a conflict situation, they will have to compensate and disgorge any profits to the beneficiary attributable to the act of disloyalty

-Trustees *may* enter situations of self dealing - where they purchase the trust assets for their own enjoyment, so long as they make full disclosure

*however, transaction will be voidable if the power imbalance between the trustee and the beneficiary is too great

Duty to Take Custody of and Personally Manage (Delegate) Trust Assets

General

-On appointment the trustee must collect and gain custody of the settlor's property that he is designated to hold in trust

* this may include money that is owed to the testator and must be collected

-Title must be vested in the name of the trustee to give him authority to deal with the trust assets and to perfect the trust arrangement

-Trustee must then act as custodian of the trust assets by preserving, and likely enhancing, the value of the property to the beneficiaries

*trust instrument will likely have instructions in regard to the expectations of the settlor in the maintenance of trust property, and the distribution of the property to beneficiaries or others

-Trustee must decide, in line with instructions in trust instrument, what assets should be sold, invested, retained

*this will likely involve engagement of agents to help with these tasks

-General duty a CL to act personally in the administration and management of the trust property (“a delegatee may no delegate to another”)

*however, given the complexities of administering a modern trust, trustees are entitled to appoint agents to perform many acts of administration

-In some cases management competencies are authorized by the *Trustee Acts*, in other they are authorized by practices countenanced by law

-Trustee Act:

*7 - Trustee can employ solicitors and bankers without being in breach for wrongs performed simply by that appointment

*15.5 - Trustee may delegate to an agent the degree of authority with respect to the investment of trust property that a prudent investor might delegate in accordance with ordinary business practice

-Trustee must exercise prudence in selecting an agent, establishing terms and limits of the authority delegated, acquaint the agent with investment objectives, and monitor the performance of the agent

*practically - this means that the settlor should focus on drafting the delegation in the trust instrument so that it realistically enables the trustee to delegate where appropriate

Speight v Gaunt - 1893 - HL (Sort of Historic)

Facts

-Action for breach of trust because the trustee had appointed a stockbroker to be an agent and purchase municipal bonds (practice in the day)

*stockbroker misappropriated trust funds - said he would invest the money and didn't

Issue

-Whether the trustee breached his duty under the trust by delegating this administrative act

Ratio

-Trustee not liable because method of engaging a stockbroker for the selling and buying was the standard business practice of purchasing stock

*trustee may, in the administration of the trust, avail himself of the agency of third parties such as bankers, brokers, and others if he does so from a moral necessity or in the regular course of business

case has largely been displaced by sections 7/15.5

Re Wilson - 1937 - OCA - (Historic)

Facts

-T entrusted his estate to a trust company for the benefit of beneficiaries

-Offer to purchase property from estate was directed at trust company, who rejected it but failed to communicate this decision to the board

*in practice, board had allowed this employee to handle the administration of the trust estate as he thought best

Issue

-Was this a lawful delegation of board's power as trustee?

Ratio

-Board's delegation of its discretion constituted an unlawful delegation

*trustee cannot escape responsibility by leaving to another person the exercise of that judgement

-Here - it was the board's responsibility to make decisions governing the exercise of discretionary powers regarding sale, retention, or investment of the trust property

*as a result, board's failure to consider the offer was a breach of trust

Fales v Wohlleben Estate - 1976 - SCC

Ratio

-SCC rejected the notion that in the case of corporate trustees, only the board of directors can exercise discretionary powers because

*would be tantamount to treating the directors as individual trustees

-Thus, when selecting a corporate trustee, a settlor is implicitly choosing its decision making structure or management style with overall supervision through the board/committee/CEO

*in the hands of the settlor to review company practices on decision making and constitution when choosing a corporate trustee

Trustee Act Section 95 - Implied Indemnity of Trustees

A trustee, without prejudice to the provisions of an instrument creating the trust, is chargeable only for money and securities actually received by the trustee even though the trustee signed a receipt for the sake of conformity, and is answerable and accountable only for the trustee's own acts, receipts, neglects or defaults and not for those of other trustees or a banker, broker or other person with whom trust money or securities may be deposited, nor for the insufficiency or deficiency of securities or any other loss, unless it happens through the trustee's own willful default, and may reimburse himself or herself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his or her trusts or powers.

-Provision makes it clear that the trustee does not assume a guarantor role

*liability of the trustee will be considered from the standpoint of whether he has discharged his duties using the standard of a reasonable business person (negligence standard)

Trustee's Duty to Care for and Preserve Value in Trust Assets

General Duty/Statutory Guidelines + Rules/ Liability

-Assuming that the trust is not a bare trust (trustee just holding assets for beneficiary, there is a duty to invest)

-In setting parameters in the trust instrument the settlor/testator has the power to:

1) Authorize the trustee to make any type of investment, having regard to the purposes of the trust (ex. emphasizing income generation over capital-value enhancement because of a need to supplement the income of an identified beneficiary or group of beneficiaries)

2) Set the standard of investment; and

3) Describe the circumstances of its application

-*Speight* - says that a trustee in managing the trust property takes on the obligation to act as a prudent person of business would act in managing his own affairs

*not responsible to beat the market indexes or be responsible for a general downturn in the market because of adverse economic conditions

-2 broad aspects to trustee investment:

1) The duty to invest so that the capital fund is preserved from risk, but at the same time yields a reasonable return

2) The investment must be made by the trustee in a way that is even-handed between the different classes of beneficiary (ex. life tenant v remainderman)

-Trustee Act:

***15.1 - Investment of Trust Property**

(1) A trustee may invest property in any form of property or security in which a prudent investor might invest, including a security issued by an investment fund as defined in the *Securities Act*

(2) Subsection (1) does not authorize a trustee to invest in a manner that is inconsistent with the trust

(3) Without limiting subsection (1), a trustee may invest trust property in a common trust fund managed by a trust company, whether or not the trust company is a co-trustee

***15.2 Standard of Care**

In investing trust property, a trustee must exercise the care, skill, diligence, and judgment that a prudent investor would exercise in making investments

*PAVS - this rule is similar to the one endorsed by the SCC in *Fales*

*15.3 - trustee is immune for losses to the trust if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor would adopt under comparable circumstances

*this section recognizes that modern trust investment practice involve delegating to a money manager who constantly monitors the risk/variety of trust portfolios and makes adjustments based on this expertise

***15.4 - Abrogation of common-law rules: anti-netting rules**

(1) The rule of general trust law that requires the assessment of the decision of a trustee on an investment by investment basis if the decisions are question is abrogated

(2) The rule for the assessment of damages for breach of trust that prohibits losses from being offset by gains is abrogated except in respect of circumstances in which the breach is associated with dishonesty on the part of the trustee

*15.5 authorizes the delegation by trustees of asset management to investment specialists unless the trust deed prohibits this and provided that it falls within the prudent advisor test

*section exposes all relevant circumstances to the prudent advisor test: 1) selection of agent; 2) limiting the authority of the agent; 3) acquainting the agent with the trustees' investment objectives 4) putting in place a sufficient performance monitoring plan

*section creates a duty of care to the trust by the agent; which, in combination with 15.3 will totally insulate trustees from liability for investment losses if they have selected the agent with care/informed agent/monitored agent

*17.1 - Trustee may not invest in its own shares

*70 - Trustee can seek advice from investment experts

CL Duty of Care - Fales v Wohlleben - 1976 - SCC (Replaced by 15.2)

Facts

-T bequeathed estate in trust to his wife and his children - consisted mostly of shares in a closely held corporation

*trustees were his wife and a trust company

-Will allowed trustees at their discretion to sell, call in, and convert into money as the trustees with power to postpone the sale, calling in or conversion of the whole or any parts of the property, and to retain any portion of the estate in the form in which it may be at T's death for such length of time as the trustees think best

-Trust company intended to convert the shares into authorized investments, but stalled as there was a thin market for shares in closely held corporations

*holds stock for 11 years, then cashes it and invests in speculative stock

-Took no serious action to shift the speculative investments to secure stocks (despite justifying the risky investment as a transitioning investment)

*Risky company goes bankrupt - Beneficiaries sued the trust co for breach of trust

Issue

-Whether this clause imposed a duty on the trustees to retain the shares

Ratio

-SCC: trust co + widow held liable for breach of trust

*it is a breach of trust to hold 60% of the trust assets in a risky enterprise without spreading the risk by lowering that concentration in a timely fashion

-Every trustee has been expected to act as the person of ordinary prudence would act

-Trust co attempted to invoke court's power to relieve a person of liability from breach of trust under 96 of the trustee act

*SCC refused to extend this concession because they found that Trust Co's actions were not reasonable despite its honesty throughout its action and inaction in handling the trust assets

*extended this concession to the widow because they found that a trustee in her situation (with minimal business experience) had acted honestly and reasonably; should be excused because she was kept out of the loop Trust co

***SCC affirmed the following law:

1) Standard of care and diligence required of a trustee in administering the trust is that of a person "of ordinary prudence in managing his/her own affairs"

*will usually require management of a diversified portfolio of assets in which risk is spread

*trustee may not invest speculatively and must avoid, as far as possible, investing or retaining hazardous investments unless required by the terms of the trust settlement

2) Standard of care is the same for all trustees (whether corporate or individuals)

3) Power of the court to relieve under trustee legislation can be selective among the group of trustees

Moral Investment Considerations - Cowan v Scargill - 1985 - CHD

Facts

-Objection was made to a pension fund investment in rival companies engaged in the same mining activity of the union members of the plan

Issue

-Can Beneficiaries object to investment on business competition/conflict grounds?

Ratio

-No - trustees must put on one side their own personal interests and views

*trustees may have strongly held social or political views and object to any form of investments concerned with alcohol, tobacco, armaments in their own affairs; but under a trustee these investments are more beneficial to beneficiaries than other investments, the trustees must not refrain from making the investments by reason of the view that they hold

-Limitation where a trust is silent concerning the use of non-financial criteria - trustee should not be under a legal disability to consider non-financial criteria, provided the predominant goal remains the securing of a reasonable financial return

**PAVS - if all the beneficiaries are sui juris and share the trustees moral values then it may benefit to these beneficiaries not to invest in vehicles they agree are immoral

*could vary the trust to accommodate these considerations**

Duty to Appreciate Funds? Nestle v National Westminster Bank - 1993 - ENG

Facts

-Testator left a life estate to his wife and 2 sons with remainder to his only granddaughter

-Trustees pursued a narrow and constrained investment plan that spanned half a century

-1986 - remainder interest was worth 270K (initially worth 54K in 1922)

*granddaughter complained that it should have been worth 1.8 million

Issue

-Can Beneficiary sue for breach of trusts where growth in fund has been meagre?

Ratio

-CA: Beneficiary held that the Trust Co had fallen short in their management of the value of the shares, especially given the relative increases in share price over this time

-However, claim failed because:

1) Trust co showed it had deliberately invested in tax-exempt bonds that had suited the life tenants and shielded the trust from inheritance tax; and

2) The Bank had expert witnesses that showed that prior to 1959, equity investments had been regarded as risky and had not been invested in

-CA: trustee's performance must not be judged with hindsight

*where a trustee invests as an ordinary prudent man of business he should not be faulted as negligent

-PAVS - courts today would likely not be as forgiving because of the increased ability for trustees to invest widely and monitor these investments

Trustee's Duty of Loyalty to the Beneficiary

Overview of Duty

-Defining characteristic of fiduciary obligation is manifested in the form of the duty of loyalty that a trustee owes the beneficiary

-Trustee breaches his duty of loyalty to the beneficiary when he transacts with trust assets in a way where his personal interest conflicts with the equitable interest that the beneficiary has in those assets under the trust and he, the trustee, profits from his position

-Duty of Loyalty Requires Fiduciary to:

1) Act in good faith - the trustee must not personally profit at the expense of the trust;

2) Not misuse position and place himself, through acquired knowledge or opportunity in administering the trust, in a position where his duty and personal interest may conflict with the beneficiary's interests;

3) Not act for own benefit or that of a 3rd person through inconsistent engagement of trust assets without the informed consent of the beneficiary; and

4) Only contract with the beneficiary in transactions that are fair and in which there has been full disclosure of all matters material to the transaction

-Trustee will be liable to disgorge any profits or to account for any profit resulting out of the administration of trust assets where his interest may have conflicted with the duty to use trust property for the benefit of the beneficiary only

Keech v Sandford - 1726 - ENG (Historical)

Facts

- Trustee held property under a lease on trust for a beneficiary who was a minor
- Trustee in his capacity as tenant sought to renew the lease on behalf of the trust
- *landlord refused to renew the lease because the lessee was a minor
- To get around this, trustee entered into a lease on his own account

Issue

- Is this a breach of the duty of loyalty?

