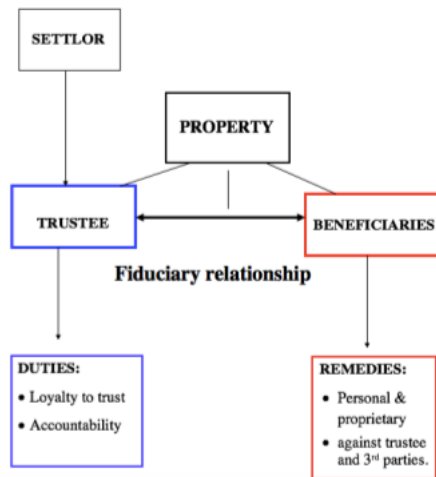


TRUSTS

- The Trust Bill 2017 has had its first readings and is currently in the select committee stage

What is a trust?



HISTORY - Scott and Ascher on Trusts 5th ed:

- Trusts are the most important exploit of Equity - for the disposition of property
 - The duties of the trustee are those that the creator of the trust chooses to impose, and the interests of the beneficiaries are those that the creator chooses to confer.
 - Creating a trust has largely been used for the creator's family, over time. Through the trust it is possible to separate the benefits of ownership from the burdens of ownership. The responsibility for managing the property is exclusively that of the trustee.
 - It is possible to make the beneficiaries interests dependent upon the trustee's discretion.
 - Trust is also frequently used in business transactions
- Debate of who has the interest in the property - however, concluding that the trustee has legal title to the subject matter of the trust and that the beneficiary has an equitable or beneficial interest in it - has never led to a civil war or anarchy.
 - The Successive Chancellors built up a system of equitable ownership over time - it was a far more flexible system than that of legal ownership (it became an instrument of law reform).
 - Hence the darker side of trusts - it became a means to evading the law. Evasion in the long run proves successful is often referred to later as reform. It was used to evade creditors claims, to secure monopolies and suppress competition, make testamentary dispositions of land at a time when land was not devisable to avoid the feudal claims of an overlord.

WHAT IS A TRUST - S Gardner An introduction to the Law of Trusts:

- The owner of the property, the 'settlor' (grandfather), transferring it to another person, the 'trustee', with the stipulation that the trustee should not treat it as his own but handle it in some way for the benefit of a third person, the 'beneficiary' (Sally)
- Trusts have been used to avoid tax liability - it would bring about the money which would naturally have been regarded and taxed as income, appeared instead as capital gain (which carried a lower tax rate). -- however, not so much now as tax rates have lowered.
- Companies make trusts too - as a vehicle for conferring pensions and other benefits on their staff.
- You can have trusts whilst you are still alive (inter vivos trust) or upon death (testamentary trust)
- You can have more than one trustee. This is the usual case so one trustee can hold the other more accountable. It is also more likely to have multiple beneficiaries - which can be arrangement concurrently or succession to one another.
- Also possible for the settlor and trustee or settlor and beneficiary be the same person.
 - Quite common for settlor and trustee to be the same person - they will be under a duty to themselves "declaring a trust".

- Settlor and beneficiary can be the same person - unusual though. This is known as a resulting trust because the benefit of the property 'results' - etymologically, 'jumps back' to the settlor. This is nowadays an accidental situation as no-one needs to purposely create a resulting trust to avoid tax. The settlor is made the beneficiary in this situation as it is the safest assumption as to what he would have stipulated for the contingency if he had thought about it.
- Trustee can also be a beneficiary - but this can only occur in trusts with more than one trustee and/or beneficiary. Otherwise the trust would consist in him owing an obligation purely to himself, which dissolves into nothing: he would in effect be absolute owner.
- Trusts do not need to have a human element as the beneficiary - it can be put towards the achievement of some purpose e.g. community donations, public services etc. These are called 'purpose trusts'. These trusts can have certain characteristics that can make them 'charitable' - Charitable Trusts Act 1957.
- Three features of the original trust remain present: a trustee, a duty and property.
- Two possibilities for identifying concepts which distinguish trusts from these other legal concepts:
 - i. Trust as an Equitable Concept
 - ii. The Absence of a Personal Interest in the Trustee

Central to a Trust:

1. Alienation of the beneficial interest in property
2. Accountability of the trustee to the beneficiaries of the trust

What is a Trust?