Ratio

- CT required the trustee to hold the lease for the beneficiary and account for all profit even though there was no conflict with the beneficiary when the trustee took the lease
- *no conflict because this was the only way to continue the lease given the landlords position
- Reflects the absolute standard of the duty of loyalty trustee behaviour in the handling of trust assets in which the trustees personal interest develops and so produces a conflict
- *here, trustee did not act in bad faith or against the beneficiary yet was held fully accountable for the trust property
- **PAVS - absolute standard banned the personal profit of the trustee from any associations with trust property, even in circumstances where it is impossible for the beneficiary to benefit**

Boardman v Phipps - 1967 - HL (Sort of Historic)

Facts

- Trust assets consisted of a controlling interests in Pco and a minority shareholding in Lco
- *Lco did not perform well
- Solicitor of the trustee and one of the beneficiaries go to Lco's AGM to gather info about Lco
- *attended other meetings, had access to these meeting as a result of their connection with the trust
- Recommended trustees acquire a controlling interest in Lco at a price they formulated from their knowledge of the company
- *trustees rejected this approach as it believed it was a risky investment and would be contrary to the terms of the trust
- The solicitor and the beneficiary then purchase Lco stock with their own money
- *trustees supported this arrangement, beneficiaries were told about the arrangement, but not the full extent of the benefits that may flow to the solicitor/beneficiary
- Benefited solicitor/ beneficiary because they realized financial gain, benefited the other beneficiaries because Lco was controlled in friendly hands and was performing better
- One beneficiary was dissatisfied and sought an action against beneficiary/solicitor to disgorge their profits and put the shares in a constructive trust

Issue

- Is this a breach of Duty of Loyalty?

Ratio

- Court split on issue of whether the defendants had breached a fiduciary duty
- *Majority: held that the rule that fiduciaries cannot profit from their position without the informed consent of the beneficiaries; absolute standard
 - here, all the information that they received from the meetings was trust property because they were acting in capacity as a trustee; profited from this knowledge so fiduciary is accountable for profit
 - *PAVS - court not clear on who they owed the fiduciary duty to, focused on the privity of contract between solicitor/beneficiary and trustee
 - while there was a fiduciary duty and had to account for profits, the defendants were granted an allowance assessed on a liberal scale for their hard work
- *Dissent - Trustees had opposed purchasing further shares in Lco because to do so would be a breach of trust; therefore, no conflict of interest; furthermore, pointed to the fact that the trustees had favoured purchase as it has put shares in Lco in friendly hands
 - test for conflict of interest should not be absolute, should be reasonable conflict, where a reasonable man in the facts and circumstances would conclude that there is a real possibility of conflict
- **Thus, even though the trustees had approved the purchasing of the shares, the solicitor/beneficiary owed duties to the trust
- *little explanation for this, PAVS assumes that it was because the defendants were acting as co-agents of the trustees and thus was acting on information gained in this role for their own financial benefit

***the test stayed *Keech*

Peso Silver Mines Ltd v Cropper - 1966 - SCC

Facts

- P had considered offers on a number of mining claims
- *directors of the company had refused them because it lacked the funds to purchase them
- Later, C, a director of Peso, established a company that bought the claims rejected by Peso
- P sued C, arguing the C claims were held for P under a constructive trust

Issue

- Is this self-dealing?

Ratio

- CT: Refused constructive trust - directors had correctly decided not to pursue the mining claim in question, and later when C picked up the properties, the action of the P board had passed out of C's mind
- *BCCA Majority - Strict rule should be contextualized for modern business practice (not clear on how it should be relaxed)
- *BCCA Minority - Modern business practice means that the conflicts rules should be enforced strictly in order that such complexities may not be used as a vehicle for fraud

Canadian Aero Services Ltd. v O'Malley - 1973 - SCC

Facts

- M is the president of C - engage in a project that is going to take about 5 years to get government contract
- *in the meantime another employee leaves the company and founds Tco, and persuades M to come with him
- Tco ends up getting the government contract, beating out C
- C sued arguing breach of fiduciary duty through conflict of interest

Issue

- Is this a breach of fiduciary duty?

Ratio

- CT: M, as top manager, was placed in the same position as directors because of his control of the Company
- *even though M was not acting in bad faith, SCC found M to be a faithless fiduciary by depriving C of corporate opportunity - disgorged of his profit
- Laskin - No-conflict rule should not be couched in absolute or statute-like form
- *Conflicts should be tested in a case-by-case basis; should factor in position or office held, nature of corporate opportunity, ripeness, specifics, director's circumstances in which the benefit was obtained, factor of time in the continuation of fiduciary duty where the breach occurs after the termination of the relationship with the company
- **PAVS - we can see this as a relaxing of the strict standard, but Laskin makes it clear that the very strict approach to conflicts still prevails**

Holder v Holder - 1968 - ENG

Facts

- D was appointed executor in his father's will
- *renounced the position after performing a few minor tasks
- Remaining trustee-executors auctioned 2 farms, D bought the farms at a fair price at the public auction
- *D did not partake in the trustees decision to sell the farms in the estate
- Beneficiary sought to have the sale set aside

Issue

- Self-Dealing?

Ratio

- CA - upheld the sale - accepted the principle of self-dealing which states that a man may not be both vendor and purchaser, but concluded that the sale was outside of the mischief that the self-dealing rule prohibits
- *no real conflict - D had clearly renounced trusteeship, was not part of the decision to sell the farms, bought the farms at a fair price
- CA - old rule is too severe - courts should investigate the facts to determine whether there are grounds sufficient to set aside the contract
- ***Molchan* - SCC Majority approved Holder as law in Canada

Self-Dealing v Fair Dealing

Summary

-Self dealing = transaction voidable; fair dealing = no breach of fiduciary duty

-Self dealing = trustee purchases trust property himself

*exception - *Holder* - self-dealing is not a breach of fiduciary duty where:

- 1) Trustee is one of several trustees
- 2) Renounces his role as trustee very early in the auctioning of trust property
- 3) Abstains from negotiating for purchase price
- 4) Pays fair consideration for trust property

*note that this overrules the strict approach in *Keech*

-Upheld by SCC - purchase by general partner who owed Fiduciary Duty to partnership of partnerships assets not held to be a breach of fiduciary duty, despite being self-dealing, because:

- 1) No bad faith;
- 2) adequate consideration paid;
- 3) sale in best interests of company because of strained financial circumstances and difficulty selling assets to 3rd party;
- 4) Terms of partnership agreement allowed general partner to dispose of property at its discretion

*Remedy: Beneficiary can ask for damages, the property, or an accounting for profits

-Fair Dealing = Trustee purchases beneficiaries equitable title

*distinguished from self-dealing because beneficiary is on the other side of the contract, rather than trustee selling to himself

**Crichton* - to be valid, trustee must show:

- 1) No fraud or concealment of advantage taken by him of information acquired by himself in character of trustee;
- 2) Beneficiary had independent advice, every kind of protection, and the fullest information with regard to property;
- 3) Consideration was adequate

Crichton v Roman - 1960 - SCC

Facts

-Trustee obtained 100k shares from the beneficiary, with intent to convert them into more valuable shares

*did not tell the beneficiary this, knowing that the beneficiary knew that free shares were worth more than the existing shares

-Instead, trustee lead beneficiary to believe that by selling his shares to the trustee, he would be fulfilling a duty that he owed to third party - which was not true

-Cites Halsbury for 3 conditions for a deal to be fair dealing

Issue

-Fair Dealing or Self-Dealing?

Ratio

-If beneficiary disputes the transaction within reasonable time, the trustee must show:

- 1) No fraud or concealment or advantage taken by him of info acquired by him in the character of the trustee;
- 2) Beneficiary had independent advice, and every kind of protection and the fullest info with regard to the property; and
- 3) Consideration was adequate

-CT: Not fair dealing - fails all of the tests

Trustee's Duty of Impartiality

General/ Definitions

-Always subject to trust document expressing contrary intent

-Wasting asset - generates excessive income while consuming capital rapidly (depreciating)

*good for income beneficiary, bad for capital beneficiary

*can include unauthorized or reversionary assets

-Reversionary asset - only received in the future

*ex. life insurance on person that won't die during income beneficiary's lifetime

*good for remainder, bad for life tenant

-Unauthorized assets - assets that prudent investor would not invest in and do not have income/capital growth capacity to allow trustee to meet duty of impartiality

-Authorized investment - ones that prudent investor would invest in and which enable trustee to meet obligations of risk management and fair, impartial treatment of successive beneficiaries from both income and capital growth

-Rule - Multiple beneficiaries, but not successive - trustee must hold an even hand with respect to all beneficiaries - advantages/disadvantages of the trust must be distributed equally among the beneficiaries with honesty, objectivity and care

-Rule - Successive beneficiaries - Trustee must invest assets to ensure life tenant receives no more than fair yield income (4% indexed to inflation), w/ excess re-invested into capital base for remainder man

The Rule in Howe v Lord Dartmouth

-Rule - If contents of trust fund include wasting, unauthorized, or reversionary assets, then trustee MUST sell wasting/unauthorized/reversionary assets and invest proceeds in authorized investment and distribute income of fund to life tenant, with excess invested into capital for benefit of remainder

*the investments must be those that prudent investor would regard as acceptable from a risk management point of view, and which have yield and capital growth capabilities that enable the trustee to meet the obligation of impartiality

-Required circumstances:

1) Testamentary trust - cannot be inter vivos since the assets would not be residuary, which suggests that settlor intended to keep them *in specie*

2) Residuary - if will bequeaths a specific asset, then presumed intent is to keep it *in specie*

3) Personalty - does not apply to realty (seen in *Lottman v Stanford*)

4) Successive beneficiary

-If there is a trust to retain + real estate = no duty to convert unless expressed directly as income from real estate is in specie (see *Lauer v Stekl*)

Apportionment under Earl of Chesterfield

-Rule - If *Howe* duty to convert applies, trustee is not required to convert assets immediately

*however, while partiality exists, trustee must apportion income from assets between life tenant and remainder man

1) If there is a duty to convert wasting & unauthorized assets = income split w/ the life tenant receiving 4% of value of the personalty per annum and balance going into capital

*note this is 4% of the capital value of personalty, not 4% of income

-The time at which the value of the personalty is taken varies based on the following rules:

1) If the duty to convert arises from an inter vivos trust for sale, the value of the trust assets are assessed at the date the trust becomes effective;

2) If duty of conversion stems from a testamentary trust for sale, then value of shares is taken as at date of death;

3) If duty of conversion comes from *Howe* conditions and not trust for sale, then:

A) If the shares are sold within a year of the testator's death, the value of the shares is assessed at the date of sale;

B) If not sold within a year, the value is taken at the first anniversary of the testator's death

-Thus, trustee has to calculate 4% of the value of the shares at this date when the sale occurs, then compare it to income paid to life tenant before the sale

*if the income received pending sale was less than 4% of the value of the shares, the life tenant receives all of the income produced, and the shortfall is made up from the proceeds of sale

2) If there is a duty to convert reversionary assets, whether it arises from *Howe* rule or express trust for sale = calculate amount that would have to be invested on date of testator's death to equal amount of sale price at the date of sale

*Life tenant gets the difference between that amount of the sale price, and income from investing the amount

-ex. suppose sale price of reversionary asset is 100K, and trustee doesn't sell until 3 years after testator's death

*the amount is 94K because that is the amount of money, compounded at 4%/annum, produced 100k in 3 years

-trustee pays 6K to life tenant and invests 94K in capital, with life tenant also getting income from this new investment

-If the income received pending sale is less than 4% of the value of the property, the life tenant receives all of the income produced; if the income later exceeds 4 %, that difference is paid to the life tenant to make up the shortfall

*if the shortfall is not made up before sale of the asset, the life tenant can get it made up from the proceeds of sale of the imperfect asset

Impartiality Implied v Permitted

“Trust for Sale” and “Trust to Convert” Clauses - Implied Impartiality

-Where there is a “trust for sale” or a “trust to convert” trust assets = implied requirement of impartiality by the trustee = *Howe* and *Chesterfield* rules will apply

-Trust for sale + power of postponement = When apportioning, 4% is taken at date of death

Partiality Permitted

-Testator intention to allow partiality can be indicated in a number of ways:

- 1) Express provisions in the will that permit partiality of treatment of successive beneficiaries;
- 2) The testator’s intention to exclude the rules can be implied from provisions in a will that:
 - a) direct the residue that constitute the assets of the trust be kept or retained;
 - b) authorize the trustee to maintain unauthorized investments despite the duty of prudent investment; or
 - c) that direct the life tenant beneficiary to receive income *in specie*

-Difference between Power to Postpone, and Power to Retain:

*power to postpone usually implies inevitable conversion; could imply an intention by the testator that the life-tenant beneficiary should enjoy the asset in specie irrespective of its capital value and income yield

*power to retain may also imply an ability to enjoy in specie, but to a considerably lesser degree than a trust to retain (which implies intention of partiality between beneficiaries)

-Note that provisions of a will/ inter vivos settlement may require, or even extend, the duty of impartiality to real estate

Express Trusts for Sale with Powers to Retain or Postpone

Overview

-Where there is a mix of sale and retention trusts/powers you infer an intention to enable the sale of a troublesome asset at some future economically propitious time

-Where a power to postpone or a power to retain features very prominently in the will, the issue will be whether it should be accorded greater weight than simply a signal to the trustee that he can determine a propitious time to sell

*it may arguably have the effect of excluding the duty of impartiality

-Question becomes - can the power to postpone the sale of the assets ever be construed as negating the trustee’s duty to be impartial between successive beneficiaries?

-Given decision in *Lauer* - court must ascertain what the testator’s dominant intent is

*is the provision a general empowerment to the trustee to retain assets if that is the right thing to do; or is it a compulsion to ultimately sell in order to secure fairness between the classes, the timing of which is left within reasonable limits at the discretion of the trustee

-Remember - power to postpone is different from a power to retain

Lottman v Stanford - 1980 - SCC

Facts

-T left estate to trustees for the benefit of his wife as life tenant and his 4 children in remainder

*Express trust for sale with the power to postpone - wide discretion to postpone conversion

-All assets are sold except one parcel of land which had been leased to the testator’s son for 20 years at rental rate that way below market value

-Widow sued to enforce trust for sale

Issue

-Does wide power to postpone displace power for sale?

Ratio

-SCC - affirmed *Howe* does not apply to real estate and refused to extend the rule to cover real estate, arguing that it would be tantamount to judicial legislation

*widow was not entitled to notional interest from the real estate and was limited to the actual rent generated from it (0\$)

-*Howe* does not even apply to the personalty from the estate - language of the will concerning conversion of personalty centred on the use of the capital needed for emergent expenses, thus excluding the operation of *Howe* in favour of the specific direction of the testator

PAVS - Case affirms that unless real estate is expressly included in the instrument of trust it continues to be outside the purview of the rule in *Howe*

***where there is a devise of real estate in a trust for sale, until the sale of the real estate actually occurs, the life tenant is entitled to rents and profits *in specie*

Lauer v Stekl - 1974 - BCCA (affm'd SCC)

Facts

-Testamentary Trust, for successive class of beneficiaries, to convert all the estate (mixed realty and personalty) into money combined with a wide power to postpone and retain

Issue

-Is there a duty of impartiality for real estate?

Ratio

-CA: Characterized the clause for conversion as primary and dominant; interpreted power to postpone as not being permanent

*words of the instrument displayed dominant intention of sale and conversion applied to both personalty and realty

-PAVS - case does not support contention that *Howe* applies to both personalty and realty, supports contention that testator intent can apply the duty of impartiality to real estate and personalty

Royal Trust Co v Crawford - 1955 - SCC

Facts

-T left heirs in succession; bulk of estate was shares in Sco (few assets, high value of goodwill)

*Will had trust for sale/conversion with wide powers of postponement, and retention

-Huge dividend of approximately 450K was declared and paid to the widow - reduced value of company by 75%

Issue

-Whether all or part of the dividend ought to be apportioned as income or capital

Ratio

-Intention of a testator that allegedly displaces the requirements of apportionment must be clearly gauged from the will and surrounding circumstances

*Here, while the testator wanted his wife to continue to live in comfort, it was not what the testator wanted above all else (with regard to this desire to permitting the wife to encroach on the capital)

-clauses that required conversion of capital by the trustees evidenced this was not the testator's dominant intention

-*Howe* - tells us that she only deserves a fair return - considerably less than she was getting from distribution

-Concluded from this evidence that *in specie* enjoyment by the widow was not intended, and, accordingly, ordered apportionment

-Dissent - construed a paragraph of the will as granting the wife "any surplus income", that is an *in specie* prerogative that, combined with a wide power of retention by the trustees, justified the trustees' disposition of assets to the widow in this case

-PAVS - thinks that the majority and minority decisions both have merit - demonstrates difficulty in deciding what the intention of the testator was

Express Powers to Both Sell and Retain the Trust Assets: Re Smith

Facts

- Will of father places shares in trust to the son to take care of his mother with income from 25% of the shares for her benefit for life
- Son complied with father's wishes pursuant to an inter vivos trust deed, in which he gave a life interest to his mother and settled the remainder on himself
- *yearly income was a constant 2.5%, which was insufficient to allow the widow to live the high standard she had enjoyed
- Trustee ignored her request for variation in the investment portfolio that would enhance her income to 8-10%
- *son was also uncomfortable with trustee moving out of imperial shares - trustee took this into account when dealing with the trust assets

Issue

- Did the Son have to sell, or could he retain?

Ratio

- BCCA - Found that trustee had erroneously construed the power to retain in the deed as a trust to retain, despite the advice of the widow's lawyer that the trustee had merely discretion to retain and a duty to be impartial (trustee had sought advice of the lawyer who had drafted the trust document)

***PAVS - case raises a number of questions:

- 1) What was the trigger for the duty to act impartially, given the power of sale?
- 2) Is the trustee's power of sale enough to trigger the duty of impartiality and the need to follow the rules in *Howe*?

Howe?

- *Case suggests it might be enough, although it will be overridden by a clear intention by the settlor or testator to the contrary
 - intention was not evident here, albeit the case involved an inter vivos trust which historically has not been subject to the rules in *Howe*
- Overriding consideration is whether the retention is a trust or a power***

Impartiality Where Trust Assets are Settled Shares in a Company

General

- Where the trust assets consist of settled shares in a company, and the trust instrument gives the trustee a power to retain them or requires retention as a duty, how is the trustee's duty to be impartial towards all successive beneficiaries affected
- *distribution of income may become the product of adventitious circumstances which are made by the company based on consideration pertinent to the shareholders at large, and not to those beneficiaries holding the settled shares
- *another issue is if the dividends are paid in shares - should these shares be classified as income to be distributed to beneficiaries or retained as capital in the trust fund
- Usually - courts look to the intention of the company and give effect to the form that the board of directors chose to distribute to its company's shareholders
- Re Waters estate* - form is substance - how and what form the company labels the recompense from these settled shares will determine whether they are income for the life tenant or capital benefiting the remainders
- *company profits had been capitalized into preferred shares and distributed to shareholders in place of dividends
- accordingly, the preferred shares were treated as capital when they were received into the custody of the trustee
- However - form is substance rule will not override a clear intention by the testator to the contrary - whether this intention is express or implied

Re Welsch - 1980 - OHC

Facts

- Shares in trust with successive beneficiaries, issuer liquidated assets as dividends

Issue

- Does Form = Substance Apply?

Ratio

- Fact that the company issued assets as income did not mean that they retained that same character once it became part of the estate

*here, if monies were treated as income it would have defeated the testator's intention to care for his widow during her lifetime and pass on the capital of the estate to his children

-Monies were treated as capital from which the widow would claim an income and could encroach on as necessary

**PAVS - facts were essential in leading to the departure from *Re Waters* - if they had followed *Re Waters*, estate of deceased wife would have taken it (which meant the husband she re-married after the T died, and his sons would get it over the T's biological children)

-Where the children of a deceased are the claimants, the courts quite naturally will lean in their favour and prefer their claim over claims by children who are effectively strangers to the deceased

*also, there is an element of why the assets were distributed the way they were - if it was something that could have been anticipated by the T then the courts will be more likely to enforce the category of the returns; whereas if it was potentially unanticipated by the T then the courts may be more willing to overlook the form is substance rule

Duty to Apportion Debts and Other Disbursements

Common Law Position (Historic)

-*Allthusen v Whittel* - Expenses associated with enhancing the income stream redound to the life tenant's account, while those relating to capital redound to remainder persons (ex. major improvements of property)

*under this rule, trustee was required to equitably apportion debt payment to ensure impartial treatment between the life tenant and the remainder man

*rule requires life tenant receiving income to make a contribution to payments made later in the administration immediately upon establishment of the trust

-PAVS - this rule proved cumbersome and difficult to apply, so it was commonly excluded

*it is not implied where the rule in *Howe* might have been excluded

Statutory Alteration - WESA 144

-Unless the testator requires otherwise, income is not available in isolation for payments of debts, payments are to be made out of capital

*thus, unless the capital is insufficient to meet the estate's liabilities, trustees are not to be regarded as having to apply any income of the estate to the payment of debts

Trustee's Duty to Provide Information

Overview

-CL - trustees need not volunteer information, though a sui juris beneficiary is entitled to seek and obtain information concerning the nature of his equitable interest

-PAVS - In today's legal landscape it is suggested that beneficiaries have an expanded right to require a trustee to provide information that will enable a means of judging whether the trust is or is not being properly managed

*this means that after meeting a reasonable notice requirement, beneficiary has the right to examine the trust accounts, the portfolio of investments, the trust document, and all reasonable information concerning management of trust property

*however, beneficiary is still not entitled to access to all information pertaining to the trust

-*Froese v Montreal Trust Co.* - Disclosure of a legal opinion given to the trust is not automatically available

*modern thought suggests that the beneficiary should be copied on legal opinions that deal with issues of benefit to both trustees and beneficiaries

Re Londonderry's Settlements - 1965 - CA

Facts

-Beneficiary has an interest in the distribution of income among a class of beneficiaries, sought to examine agenda and minutes of meeting during which the discretion has been exercised

Issue

-Does the Beneficiary have an ability to examine documents

Ratio

- Beneficiary is not entitled to documents covering the trustee's exercise of a discretionary power of beneficiary selection
- *policy rational - if trustee's reasons were always required to be disclosed, no-one would want to be a trustee; if trustees are acting in bad faith, information can be compelled by court order
- *documents not subject to disclosure - agenda, correspondence between the trustees and the trustees and beneficiaries, as well as minutes of trustee meetings
- Seems to be a factor here that the beneficiary's interest was really small
- *PAVS - no information unless you are a particularized beneficiary or you show that there was some kind of wrong doing

Schmidt v Rosewood Trust - 2003 - UK

Facts

- Discretionary beneficiary sought information about an offshore tax haven trust
- *beneficiary suggested that this information was an aspect of his proprietary right

Issue

- Does discretionary beneficiary have right to information here?

Ratio

- Assessment of whether a beneficiary is entitled to information can be based on their entitlement to assets under the trust
- *in this case - beneficiary could potentially be invested with a very wide power with regards to the trust in question - had a strong claim to disclosure documents

Trustee's Duty to Account

- Trustee is obliged to account for the trust assets and the beneficiary has a right to inspect these records
- Stanford v Porter* - beneficiaries are not entitled to an instantaneous response even though they are entitled to inspect accounts
- *extent of trustee's duty is to make the accounts available for inspection and examination
- *what is required in each case will be dependent on the circumstances at play
- **Case is a bit out of date because now we have digital age and you can be expected to provide information a bit more quickly
- Trustee Act s.99 - in a deceased estate, trust ordinarily has 2 years from the date of appointment to file the accounts

Remuneration of Trustees

Overview

- Equity says that a trustee acts voluntarily and his services are without compensation
- Practically, remuneration of the trustee is regulated in the trust instrument (charging clauses)
- *can also be arranged in a contract with *sui juris* beneficiaries - although such arrangements are not advisable because they are vulnerable to undue influence attack
- Courts have inherent jurisdiction in trust law for profit costs, and can order compensation on that basis only (think *Boardman*)
- Trustee Act:
- *88 - trustees are allowed expenses plus 'a fair and reasonable allowance' not exceeding 5% on the gross aggregate value of the assets; trustees can apply for a care and management fee not exceeding 0.4% of the average market value of the assets
- *88(2) - judge of Supreme court or registrar determines remunerative amounts
- Expenses of the trust form a lien on the trust assets

Re Sproule Estate - 1979 - ASC

Facts

- Beneficiaries argued for lower fees since they alleged that the trustee was little more than a passive custodian of the shares

-Trustee argued that the care and management of a high value asset is inherently risky, such that there was a need for constant monitoring

Issue

-What should level of compensation be?