- Equity
- Protect assets
- Settlor - Trustee - Property - Beneficiaries
 - Fiduciary relationship (legal owner and beneficial owners)
 - Settlor dispensable (not necessary) - there may be a resulting trust or constructive trust (reasonable expectation). Trustee is also the settlor.
 - You need an independent trustee that isn't a beneficiary - because fiduciary relationship where you owe a duty. Legal duties need to be

enforceable. You would just own the property. There must be one other beneficiaries who will hold the trustee to account.

- Essential to a trust is the fiduciary relationship and property!

Two core ingredients of a Trust:

- This fiduciary relationship creates a duty of accountability.
- The alienation of the beneficial ownership.

Duties of a Trust:

- Obedience to the trust
- Prudent management of the trust property (breach of duty of loyalty if you profit from it - if not, then sue in negligence)
- Duty not to profit
- Accounting
- Even-handedness of the beneficiaries
- No conflict of interest (not to buy trust property)
- Non-delegation

Which of these duties squarely relate to the fiduciary relationship of the trust?

- No conflict - duty of loyalty and act in interest of the beneficiaries
- No profit
- Accountability (broader than just annual accounts)

Even the core duties - no conflict and no profit rule can be excluded and almost invariably excluded in every family trust.

What then can we not exclude from a trust? Duty to perform the trust honestly and in good faith - that is the minimum duty that is required of a trust.

Fiduciary relationship:

- Between trustee and beneficiary
- With respect to property
- Arising from settlors intention or operation of law:
 - Actual intention: express trust
 - Presumed intention: resulting trust
 - Operation of law: constructive trust
- Imposing duties of loyalty:

- To act personally (non-delegation of that duty)
 - Honestly and in good faith
 - In the interest of the beneficiaries
- Enforceable in equity:
 - Personal remedies
 - Proprietary remedies: tracing

Reasons for Trusts:

- Protect assets from: Creditors; Spouses/ partners; Asset and means testing; IRD!
- Provide for others: Vulnerable family members ; Education; Create successive interests; Pension schemes; Charities
- Manage business or organisations: Farms; Trading trusts; Charitable organisations

Law Commission Review:

- Trustee Act old - 1956
- Administrative problems
- Dispositive problems
- Sloppy administration
- Standard of conduct

Trusts law was referred to the law commission for review - trusts were becoming a lark, far too many of them, people didn't understand what they were about, trusts were undermining the relationship property regime.

Principles underpinning reform:

1. Trusts as robust instrument with core duties
2. Fit for NZ context & consistent with overseas trust law
3. Respecting individual's right to hold and transfer property as they wish

New Trusts Bill:

- Applies to express trusts
- Not a code: Flexibility of equity preserved
 - Not intended to replace common law and equitable principles
- Simplified procedures - e.g. currently if a trustee retires or resigns from a trust but the trustee doesn't hand over the legal title to property (land), they can't then

transfer to the new trustees - have to apply to the HC for an order vesting the property to the new trustees.

- Modern default provisions
- Core characteristics set out
- Mandatory and default duties listed - mandatory duties are those that you cannot exclude - compulsory with every trust.
- Relationship with other statutes

THEORETICAL BASIS OF A TRUST:

- John Burrows - Contracts: *"In a trust, one person (the trustee) holds property on behalf of another (the beneficiary) and is bound to deal with it for the benefit of that other. While the trustee is the legal owner of the property, the beneficiary is said to have the beneficial, or equitable, ownership of it"*
- Underhill and Hayton Law on Trusts and Trustees - Property: *"A trust is an equitable obligation, binding a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries) of whom he himself may be one, and any one of whom may enforce the obligation."*
- The difference is - whether the trust a property construct or obligation construct?
- Law Commissions Recommendations Trusts Bill 2017: defines Express Trusts under cl. 5
- Trusts Bill 2017: s12 Meaning of Express Trust, s13 Characteristics of Express Trust, s14 Sole trustee cannot be sole beneficiary

Is it Proprietary Species or Contract Species?

a. Proprietary Theory:

- Structure for holding property for the benefit of others - property is essential to the trust. Legal ownership is vested in the trustee, while equitable ownership is vested elsewhere. This is what entitles beneficiaries to trace misappropriated property, rather than having personal remedies.
- The terms of the trust run with the property ownership - much like paying rent

- The beneficiaries hold the trustees to account, because the trust property is theirs - beneficiaries acting together can bring a trust to an end (**Saunders v Vautier 1841**).

b. Contractarian Theory:

- Property theory poses problems for discretionary trusts. Beneficiaries of trusts generally have no property in the assets of the trust until the trustees exercise their discretion in favour of the beneficiary (**Gartside v IR Commissioners 1968; Kain v Hutton 2008 SC etc**). These cases held that beneficiaries of the trust had at most a "hope" of benefiting from the trust. If they do not have equitable ownership it cannot be said that the split between the legal and equitable estates is fundamental to a trust.
- Trusts are not proprietary but obligational in nature. John Langbein regards the trust as a bargain struck between the settlor and the trustee, but where the obligations imposed on the trustee are enforceable by the beneficiaries. Patrick Parkinson states the trustee is the owner of the property but is subject to obligations to deal with the property for the benefit of others.

c. Other:

- Perhaps it is a hybrid construct with elements of both contract and property. The question is: what aspects are proprietary in nature and which ones are of an obligational nature and why.
- Sui Generis? Bit of both - something that is a sui generis construct - proprietary and contract constructs

Trust Bill -

- **s 12 Meaning of express trust:** "For the purposes of this Act" "express trust has certain characteristics in s 13"
- **s 13 Characteristics of express trust:**
 - (a) "fiduciary relationship" "trustee holds or deals with property" "for the benefit of beneficiaries" (property like)
 - (b) trustee accountable for way the trustee carries out the duties imposed on the trustee by law" (obligationary like)
- Statute is neutral? Doesn't advance the debate about whether it is property or contract like.

• **S 15 Creation of express trust:**

- (a) "by or under an enactment"
- (b) "by settlor who clearly and reasonable certainty -
 - Indicates and intention to create a trust; (intention)
 - Identifies the beneficiaries (subject matter)
 - Identifies the trust property (objects)
 - Commences when trustee holds property on trust
- Any model trust deed - should tell you what the trust is intending to do

CLASSIFICATION OF TRUSTS:

a) Classification by Intention:

- i. **Express Trusts:**
 - Owner of assets intended to create a trust in respect of those assets. That intention may be expressed in clear terms via executing a trust deed OR inferred by words and conduct.
 - **Paul v Constance 1977:** words and conduct intended the funds deposited into a Bank account in his name to be held for the benefit of himself and his de facto partner. There was never a trust deed but what was obvious from the circumstances that he did intend to create a trust - he intended the money for both of them. The only way she could benefit was if the funds in bank account were held on trust - argued that there was an express trust. She could claim not all of the assets were his - half belonged to her in equity. Then the wife inherited the rest.
- ii. **Constructive Trusts:**
 - Imposed by law because the circumstances demand the legal owner should be subject to duties concerning its handling. The Court construes a trust from the conduct of the parties and surrounding circumstances.
 - **Gillies v Keogh 1989:** Court held constructive trust could be imposed if the applicant had made contributions to the property owned by the respondent and both parties reasonably expected to share the beneficial ownership
 - **Re Hallett:** Constructive trust imposed to give effect to tracing claim. These are commonly referred to as institutional constructive trusts as they give effect to a pre-existing interest of the claimant in the property.