Ratio

-SC: reduced this to 30K; expressed a preference for lump sum remuneration and opined that the use of percentages would require special reasons

-Care and management = responsibility of reasonable supervision and vigilance over the preservation and disposition of the assets; also the responsibility of judgment and decision making in the affairs of an estate to resolve problems from time to time arising over and above the usual and regular procedures attendant upon administration

-Endorsed guidelines for remuneration:

- 1) Magnitude of the trust (value, complexity, portfolio, requirement to run business)
- 2) Care and responsibility arising to it
- 3) Time occupied in performing the duties
- 4) Skill and ability displayed
- 5) Success that has attended the trustee's administration of the trust assets

Re Pedlar Estate - 1982 - BCSC

Clarifies what a trustee must prove to the court to collect a care and management fee under 88

-Trustee needs to give a general summary of the estate and of his services performed in the care and management of the estate

*if this is properly done it does not entitle the trustee to an automatic 0.4%, court will determine percentage up to 0.4%, and can determine the respective values for capital and income

-Factors to be considered:

- 1) Value of the estate assets administered
 - 2) Nature of the assets administered, such as active business, a farm, real property held for investment for appreciation, a portfolio of investments and the type of investments
 - 3) Degree of responsibility imposed upon the trustee by the terms of the will or other instrument, including the length or duration of the trust
 - 4) the time expended by the trustee in the care and management of the estate
 - 5) The degree of ability exhibited by the trustee in the care and management of the estate
 - 6) the success or failure of the trustee in the care and management of the estate; and
 - 7) the rendering of some extraordinary service in the care and management of the estate
- However, remember that the parties to a trust can all agree on the charges for administration

Trustee's Right to be Indemnified

General

-As legal owner, trustee may be liable for trust debts that are incurred for the trust, but in equity they are ultimately shouldered by the equitable owner unless there is a good reason for the trustee to be responsible for them

-Section 95 of Trustee Act - Trustees have a claim against the funds of the trust to meet any contractual obligations they incur in administering the trust terms or against the beneficiaries personally

-*Hardoon v Belilios* - Ex. of how trustees are not indemnified if there is a good reason

*here, trustees divided trust into several smaller trusts in favour of several beneficiaries, only one of whom was *sui juris*

*court said that it would be unfair to cast the increased liabilities of the divided trusts onto the one and only *sui juris* beneficiary

Re Reid - 1970 - BCCA

Facts

-Remainder person and absolute beneficiary argued that an indemnity of the trustee for taxes paid in the UK should be confined to the value of assets in that jurisdiction

*beneficiary suggested that conflicts rules gave trustee good reason not to make those payments, and because he made them the trustee should not be indemnified

Issue

-Should trustee not be indemnified for incorrect legal interpretation?

Ratio

-CA: found that this was not a good reason to refuse to indemnify a trustee

*rule in *Harden* applies only to any actual attempt by a foreign state to extend its sovereign authority in BC - which was not the case here

-Here the trustee was personally liable to the government because UK legislation made the trustee indebted in this type of trust situation, and the trustee had paid the money because it was personally accountable by UK statute

*thus, the trustee should be allowed to seek indemnification from BC beneficiary

Powers of Trustees

-Assignment of written powers in a trust can be instructive on the trustee's intent

-Where not included in trust instrument, statute makes it clear that trustee can apply trust property for the maintenance of persons under the age of majority

*in doing this trustee must have regard to the overall objectives of the trust (monitored by the court)

-Where granted in the trust instrument, usually trustee is empowered to advance sums from capital to assist a beneficiary - trustee exercising this power must do so fully conscious of his fiduciary obligations

*court has inherent power to order the exercise of this discretion

-2 big groups of powers: administrative and dispositive

*dispositive - power of appointment, power to select beneficiaries

*administrative powers are all the powers that an owner has with regard to the maintenance and administration of the trust

-Overall tone of the Trustee Act is that the trustee has the duty to take on proper care of the assets, and grants powers to the trustee to spend money on repairs and improvements to allow the fulfillment of that duty:

*5 - General rule is that unless there is a specific duty to keep or retain an asset, the trustee has the power to choose what assets to sell, the timing of that sale, and the form of that sale

-Power is contextualized by the duty to manage the assets as a prudent business person, and to do so while keeping an eye on assets that will meet the requirements of common law duties (impartiality mainly - unless instrument overrides this)

-section also exempts trustee from losses arising from the exercise of discretion surrounding sale unless the transaction is untoward because of some fraudulent/maligned act

*6 - Beneficiary may not interfere with the substitution of assets, and may only impeach the sale where it is clear that the consideration is inadequate

*7 - Trustee can appoint a solicitor or a banker to receive and give discharge for money

*8 - Trustee has the power to insure trust assets

*9 - Trustee has the power, in the course of sale, to give or insist upon security, allow time for payment of a debt, compromise, compound, or abandon debt, unless contrary intention in the trust instrument

-alleviates liability to the beneficiary for exercising these powers

*11 - Trustee can spend money on repairs and improvements to prevent deterioration of land

*15.5 - Trustee can delegate to specialist agents investment responsibility, having regard to the investment objectives of the trust and ensuring proper due diligence in the selection of those agents

*22 - Trustee can vary investment decisions

*23 - Trustee has discretion, where it is expedient, to compound debts and issue releases for them or choose to refer disputes concerning debts to arbitration

-can also, under this section, exercise discretion around corporate management and reorganization in respect to companies to which the shares relate

Control of Trustees

Control by Beneficiaries

General

-Sui Juris beneficiaries can call for the trust, can combine with trustees to amend or redraft terms of trust settlement = lots of power to guide the administration of the trust

*However - collapsing the trust may frustrate the purpose of the trust and pose negative financial consequences

-*Konig v Hobza (Ontario)* - imported general principle that beneficiaries do not have shareholder rights in corporations simply because they have an equitable interest in the shares

Re Brockbank - 1948 - UK

Facts

-T had appointed widow as beneficiary of a life estate with remainder to his children

*2 trustees with the power to appoint a professional trustee

-One of the trustees wished to retire - beneficiaries insisted that bank should take their place

*trustees resisted and argued that they had full powers over trustee retirement, removal and appointment

-Beneficiaries file for a court order to enforce their wishes

Issue

-Can Beneficiaries direct the appointment of new trustee

Ratio

-Issue of trustee retirement and replacement is a matter within the discretion of trustees

*beneficiaries have 2 options: accept the trust as is, or call for the trust under *Saunders* and accept any adverse financial consequences that may flow from that termination

PAVS - affirms that the trustee's power to appoint cannot be controlled by beneficiaries

Butt v Kelson - 1952 - UK

Facts

-Estate consisted of shares in a private company

-Trustees used shares to appoint themselves sole directors of the private company

-Beneficiary was unhappy with the management of the company and demanded to see all company documents in the trustees' possession

*trustees said that as directors, they had duties to the company and to minority shareholders - and the beneficiaries should only be entitled to those documents that are available to all shareholder

Issue

-Does beneficiary have the power to compel disclosure of corporate document?

Ratio

-CT agreed with trustees, to hold otherwise would allow one or more beneficiaries to have insight into company secrets, even though other beneficiaries had thought this imprudent and objected

-In terms of information flow - beneficiaries could not control trustees who are directors

*beneficiaries generally have same right as shareholders and not more - to compel trustees to vote the shares as directed, or to change the articles of the company

Re Martin Estate - BCSC - 2009

-*Butt* does not restrict beneficiaries' access to information only available to normal shareholders where the trust has controlling interest in the corporation and the trustees are its directors

*interpreted *Butt* broadly - requires courts to balance the interests of all stakeholders when dealing with issues of information disclosure

*court did say that where the corporation has minority shareholders unassociated with the trust, beneficiaries' request for complete disclosure is more likely to be rejected

Control by Courts

Legislation

86 (1) A trustee, executor or administrator may apply by petition to the court for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a testator or intestate

(2) The application under subsection (1) must be served on, or the hearing attended by all persons interested in the application, or by those that the court thinks expedient

87 - Absolves trustees of responsibility where they are acting under court authority

*immunity does not extend to indemnifying a trustee who is guilty of fraud, willful concealment, or misrepresentation by obtaining such opinion, advice, or direction

75 - Emphasizes the power of the court to intervene in stock transfers and give directions at the behest of beneficiaries and those who think they are entitled under the trust

Tempest v Lord Camoys - 1882 - UK

Facts

-T devised realty to two trustees with a power of sale

-Beneficiaries' wanted to mortgage the realty and use the proceeds of the sale of another property to purchase their family home

*the trustees were split on whether to allow this

Issue

-Can Court Compel trustees to obey beneficiaries' request?

Ratio

-Can not force trustee refusing this course of action to take the view that it is proper to administer the estate in this way

PAVS - leading case on the courts not wanting to extend jurisdiction where there is a stale-mate in decision making with the trustees

Re Wright - 1976 - OHC

Facts

-Major asset of the trust is shares that are worth 8 million at the time of the testator's death

-20 years later, trustees agreed to sell the shares

*offer to purchase was rejected by 3 of individual trustees because the price was advised to be too low

-Corporate trustee applied to court for advice and an order for the sale

Issue

-Can court break stalemate here?

Ratio

-Refused to make order where simply a disagreement on price - asserted that trustees given discretion should exercise it as they properly see fit and without interference from the court

*trustees should not look to the court where there is disagreement on price - only in the event of a real and substantial deadlock will the court intervene

-ex. in a trust with powers to sell and retain where 3 want to sell and 3 want to retain

-PAVS - only in the case of bad faith or refusal to discharge duties should a court step in to control the exercise of the discretion a testator has reposed in the trustees

Re Billes - 1983 - OHC

Facts

-T left an estate of \$7 million in Canadian Tire Stock that was worth \$51.5 million dollars and compromised 95% of the estate - income was left to his widow, children, and charities

*when widow and children die, income was to be divided among 23 charities

-Trustees were given absolute power to convert and to retain the shares

-Some charities were dissatisfied with the income stream of 2.2% - trust company wanted to sell the shares - this was opposed by son and widow

Issue

-Is this a serious deadlock that the court can intervene in?

Ratio

-Serious deadlock - adopted National Trust's solution to diversify assets because this avoided the unwarranted risk attending high concentration, enable distribution of a substantially greater income to the income beneficiaries, and brought stability to the capital value

*also relieved a conflict of interest because the son was also co-executor of the estate

Kordyban v Kordyban - 2002 - BCSC (aff'd BCCA)

-Set out appropriate criterion for the court to use in a case of deadlock of trustees:

1) Court should step into the shoes to the settlor and surmise what he would have done on the basis of the discernible objectives in the trust document

2) Court should act in furtherance of what is just and equitable

*Court should give a decision in accord with these two principles, but would only intervene in circumstances where not to do so would be manifestly prejudicial to the beneficiaries

Intervention where the trustee is acting outside trust purposes (Shipper)

Shipper v Guaranty Trust Co. of Canada - 1989 - OCA

Facts

-T gave G an uncontrolled discretion to administer and manage the trust for the general welfare, benefit, comfort, and enjoyment of his wife

-When the wife wanted to encroach into capital, G refused its consent, while the other 2 trustees approved

Issue

-Can court intervene in interests of trust purposes?

Ratio

-Despite the principle that the court will refuse to interfere with the uncontrolled discretion of a bona fide trustee, CT declared it will interfere where the trustee is attempting to exercise its discretion to achieve a purpose not intended under the terms of the trust

-Here, G had failed to give effect to the testator's first and foremost intention to provide for his wife by preserving capital for future contingent beneficiaries who were speculative

*also failed to take into account the unanimous consent of all residuary beneficiaries

Where trustee failed to be even handed (Re Fleming)

Re Fleming - 1973 - OHC

Facts

-T bequeathed a life estate to his wife and appointed her one of the executors

-Trustees, as directors of a corporate trust asset, were faced with a surplus, and could distribute that surplus either as income (overwhelmingly favouring life tenant) or as capital in the form of pref shares

Issue

-Can court step in to order distribution method?

Ratio

-CT ordered the company to distribute surplus as capital, favouring the life-tenant wife who had hitherto been shortchanged by low-yield returns because:

*adverse tax consequences of treating the surplus as income,

*prospects of future income enhancements for the life tenant from other sources and income from enhanced capital, and

*the need to be even-handed between the life tenant and the remainder person

-PAVS: Case affirms the principal of not relieving trustees from the duty to exercise their discretion honestly and intelligently, but ultimately did interfere here

Ousting the Jurisdiction of the Court

General

-Attempts by settlers or testators to oust court jurisdiction using trust terms that state that the trustee is empowered to make exclusively binding and conclusive decisions will be treated by the courts as invalid due to being contrary to public policy

**Evans v Gonder* - no provision of the Trustee Act, or the Act as a whole, ousts the inherent equitable jurisdiction of the court to remove a trustee; this is true even if this power would leave the trust with no trustee, so long as the court ensures proper administration of the estate in the best interests of the beneficiaries

-However, a power to adjudicate can be given exclusively to a trustee in relation to matters of fact, not law

*thus, a power of decision conferred on trustees in relation to the meaning of residue cures the word of any defects in meaning arising from semantic uncertainty

-*Tuck's Settlement* - Demonstrates a mechanism that may partially limit court's jurisdiction

*allows mediation clause so long as it is not being used in bad faith to oust the courts jurisdiction

*Denning upheld Jewish faith clause where the Chief Rabbi of London was empowered to determine conclusively whether an approved wife met the condition set out by the testator
 *said the court does maintain control where a rabbi has misconducted himself or come to a conclusion that is wholly unreasonable

Re Wynn - 1952 - UK

Facts

-T allowed trustees to treat beneficiaries differentially and unequally, purported to give trustees power to make decisions in acts and proceedings that shall be conclusive and binding upon all persons interest under this will

Issue

-Can settlement oust jurisdiction of beneficiaries?

Ratio

-Held that this attempt to oust the jurisdiction of the court is invalid and contrary to public policy

Boe v Alexander - 1987 - BCCA

Facts

-Pension plan gave trustees wide authority to determine all questions of coverage, eligibility, and methods for providing or arranging benefits

*any determination or construction they made in good faith shall be binding on all parties and beneficiaries

-Contributions to the plan were contractually required to be made by employers only

-Members sued trustees alleging that they took contributions from some members

-Trustee attempted to rely on exclusive jurisdiction they had to make determinations that were final and binding

Issue

-Is this an allowable ousting of the courts jurisdiction, or impeachable one?

Ratio

-A privative clause will be ineffectual to prevent judicial review where the trustees have acted dishonestly or failed:

1) to exercise a discretion at all

2) to exercise a level of prudence expected from a reasonable businessperson; and

3) to act impartially between classes of beneficiary or in manner prejudicial to their interests

-Settlements that purportedly shield the liability of the trustee through exculpatory clauses will also fail to protect the trustee in cases where he has been dishonest, in wilful breach of trust, or grossly negligent

Re Poche - 1983 - AQB

Facts

-Exculpatory clause - trustee in an estate where the wife had a life estate with remainder to her daughter

-Trustee failed to gather in all the assets, put her mind to the sale of the assets, and to act even-handedly between 2 classes of beneficiary

Issue

-Shielded from liability for breach of trust?

Ratio

-Found the trustee's grossly negligent behaviour constituted a breach of trust; court removed her as trustee - exculpatory clause was not sufficient to shield the trustee

Jones v Shipping Federation of BC - 1963 - BCSC

Facts

-Pension plan in favour of the plaintiffs was established and wholly funded by the defendant shipping company

*arrangement provided that no person other than the federation of the plaintiffs may require an accounting or bring an action against the trustee with respect to the Plan or the Fund and or its actions as Trustee

Issue

-Does clause Act to thwart jurisdiction of court?

Ratio

-CT refused to give effect to this clause - to allow this defence would be to oust the jurisdiction of the courts entirely

Constructive Trust

3 Situations of Constructive Trust

Overview

1) Substantive constructive trust - trust that is imposed in situations that have long been recognized to be situations that beget a constructive trust

*defendants who have been in a relationship with the claimant as a fiduciary *per se* will inherently owe a duty to act with utmost good faith in their property dealings towards those to whom the obligation is owed

-common thread in these situations: breach by the defendant of the duty of loyalty that a claimant has successfully proved

-Examples:

*property acquired by a defendant in circumstances of undue influence

*property that had been held by the trustee in an express trust and is now held by him in his personal capacity having been acquired in a self dealing situation; directors and officers of a company who have harmed the company through property acquisition from situations of corporate opportunities/self-dealing

*agent breaches duty of loyalty to principle, solicitor breaches duty of loyalty to client, and acquires property as a result of the breach

-in this circumstance the property with increased value if applicable, will be designated by the court for the plaintiff who may call for title from the defendant

*activity by strangers (non-trustees, agents not authorized to act for the trust) with regard to trust property, which is not consistent with the trust

* overreaching partners

*bribers

*corrupt officials

*breach of confidence tricksters

*constructive trust relationship imposed in sale of land

2) Constructive trust is imposed because the conduct of the defendant in the specific case is regarded as sufficiently reprehensible through misuse of his position in a relationship not ordinarily covered by the fiduciary category

*court will characterize a party as an *ad hoc* fiduciary after being satisfied by evidence demonstrating that the property in that party's name was acquired in circumstances that place him in a fiduciary position towards the plaintiff and which are not covered by the fiduciary category

***2 categories are linked, but are dealt with separately by the courts

*deployment of constructive trust is automatic as from the date of misconduct in the first category; but used remedially and appropriately in the second***

3) Imposition of constructive trusts is to remedy situations of actionable unjust enrichment

-*Westdeutsche Landesbank Girozentrale v Islington BC* - Remedial v Institutional trust - Function of court in institutional trusts is merely to declare that such a trust has arisen in the past; the consequences that result from such a trust having arisen are determined by rules of law and not discretion

*conversely, remedial trust is a judicial remedy giving rise to an enforceable equitable obligation, the extent to which operates retrospectively to the prejudice of 3rd parties lies in the discretion of the court

Institutional Constructive Trust - Per Se Fiduciaries

Menard v Menard - 2012 - OSC

Facts

-Deceased held the shares in his own name, then transferred them

*technically, transferees do not have legal title until the registration had been effected in their names

Issue

-Who owned the shares during the interim period

Ratio

-Deceased continued holding title as constructive trustee - where formalities of transfer have not been fully complied with, but the transaction is accomplished in substance, courts will use mechanism of the constructive trust to treat the intended transferee as the effective beneficial or equitable owner, while the transferor will hold legal title for his benefit

Mayo v Leitovski - 1928 - MKB

Facts

- Life tenant mother had failed to pay taxes on her property holdings
- *daughter and son in law purchased the property at a tax sale, and transferred estate in fee simple to their mother
- Problem with this was that it gave ownership to someone who was determined by the previous owner only to possess a life estate in the property
- *this deprived future beneficiaries

Issue

- Is this a per se fiduciary relationship?

Ratio

- Constructive trust placed on fee simple to resuscitate remainder interests
- *life tenant has the obligation to pay property taxes, used constructive trust to secure remainder interest

The Constructive Trust + Unjust Enrichment

Overview

- Idea established by *Pettus* that the principle of unjust enrichment lies at the heart of the constructive trust and serves to define it has been reversed in more recent decisions
- *incorrect to view all cases of unjust enrichment as also setting up a fiduciary relationship of loyalty
- Constructive trust serves as an appropriate remedial tool in a given situation to provide proprietary relief instead of monetary compensation in certain kinds of wrongful behaviour in which the outcome has been enrichment at another's expense and the situation is not addressed, or inadequately addressed, in other branches of the law
- Kerr v Baranow* - SCC has returned to looking at unjust enrichment from a restitutionary point of view, as opposed to a trust situation
- Unjust enrichment is the subject of restitution law with its own separate requirements
- *once unjust enrichment has been shown, then the constructive trust provides a proprietary remedy that the court may apply as the most appropriate response
- Peter v Beblow* - McLachlin outlines 4 conditions which generally should be satisfied before awarding a constructive trust as a remedy in unjust enrichment:
 - 1) D must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands;
 - 2) Assets in the hands of the defendant must be shown to have resulted from deemed or actual activities of the defendant in breach of his equitable obligation to the plaintiff;
 - 3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
 - 4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case (interest of intervening creditors must be protected)
- PAVS - the reticence by the court for an expanded constructive trust that is automatically imposed in cases of unjust enrichment is likely explained by insolvency considerations (i.e. should victims of unjust enrichment outside of fiduciary circumstances really be preferred over other non-secured creditors in this way)
- *have replaced this expanded definition of a constructive trust with the *Ad Hoc* fiduciary concept
- So now the analysis with regard to unjust enrichment goes:
 - 1) Have they been living together? What have they each contributed?
 - 2) What is the best way to deal with this
- *Quantum Meruit?
- *Joint Family Venture?
 - If joint family venture - is the imposition of the constructive trust the best restitutionary means or can it be remedied with damage award (more likely)

Petkus v Becker - 1980 - SCC

Facts

- B brought a claim against P with regard to jointly accumulated property that had been amassed over the course of their unmarried cohabitation
- P had stated an intention not to share title in any property he acquired

Issue

-Does B have title to the jointly accumulated property

Ratio

-P's title to the properties constituted an unjust enrichment of B's contributions

-Ct awarded B a constructive trust over half of all the assets

*in social relationships of cohabitation during which property has been accumulated and title has been placed solely in the defendant's name, constructive trust may be the appropriate legal instrument for reassigning the title between the parties so as to more appropriately match their respective financial contributions

-Criteria to be satisfied in order for a constructive trust to apply:

1) Enrichment by the Defendant

2) Corresponding deprivation by the plaintiff, and

*must be a causal connection between the enrichment and the deprivation with regard to the assets subject to the unjust enrichment claim

3) an absence of any juristic reason explaining or justifying the enrichment

Kerr v Baranow - 2011 - SCC*Facts*

-K and B were in relationship for 25 years; common law partners

*K claimed support and a share of property in B's name based on principles of unjust enrichment

Issue

-Is this unjust enrichment?

Ratio

-No - K was severely disabled at all material times and had not made an equitable contribution to the acquisition or improvement of the realty registered in B's name

**2 step analysis for deliberating juristic reason in relation to unjust enrichment:

1) Gifts or benefits proceeding from a legal obligation

2) Whether the facts of the case disclose reasonable expectations by the parties to share the assets, guided by policy considerations that may point to the enrichment as an unjust one

*limited role to the reasonable expectations analysis**

Vanessa v Seguin - 2011 - SCC*Issue*

-Assessment of compensation where a claim for unjust enrichment is valid, and where the constructive trust would be inappropriate

Ratio

-Cromwell: successful claim for unjust enrichment may attract either a personal restitutionary award or a restitutionary proprietary award (money or property)

-Measurement may be on basis of quantum meruit, but in other cases can be calculated on the value of the claimant's contributions throughout the partnership that have survived

*where appropriate, the court may assess the value of the patrimony of assets surviving in the relationship by investigating whether there is a link between the joint effort of both parties and the accumulation of wealth

-Plaintiff must show clear connection between contributions and the accumulation of wealth in the integrated economic lives of the partners

*goal of the court is to award each party a just share of what is a joint family venture

-Only when restitutionary relief in either of these forms is inappropriate or insufficient can the plaintiff then seek a restitutionary proprietary award (constructive trust)

*in this calculation court can assess the probability of recovery as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights

-where a constructive trust is granted - proportion should be in line with the plaintiff's contributions

Soulos v Korkontzilas - 1997 - SCC*Facts*

-K is a real estate broker who acted as agent for S

*K presented a commercial listing to S, S was interested in making an offer on the building

-finally agreed at \$265K after negotiations between K and the seller

*instead of conveying this to S, K arranges for his wife to purchase the property and transfer it to K as a joint tenant

-When S asked about the property, K told her to forget it because the vendor no longer wanted to sell - K denied involvement to S when asked

-S learns what actually transpired 3 years later - sues and asks to have a constructive trust put on the property - said that the property had special value because his banker was a tenant there which is seen as a status symbol in the greek community

Issue

-Unjust enrichment? Constructive Trust?

Ratio

-SCC: unjust enrichment is not the unifying theme for a constructive trust, and does not explain all situations in which the constructive trust has been applied "unless enrichment is interpreted very broadly to extend beyond pecuniary claims"

*endorsed "good conscience" as the unifying concept of the constructive trust - equity converts to a trustee he who holds legal title in bad conscience

Flexible Category - Ad Hoc Fiduciaries

Overview

-Only distinction between ad hoc fiduciaries and per se fiduciaries is how they arise: by tradition or by factual scenarios that give rise to a duty of loyalty

-*Frame v Smith* - 3-step test to determining whether a fiduciary relationship exists:

- 1) A scope for the exercise of some discretionary power
- 2) Power or discretion that can be exercised unilaterally so as to affect the beneficiary's legal or practical interests; and
- 3) A peculiar vulnerability to the exercise of that discretion or power - being at the mercy of the fiduciary holding the discretion or power

-*Galambos* - Cromwell - critical point is that in both per se and ad hoc fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty

-*Elder* - McLachlin - to establish an ad hoc duty, the claimant must be able to point to an identifiable interest that is at stake

*claimant must show:

- 1) an undertaking by alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
- 2) a defined person or class of persons vulnerable to a fiduciary's control; and
- 3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control

Guerin v The Queen - 1984 - SCC

Facts

-Federal government is negotiating a lease with the Musqueam

-Musqueam learned that the crown had negotiated a lower-than-market rental for the lease, and that this rent was contrary to the instructions given by the Musqueam band

*as land had increased in value, Musqueam argued that they had suffered financial hardship from Crown's breach

Issue

-Is their damages in contract here? Fiduciary Duty?

Ratio

1) Rejected contract argument because evidence showed that golf club never would have leased the land at the terms the Musqueam were asking for

2) It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty

*hallmark of fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion; where there is a fiduciary obligation, there is a relation in which the principal's interest can be affected by the manner in which the fiduciary uses the discretion which has been delegated to him

-Where by statute, agreement, or unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary

- In this case there was no specific precedence to be found in the category of constructive trust
- *however, by focusing on identifying a fiduciary - was able to find a constructive trust
- Were the museum entitled to a proprietary constructive trust relief?
- *no - getting constructive trust over the land wouldn't have fixed the problem
 - so they get equitable damages - significantly more than damages you would get for a breach of contract b/c you can ignore issues that limit common law damages
 - *equitable damages are meant to compensate you for where you would have been if the breach hadn't occurred

Lac Minerals Ltd v International Corona Resources Ltd - 1989 - SCC

Facts

- ICRL owns 17 claims on Corona property
- *concludes, after study, that the gold is distributed over a wide area, and seeks to acquire Williams property
- LM begins negotiations with ICLR - who disclose, with no caveat of confidentiality, that they believe that the gold extends to the Williams property
- LM sends a letter to ICLR with a number of JV opportunities
- ICLR makes an offer to Williams, one month later LM makes an offer to Williams
- *LM later made a second offer which was accepted
- ICLR asks LM to transfer the property to it

Issue

- Did LM owe a duty not to disclose confidential information in the course of bargaining a JV around the exploration of gold in the area

Ratio

- CT endorsed considerations listed in *Frame v Smith*
- Lamer +Sopinka+McIntyre - would limit expansion of duty of loyalty only to those claimants who are vulnerable
- *Here vulnerability was absent - misuse of confidential information was not a breach of fiduciary relationship, breach of duty of confidentiality in the law of tort
- La Forest+Wilson - take broad view on range of factors that could precipitate a duty of loyalty by the defendant to the plaintiff
- *Non-vulnerability did not rule out application of fiduciary duty - reliance and dependency by one party on another can support a finding of a fiduciary relationship
 - Here, LM owed ICLR a duty of loyalty - LM knew that disclosure of the gold put ICLR in a position of dependency in which it relied on LM to observe trade practice which dictated that LM shouldn't have taken advantage of the information learned during negotiations
- **PAVS - Sopinka's approach demonstrates a hesitancy to tinker with institutions that impact the centrality of negotiations of commercial transactions by large and sophisticated entrepreneurs operating in free markets, able to afford guidance from the very best lawyers (I think PAVS likes this better)
- **LaForest - wanted to preserve desired social behaviour and institutions such as bargaining in good faith
 - fiduciary relation does not arise between commercial parties in arm's-length contractual negotiations but in this case, a relationship of trust and confidence had developed between the parties, and an expectation of utmost good faith in pre-contract sharing of highly sensitive and valuable information was an industry practice and imposed an expectation of loyalty from LM
- ***Remedial constructive trust in the context of contract negotiations has been picked up in other cases
- *dominant approach taken is the La Forest approach - vulnerability is a sufficient, but not a necessary ingredient for the finding of who is an ad hoc fiduciary***

Hodgkinson v Simms - 1994 - SCC

Facts

- S was in the business of providing tax-related financial services, was employed in that capacity by H who put himself in the hands of S with respect to tax planning and sheltering
- *S gets H into residential building to shelter income
- S didn't disclose that he obtained a personal benefit in the form of extra billings from the developers in respect of sale of interest in the project
- Vancouver real estate crashes and H loses a fortune

*H wants to recover from S financially

Issue

-Is there an *ad hoc* fiduciary relationship here?

Ratio

-SCC: La Forest - H vulnerable to S because of H's reliance on S for guidance

*existence of fiduciary duty in the circumstances will depend on the reasonable expectations of the parties

-in seeking to identify the duties that flow from a relationship, it is wrong to solely look to the unilateral power imbalance/balance

*By focusing on reasonable expectations you capture all different relationships with varying power imbalances

*distinguished *Hodgkinson* from *Lac* by asserting that contractual relationships of the professional advisor type can become a fiduciary relationship when tainted by self-interest

*Broker client relationship need not necessarily be a fiduciary relationship, but it becomes one when the client places trust and confidence in the broker and relies on his expertise to make business decisions

-Here - H placed trust and confidence in S such that S's advice was in substance an exercise of a power or discretion reposed in him by H

-Minority - vulnerability occurs in those circumstances where one is at the mercy of the other's discretion - this is at the core of establishing the fiduciary relationship

*No fiduciary duty here because evidence shows that H looked to S for advice, but did not do so unreflectively; he made the final decision to invest; vulnerability was to the market, which is what everyone is vulnerable to

*would assess damages on breach of contract basis - proximate cause of H's loss was downturn in real estate market, which is a risk that he should shoulder

**PAVS - under this conception, fiduciary duty differs from duty of care because of the special elements of trust, loyalty, and confidentiality that give rise to a corresponding duty of loyalty

**in contractual setting formed from unequal bargaining power and undue influence, fiduciary obligations inure even though not specifically included as terms or are intrinsic in the nature of the contract,

**LaForest - discretion, influence, vulnerability, and trust may indicate fiduciary relationship

M(K) v M(H) -1992 - SCC

Facts

-P sued her father for damages arising from incest - sued in both tort and fiduciary duty

Issue

-Is a parenting relationship *ad hoc* fiduciary

Ratio

-Fiduciary duty is not confined to matters involving only economic interests

*Canadian courts have identified the parent-child relationship as a traditional head of fiduciary obligation

-Then the question became - does there have to be a unilateral undertaking by the fiduciary in order for there to be a relationship

*No, and even if there is it is beyond dispute to assert that being a parent comprises a unilateral undertaking by the fiduciary

-non-economic interests of an incest victim in particular are susceptible to protection from the law of equity

-McLachlin - assessment of damages under the law relating to fiduciaries is not necessarily the same in all circumstances

*fiduciary law can impose a measure that will deter future breaches because it is based on a breach of trust (unlike tort damages)

Sun Indalex Finance, LLC v United Steelworkers - 2013 - SCC

Facts

-I was a large manufacturer, became insolvent and sought protection from creditors under the CCAA, hoping to avoid bankruptcy proceedings and liquidation

*creditors began a re-organization

-I was the administrator of 2 pension plans with funding deficiencies of \$4.8 million

-As part of the reorganization, court approved an agreement for debtor-in-possession financing where each of I's group members (2 company group) would guarantee each others liabilities and would agree to borrow \$24 million in return for granting the creditors priority

*I then began soliciting purchasers - no purchasers wanted to buy I and assume pension liabilities

-Pensioners were not a party to the negotiating and were not informed of the negotiation

-Pensioners brought an action against I - alleging that I breached a fiduciary obligation owed to plan members by making arrangements despite a conflict of interest in which, as trustees, a duty of loyalty was owed to the pension holders as beneficiaries

*reorganization appeared to ignore the involvement and interests of plan beneficiaries, plus, I's interests in these insolvency negotiations were directly adverse to seeing that the monies owing on the pension deficiencies were fully paid

Issue

-Is this an *ad hoc* relationship?

Ratio

-Constructive trust inquiries ought to begin with an assessment of the nature and scope of the fiduciary duty, which required an assessment of the legal framework governing the relationship out of which the fiduciary duty arises

*Here: I's role and fiduciary obligations arose through its functions as detailed in the pension plan documents and the provision of the Pension Benefits Act

-Act sets out care, diligence, skill, and special knowledge requirements and forbids a conflict of interest

*furthermore, places duty on administrator to ensure that pension payments are made when due and to notify the Superintendent when they are not; gives the administrator statutory authority to commence court proceedings when pension payments are not made

-It is from this that I's conflict stems: had obligation as administrator to ensure pension payments are made, had duty as the lead in the creditor-compromise-exercise to sell the company for the highest value

-CT: even though the state of affairs was statutorily contemplated (and thus permitted) I had a duty of loyalty to take steps so that the beneficiaries would have the opportunity to have their interests protected in the CCAA proceedings as if the plan was administered by an independent administrator

-Majority: However - constructive trust was not appropriate remedy on the facts of the case

*such relief was incompatible with the governing statute of the CCAA which had the effect of subordinating the claim of the plan members to the debtor in possession lenders

-settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property

Galambos v Perez - 2009 - SCC

Facts

-P was firms part-time bookkeeper and office manager

*oversaw income, expenses, and accounting; had unlimited signing authority on firm's non-trust bank account

*was also a client - firm did some free wills for her

-P made voluntary cash advances of 200K to employer (G), who was principal in his own law firm

*firm was in financial distress, P made payments to G's creditors without informing G (she also puts money into the firm bank accounts, which she took out a loan for, etc.)

-Firm goes bankrupt, P is an unsecured creditor; recovers nothing

*P sues G for breach of fiduciary duty

Issue

-Ad hoc fiduciary?

Ratio

-SCC: P was not vulnerable in terms of her relationship with G, had not relinquished any decision making powers to G

*probably had more knowledge than he did of perilous state of firms finances (given she made advances and payments without his permission or knowledge)

-While there was a *per se* fiduciary relationship in the solicitor-client transactions, this did not create a generally-applicable fiduciary relationship

-Ad Hoc fiduciary duties are always a question of fact - court must ask itself whether facts disclose a power-dependency relationship and whether fiduciary relations can be expected to have arisen based on the reasonable

expectations of the weaker party and the mutual understanding of both parties that one must act in the interest of the other

*Fiduciary's undertaking may be the result of the: 1) exercise of statutory powers; 2) the express or implied terms of an agreement or 3) simply an undertaking to act in this way

*fundamental that there is an express/implied undertaking by the fiduciary that they will act in the best interest of the other party in accordance with the duty of loyalty reposed on the fiduciary

-Fiduciary law is more concerned with the position of the parties that results from the relationship which gives rise to the fiduciary duty than the respective positions of the parties before they enter into the relationship

*vulnerability in power-imbalance terms is still a consideration though, just subverted to relationship result considerations

Elder v Alberta - SCC - 2011

Ratio

-In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship:

(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;

(2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and

(3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control."

*build on what was said by Dickson in *Guerin*, and what was fleshed out in *Frame v Smith* (dissent)

Purpose Trusts

Non-Charitable purpose trusts (Private Purpose Trusts)

Why they are void

General

-Problem with private purpose trusts is that it is difficult for the court to get control of the trust (because there is no beneficiary)

*even if there is someone who will come forward and help with the administration of the purpose trust -court feels that it doesn't have the power to re-constitute the trust if things are missing

-if there is a beneficiary - court can reshape trust according to what will suit the beneficiary, as identified in the trust instrument

Re Astor's Settlement Trusts - 1952 - CHD

Facts

-A attempted to create a trust for the "maintenance of good understanding sympathy and cooperation between nations, and the preservation of the independence and integrity of newspapers and the encouragement of the adoption and maintenance by newspapers of fearless educational and constructive policies"

Issue

-Is this trust administrable?

Ratio

-Trust is void because only beneficiaries are persons who are unascertainable, so it is difficult who could initiate proceedings to enforce the trust

Exceptions to Private Purpose Trusts (Big 4)

Animals + Statues

- Astor* - Old people die - set up trust to maintain/support pets (cats/dogs/horses) = valid
- *trusts can only survive for about 21 years in perpetuity jurisdictions (which is usually enough time to administer to the animal)
- usually there is a residuary beneficiary - they will make sure that trust comes to an end because they have financial incentive to end it within 21 years
- Petingall* - Trust to look after horse valid because residuary legatees could supervise performance of trust
- Monuments - testator leaves money for upkeep of grave, setting up tombstone, construction of statue and having the statue maintained
- *allowed but subject to the perpetuity rule of 21 years
- *usually will be a residuary beneficiary

Purpose Trust for Indirect Beneficiaries (*Denlies*)

- Basically doing 2 things: 1) Purpose trust + 2) Beneficiaries (usually allowing trustee discretion in choosing the beneficiaries to carry out the purpose of the trust)
- *purpose is not allowable, but because it is co-dependant on the beneficiaries (which is allowed) then it is ok
- Name beneficiaries as a class that are actually pursuing the purpose that the settlor wants

Re Denlies - 1969 - CHD

- T invested land in trustees to be used as a sports ground for the employees of a company and other persons the trustees permit to use the facility

*Purpose trust + defined class of objects = outside the mischief that the prohibition on non-purpose trusts attempts to stop (no beneficiaries to enforce it)

Keewatin Tribal Council v Thompson - 1989 - MQB

Facts

- Council constituted itself as a trustee for a number of bands over land that it owned to provide residences for first nations students attending school in Thompson

*Object was to provide residential facilities, but to do it in a way that avoided property taxes

Court

- Indirect beneficiaries of the the trust are the individual members of the bands; real benefits in that the children are entitled to use the properties free of charge as accommodation while attending school

*no problem with trust because there are people who can enforce it

Gift for Unincorporated Association to Further Objectives

- Testator/Settlor can find a compatible club to their objective and leave money to the unincorporated association
- Unincorporated association = must be more than an amorphous group of individuals

*political parties are often not good enough because of the frequent change of membership

- Have to be somewhat careful because the rules of the organization determine how the money is utilized; be reticent of this when structuring your gift

*ex. if transfer is to present and future members the absence of those future members when the gift is effective may result in the characterization of the gift as a purpose rather than to members in conformity with the beneficiary principle

- Common situation is T leaves funds to official in unincorporated association with the intention that it be shared in common between current members = valid (*Cocks*)

-Another common situation - Gift to official in the association and is paid in trust as an accretion to the funds of the club; donation is used with general-purpose funds to advance purposes of association

*monies are then regulated according to the rules/contract between members

- members as co-owners do not beneficially hold the gift, so a member who dies or resigns from the club has no claim to the gift

*PAVS - this is a roundabout way to institute a purpose trust - but it is effective

Re Retchers - 1972 - CHD

- Gift to society, before it was received society dissolved in order to amalgamate with another club

*gift was to members of named society, and even though the donation was to amplify the general fund serving the particular purpose the gift had been made for, it was actually a gift to those specific members of the named society

*as this group had amalgamated with others, members were no longer bound contractually - so the gift failed and was held on resulting trust for the estate

POINT - when you are looking at the means of fulfilling a purpose through people, you have to look at the people you have chosen - there must be certainty in the objects that you have selected, otherwise it will fail
Re Russel, Wood v The Queen - 1977 - APC

-Legacy gift was made to society

*Gift was held valid as a charitable purpose trust but court still examined validity as non-charitable purpose on the basis that it was a gift to the members subject to their contractual rights

-CT: Did not meet the test for valid private purpose trust - used the word "trust" in the will, and only scantily specified the purposes for which the society is organized

*PAVS - care should be taken where a testator conveys property in trust for an association to prevent the construction of the gift as primarily to advance a private purpose trust and not for the benefit of its members (further demonstrated in *Leahy*)

Leahy v NSW - 1959 - PC

Facts

-Gift was to an order of nuns which the trustee could select - given to contemplative nuns = non-charitable gift

Issue

-What happens when you give to a group you think it is sustaining a charitable purpose, but in actual fact the group can't achieve this purpose because they are not recognized to achieve the purpose?

Ratio

-Clear intention of T was to establish an endowment for nuns that would continue into the future

*thus, disposition was valid under trust only where the trustees selected members of charitable orders

-As these nuns pursued purely private purposes - the gift failed

Re Lipinski's Will Trust Gosschalk v Levy - 1977 - CHD

Facts

-Unincorporated society that provides social, cultural, and sporting activities for Jews in Hull who are members of the association

*on dissolution, club rules directed the assets be held by trustees as a fund in order to set up another Jewish youth organization with similar aims and objects

-T transferred residuary estate to the society to be used solely in the work of constructing new buildings/ improving buildings for the association

Issue

-Is this a private purpose trust that is valid?

Ratio

-Yes - the will should be construed as disposing of property for the benefit of ascertainable beneficiaries and the purpose was simply descriptive of the manner of enjoying that benefit

*if gift to augment funds of an association is valid, then there is no sound reason why a similar gift that specifies purpose within the power of the association and which members of the association are beneficiaries, should not also be valid

-beneficiaries of the association could enforce the purpose

PAVS - case has been criticized in that the representation of the facts does not make it clear whether this type of gift was intended for each member such that the stated purpose could be disregarded, or whether it was a purpose trust in which the stated objective is perceived as simply the motive explaining a gift to individual beneficiaries

Private Purpose Trusts as Powers

-Instead of trust being construed as trust for purposes, it gives the trustee power to utilize the funds to further a particular objective

*if the power is not exercised, the money becomes held on a resulting trust for the settlor - goes to testator's residuary heirs

-provides a group of people to keep an eye on the purpose of the gift - able to state whether or not it has been fulfilled, can call on court to control it

-*Re Shaw's Will Trusts* - S created a testamentary trust for a 40 letter alphabet

*Upheld - characterized the trust as a power to spend money for that purpose

-Law reform leans in favour of giving effect to private purpose trusts

BC Perpetuities Act s. 24(1) A trust for a specific noncharitable purpose that creates no enforceable equitable interest in a specific person must be construed as a power to appoint the income or the capital, as the case may be.

(2) Unless a trust described in subsection (1) is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or the original trustee's successor within a period of 21 years, even if the disposition creating the trust showed an intention, either expressly or by implication, that the trust should or might continue for a period longer than that period.

(3) Despite subsection (2), if the trust is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that by doing so the result would be closer to the intention of the creator of the trust than the period of validity provided by this section.

(4) To the extent that the income or capital of a trust for a specific noncharitable purpose is not fully expended within a period of 21 years, or within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person who would have been entitled to the property comprised in the trust, if the trust had determined at the expiration of the 21 year period, is entitled to that unexpended income or capital.

-BC law reform has suggested that the government go further and create legislation that permits the settlor to appoint a 3rd party enforcer in an instrument with the authority to enforce private purpose trusts

*delegates would be subject to the supervision of the court in a similar manner to trustee

*settlor/testator who does not wish the conversion to trust powers can prohibit this - expressly or impliedly

Charitable Trusts

General

-Charitable trusts are a form of express trusts = all rules apply with exception of certainty of objects given absence of specific individuals as beneficiaries

*most important is probably certainty of purpose (ie intent to create charitable trust for x purpose)

-ex. *Chichester* - T directed that executors apply the residue of his estate for charitable institutions in England

*HL: disposition is too vague, and void

-upheld by SCC in *Brewer*

-Charities may be functionally set up in 2 ways:

1) Administration of trust assets can take the form of a permanent endowment in which income is generated from investments and used to further the specifically identified or declared charitable purpose

2) Funds are put into assets that are then deployed by the trustees to fund specific purpose charities or foundations

*These are classified by the CRA as public and private charities - where the second one is usually set up by a family and is incentivized by favourable tax treatment

-CRA has a rule in the second case whereby a certain amount of the income generated must be spent each year on the charitable purpose - so it becomes important to know what constitutes a charitable purpose

-Political purposes do not qualify for characterization as charitable purpose trusts

**Anti-Vivisection* - invalid because the court has no means of judging whether a proposed change in the role will or will not be for the public benefit and therefore cannot say that a gift to secure the change is a charitable gift

*Political purpose = one that has as its focus the aim of changing the legal situation prevailing in an area of human life, or to further the objects of political parties

*however, no impediment of charities adopting political positions on matters, especially if this is designed to secure the objectives of the charity

Framework of Analysis

Native Communications Society of BC v MNR - 1986- FCA

-CT identified the preliminary considerations to determine whether a particular purpose can be regarded as charitable - accepted 4 categories from *Pensthal*

1) Purpose must be beneficial to the community in a way which the law regards as charitable by coming within the "spirit" and "intendment" of the Preamble to the Statute of Elizabeth (does it fit within the 4 categories)

2) Whether a purpose would or may operate for the public benefit is to be answered by the court on the basis of the record before it and in exercise of its equitable jurisdiction in matters of charity

Public Benefit Requirement

-Distinguishes charitable purpose from private purpose

1) Charitable trust must address an appreciable section of society - must be truly public

*Ct must be satisfied that the potential beneficiaries of the trust are not numerically negligible and that they are not linked to each other by relationship to a common person

**Oppenheim* - charitable trust failed because its purpose was for the education of 110K company employees who all were linked to a common employer = didn't serve public widely

**Neville Estates Ltd.* - gift made to members of synagogue was regarded as an appreciable section of the public
-case differs from *Gilmour* in that the members of the synagogue spend their lives in the world, where members in *Gilmour* live secluded

2) Charity must exude a public element - this will rely on advocacy skills

**Gilmour* - gift on trust to a community of 20 contemplative nuns was held not to meet the public element test

**Jones* - Disposition directed to the officers of Eaton to be used as fund for any needy/deserving Toronto members of the Eaton Quarter Century Club = valid, public enough

-PAVS - has some doubts with this - seems to indicate that movement in case law towards rebuttable presumption for trusts fitting within the 3 main heads that they are benefitting public

*will not be void if settlor has expressed preference in favour of specified individuals

3) Charitable purpose must promote the public wellbeing or policy as determined by the court, not the settlor

**National Anti-vivisection Society* - Matter is not charitable simply because the settlor or members of the society believe that what it is doing is for the public benefit

-if Ct is not satisfied that the propaganda and expenditure of a society is beneficial to the community, the societies acts are not charitable

-may be enough for the court to find that the proposed charitable activities do not offend public policy provided the purpose conforms to at least one of the categories

**Re Pinion* (see below) - Invalid - failed the public benefit test as the artwork has been described as atrociously bad; no education benefit from foisting upon the public a mass of useless junk

Re Scarisbrick - 1951 - ENG (Public Benefit in Family Context)

Facts

-T bequeathed money for those in family that, in the opinion of her son and daughters, were in needy circumstances

Issue

-Does this serve the public widely enough?

Ratio

-CT: could be held that by the word "relations" (note I replaced this word with family in the facts) included relations in any degree so in this sense the number of potential people was large and so supportive of a charitable trust

-PAVS - likely that if it had said next of kin, it would have been too small for charity = invalid

*thus, if it is a gift to family, courts will look at the breadth of family captured to determine if it is a private or charitable purpose trust

Everywomen's Health Centre Society v MNR - 1992 - FCA

Facts

-Objects of the Society included medical services of special concern to women

*argues that the charitable purpose was invalid as political because the society also proposed establishing an abortion clinic

Issue

-Is purpose invalidated where it is politicized?

Ratio

-Task is to decide whether the purpose of the charity is beneficial to the public, which does not require clear proof that there is public policy supporting it nor that the public supports it

What is a charity? Commissioners of Income Tax v Pensthal Charitable Purpose Trusts that Exist for the Relief of Poverty

-Poverty is relative - does not mean charity needs to cater only to the destitute - must be directed towards poor/aged/sick

**Re Coulthurt's Will Trusts* - referencing people who go short

-Sometimes poverty is circumscribed by public benefit- needs to be a charity for poverty that benefits a wide group of people

Planned Parenthood of Toronto v Toronto - 1979 - OHC

Facts

-Societies purposes were giving of information and advice to members of the public and researching and disseminating information on population control

Issue

-Whether or not dissemination of information to public about population control is for relief of poverty - argument was made that most of the people who utilized the service are poor

Ratio

-Met the public benefit test, and although charity assisted the poor, it did not qualify under this particular heading

*noted the fact that there is no means test in terms of clients who came in (i.e. rich people could use services)

Charitable trusts created for advancement of education

-Education is widely defined - not confined to academic subjects

*however, cannot infer that any kind of knowledge will qualify

-*Council of Law Reporting for England and Wales* - non-profit production of law reports = charitable purpose for education

*influenced by the fact that lawyering is a learned profession and law reports provide basic material for legal research, study, and education

Vancouver Society of Immigrant and Visible Minority Women v Canada - 1999 - SCC

-Iacobucci - so long as information and training is provided in a structured manner and for a genuinely educational purpose, not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education

Re Pinion

Facts

-T had bequeathed collection of art into a charitable with the intention of enabling education around artistic pieces

Issue

-Did this satisfy the requirement for "advancement of education"

Ratio

-Gift was not for public benefit - expert evidence from art experts unanimously opined that the collection was of very low artistic quality - no educational benefit of foisting upon the public items of no or questionable value

*T's object was not to educate anyone, was to further the repute of his family, and in this case the collection of art is worthless

-PAVS - case demonstrates importance of meeting the public purpose criteria

*essential to know at least something of the quality of the proposed exhibits in order to judge whether they will be conducive to the education of the public (in the context of museums, but why not other things as well?)

Charitable trusts created for advancement of religion

-Until the 20th century there was a strong christian bias

*ex. *Thorton (Historic)* - CT approved of a charity that was established for the purposes of printing/propagating writings of some woman who believed she would give birth to next Messiah

-CT noted that while the writings were incoherent/confused, and that she was a ridiculous woman, her works were designed to extend the influence of christianity = charity

*foolishness is not a bar to religion

-Became more important throughout the 20th century - to promote multiculturalism other criteria were looked at to move charity outside of judo christian

**Funnel* - T bequeathed estate to further spiritual work carried on by a small group that she was part of who regularly engaged in spiritual healing in the T's home

-Here: religion legit - shows that reference to organized religion is not even necessary

-Advancement of religion contains organizations/trusts to erect/maintain holy places, organizations/trusts promoting religious observances, etc.

-Public component of public benefit test is more clear - charity must apply to a relatively large group of persons

**Gilmour* - there must be some limit to the kind of institution that will constitute a public benefit - here the nuns were contemplative which really did not apply any public benefit at all

-However, in certain cases, what constitutes as advancing religion has been quite technical

*this is the case regarding associations that carry out public benefit in a similar manner to religious organizations

-OVERALL - it seems now that the Canadian court is going with the more open approach to religion espoused in *Church of New Faith*, moving away from *Re South Place*

Church of the New Faith v Commissioner of Pay-Roll Tax - 1983 - AUS

-CT: recognized scientology as a religion

*2 criteria around which activities counting as religious purpose for charitable trust determinations can relate:

1) belief in a supernatural being or principle

2) acceptance of canons of conduct correlated to that belief

Re South Place Ethical Society - 1980 -CHD

Facts

-Objects of society were the study and dissemination of ethical principles and the cultivation of rational religious sentiments

Issue

-Whether SPES was a charitable body

Ratio

-One of the requirements of a charity isn't that there should be some element of public benefit in the sense that it must not be a members club devoted to the self-improvement of its own members (not the problem here - but interesting comment)

-Problem here was that society did not engage in "worship" in the sense of adoration of some numinous entity

*mere appreciation (worship for humanist religions) is not good enough

**PAVS - decision followed *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* in which court rejected Free Masonry as a religion

*didn't find that free mason code of being "reverent, honest, compassionate, loyal, temperate, benevolent, and chaste" as advancing of religion**

Trusts for other purposes beneficial to the community

-Wider category that allows the court over time to bring new ideas into the recognized charities

*tied into public morality - PAVS seems to think that these are usually accepted under public good because it does good for the public in that area

*many relate to public purposes in a local area

*where there is a dispute, usually at the behest of revenue authorities

-*Vancouver Society of Immigrant and Visible Minority Women* - court has always had the jurisdiction to decide what is charitable; nonetheless the law of charities had proceeded by way of analogy to the purposes enumerated in the preamble of the *Statute of Elizabeth*

-Some of the categories:

1) Charities with purposes that promote the welfare of sick and disabled persons

2) Charities with objects that advance and secure human life

3) Protection of the old and infirm through nursing homes

4) Concerns for the environment (*Re Cotton Trust for Rural Beautification*)

5) Trusts to assist sport with scientific knowledge showing clear linkages between exercise and good, physical and mental, health

6) Protection of animals (*Re Moss*)

7) Improvement of public spaces

8) Monitoring of corporate governance

9) Charitable gifts to vicinities or areas

**Lecavalier* - T left residue of his estate to Sussex, NB for such purposes as may be advisable and appropriate - deceased had a long involvement with community in that locale

-CT: if an area is identified and no other descriptive words are used to outline trust purposes, court will assume charitable purposes within that area were intended

Miscellaneous

Mixed Charitable and Non-Charitable Purpose (Re Dalziel + 47 of Law+Equity)

-Where the main purpose of a gift is charitable some minor or incidental non-charitable element will not invalidate it

*because it has beneficiary, which is general public, and the guardian of the general public is a sufficient guardian

47 - Law and Equity Act

Where a person gives, devises or bequeaths property in trust for a charitable purpose that is linked conjunctively or disjunctively in the instrument by which the trust is created with a non-charitable purpose, and to the gift, devise, or bequest would be void for uncertainty or remoteness, the gift, devise or bequest is not thereby invalid but operates solely for the benefit of the charitable purpose

-Severance may also resolve the problem of mixed charitable and non-charitable purpose trusts, though this may not be possible according to the intent of the donor or the structure of the gift

Re Dalziel - 1943 - CHD

Facts

-T made disposition to Hospital of 20K to be added to the existing discretionary fund and used to upkeep a mausoleum in a cemetery

Issue

-Is this charitable or non-charitable purpose? Or both? What should be done?

Ratio

-Upkeep of tomb costing over 20K necessarily involved more than a trifling amount

*here amount was large relative to the residue, and if not spent on the specified purpose there was a gift over of the fund to two other charities

-this indicates a legal requirement to use the money in this way

-Thus, whole gift failed, but it would have been upheld without the gift over, and the actual amount to upkeep the tomb in relation to the gift

PAVS seems to suggest that this case illustrates how arcane the distinctions must become to give effect to private purpose trusts - invalidity of which is based on a marginal premise

-i.e. failed because the gift over indicated that the private purpose was more important than the charitable purpose - amount was not sufficient to sustain both charitable and private purpose

Perpetuities

-Rule against perpetuities does not act against beneficiary aspect of a charity, will apply to gift to the trustee

*idea behind this is that charities are expected to endure for a long time, so holding it subject to the rule of perpetuities seems silly

-Disposition in one charity, that vests in another charity on the happening of a certain condition or event is not invalid for remoteness of vesting if that condition or event occurs outside the perpetuity period

-At CL in the absence of initial vesting within perpetuity, the entire gift is void

*for this reason, courts favour early vesting, and construe ambiguities this way - endeavour to construe an absolute immediate gift to charity with a mode of execution dependent on future events which might happen outside the perpetuity period

-Charitable purpose trusts are also not usually subject to the rule against inalienability

*thus, charities can preserve the trust as capital indefinitely with income used for purpose

Certainty of Objects and Cy-Pres

-Where the identification of a public purpose beneficiary is unclear, the court may be called upon and is empowered to provide clarity so that the trust will not fail for uncertainty

*property or gift may be applied *cy-pres* to some other charitable purpose as close as possible to the one seemingly described

-Another situation can be where it becomes impossible or impracticable to carry out the purpose of the trust - ex. trust does not earn enough income to do what it is supposed to do

*in these situations instrument may have a provision that empowers trustees to select another appropriate charity which they may apply the income

*if no such power has been conferred on the trustees, the court may direct that the trust property be used to secure some other charitable purpose

-*Re Fitzpatrick* - cy-pres order should combine the virtues of proximity, usefulness and practicability with mind to the testator's intention

-Note: 1) Trustees do not inherently possess power of *cy-pres* - court does

2) *Cy-Pres* is an attribute of charitable trusts only and does not extend to private trusts - thus, variation legislation sets the circumstances wherein courts are empowered to intervene

Re Taylor - 1888

-RULE: If upon the whole scope and intent of the will you discern the paramount objective of the testator was to benefit a particular form of charity independently of any special institution or mode, then although he may have indicated the mode in which he desire that to be carried out, you are to regard the primary paramount intention chiefly

Canada Trust Co v. Ontario HRC - 1990 - OCA

Facts

-Concerned educational scholarships that could not be awarded to persons who are not white christians

Issue

-CY-Pres?

Ratio

-Can apply *cy-pres* if the settlor had a charitable intention; court should never depart from the testator's true intention discerned from reading the instrument as a whole

*if ct decides on the basis of the evidence that the settlor would not have established the trust if it could not be executed in the way specified in the instrument, then there is no general charitable intention, and the trust fails at that point

-Here - intention of the donor was fundamentally to promote leadership through education, means of expression could be attributed to shifting cultural values over time

*factors influencing decision: 1) guy was a philanthropist who believed education was key to a strong and prosperous country; 2) there was a clause that allowed the trust income to be severed for other purposes conducive to the promotion or encouragement of education

Re Tacon - 1958 - CHD

-Discusses use of *Cy-Pres*:

1) In the case of a gift to a specific charity, where no general charitable intention is present:

A) if the charity has ceased to exist before the will is executed = gift lapses

B) if the charity is still in existence at the execution of the will = gift to charity

2) Gift for charitable purpose where there is no general charitable intention

A) will fail if purpose is too vague or uncertain that the court cannot execute it at the testator's death

Re Boyd - 1969 - OHC

Facts

-T leaves will providing a scholarship to this college

*over the years college changes names, changes to a high school, supervision of high school is changed to another board

Issue

-Cy-Pres?

Ratio

-T intended to further the work of education - fact that this purpose was now being carried in a different building and at a different school in the area was irrelevant

Royal Trust Corporation of Canada v Hospital for Sick Children - 1997 - BCSC

Facts

-T provided specific legacies for many hospitals

*also gives residuary to "crippled children's hospital in Vancouver"

-problem: no crippled children's hospital; lots of hospitals for disabled children

Issue

-Cy-pres?

Ratio

-Clear general charitable intention, so required the funds to be applied to related charities in the area

Remedies

Actions Against 3rd parties

-3rd parties can become liable as fiduciaries where they intermeddle in a trust

-3 categories:

1) Trustee de son tort: person who, though not appointed a trustee, intermeddle in trust matters

*is treated as a trustee for the purposes of breach of trust

*have to show that you are in control of the property (think Phipps and Boardman) - this is how this category differentiates itself from knowing assistance of fraud

2) Knowingly receiving or dealing with trust property for his own use

3) Knowingly assisting in a fraudulent or dishonest transaction on the part of the trustee or fraudster

*3rd party was unconscionable - can be held liable even if no benefit derived

*3 requirements - 1) Existence of fiduciary duty; 2) Breach of that duty by the fiduciary; and 3) dishonest and knowing assistance by the 3rd party in that design

-knowing assistance can be actual notice or constructive notice (*Nelson*)

**Nelson* - 3rd party received a cheque from the trustee signed "BA Potts, executor of Wm Burns deceased"

-constituted constructive notice that the money was coming from a trust since executor = trustee

-carelessness is not enough, but recklessness and wilful blindness are (*Air Canada*)

*Owner of company that breached trust by failing to set up a trust account was held to have been either willfully blind to the breach, or reckless in his failure to realize there was a breach where the owner knew of the terms of the agreement with the beneficiary, had actually signed the terms of agreement, knew of the need for the trust account, and the potential consequences to the beneficiary of not creating the trust account, even though the owner did not himself commit the breach

*wilful blindness is an objective standard - do not take into account 3rd party's subjective characteristics, such as personal intelligence or business experience

-*Twinsectra* - 3rd party was a solicitor, PC compared his actions to those of responsible and honest solicitors - this is an objective standard

**Twinsectra* - L was held to have dishonestly and knowingly assisted in the breach of trust when he refused to give an undertaking that Y's loan would be used for a particular purpose

-though L had enough knowledge to know not to give the undertaking (ie aware that there may be a breach), this level of knowledge did not constitute wilful blindness