- Also have remedial constructive trusts - where it can be imposed for a wider range of reasons going beyond the recognition of a pre-existing right in the property. (Not universally accepted in NZ).

iii. **Resulting Trusts:**

- Give effects based on presumed intention of the settlor. Two situation in which this arises are described by Lord Browne-Wilkinson in **Westdeutsche Landesbank Girozentrale v Council of London 1996:**
 - First, where Laura makes a voluntary payment to Katie or pays for the purchase of property which is vested either in Katie alone or in their joint names, there is a presumption that Laura did not intend to make a gift to Katie: the money or property is held on trust for Laura or in joint purchase in shares proportionate to their contributions. (THIS IS ONLY A PRESUMPTION)
 - Secondly, where Laura transfer property to Katie on express trusts, but the trusts declared do not exhaust the whole beneficial interest
 - This dictum has been cited in several NZ cases including **COA - Crampton-Smith 2011, 2012** in which a resulting trust arose over land owned by the respondent in favour of her brother. She tried to rebut the presumption by arguing her brother had advanced the purchase price as a loan to her, but that was rejected in the absence of any evidence of a loan agreement or repayments being made.

b) **Classification by Creation:**

- Within the category of express trusts is inter vivos trusts and testamentary trusts. These depend on the time the trust was created - during life or upon death of the settlor/testator.

c) **Classification by Object:**

- Express trusts are also classified by the objects of the trusts - public or charitable trusts AND private trusts.
 - Private trusts need beneficiaries who can enforce the trust whereas charitable trusts do not. Both can be created inter vivos or testamentary.
- Express private trusts are further split into fixed trusts and discretionary trusts.

- Fixed: no discretion to the trustee in regard to distribution of assets. In this case the beneficiaries are said to have beneficial ownership of the trust property
- Discretionary: gives the trustee discretion and the nature of that may vary. In this case the beneficiaries ownership depends on the trustees exercising their discretion in favour of any one of the beneficiaries. They have at most hope.
 - This is most common in NZ private trusts.

THE THREE CERTAINTIES:

Essential to express non-charitable trusts are three certainties: certainty of intention to create a trust, subject matter and objects. Cl 15 Trusts Bill 2017 purports to restate this.

1. Certainty of Intention:

Settlor or Testator must have intended to create a trust. If there was no certainty that a trust was intended, the "trust" is void for lack of certainty.

a. Precatory Trust - Re Burton 1965:

- Question was whether Burton's homemade will was an absolute gift to the widow or a trust conferring on the widow merely a life estate.
- In all of the cases discussed, the absolute gift was cut down to a life interest is the mention in some form of words of the death of the first taker.
- In Halsbury's Law of England: "a gift which is in terms absolute is not to be cut down to a trust estate or to a life estate with a trust for disposal thereafter by mere precatory words, unless the will as a whole shows an intention to impose an obligation".
- After a further line of cases - there is no case where an absolute interest has been cut down to a life interest unless there are present words such as "on her death", "in the event of death" and so on.
- In this case: the widow took an absolute interest in the whole estate.
- Will: "I give and bequeath all my property unto my wife"
- "When she is finished with it. I desire that it will be divided equally between my two children"
- Did Mr Burton intend this clause to create a trust?
 - Certain that he intended that.

- She could use during her lifetime
- But is not a trust - Precatory trust; the words are sufficiently uncertain to impose a legal obligation on Miss Burton to the children.
- It's a wish - imposes at most merely a moral obligation not a legal obligation

b. Sham - Ben Nevis Forestry Ventures Ltd v Commissioner of IRD 2008 SC:

- No trust if the arrangement is a façade or false front. The transaction is set up to look genuine, but in fact the parties never intended the transaction to take effect according to its terms. The trust deed is nothing other than a false front intended to mislead others into thinking the assets referred to in the deed are held in trust.
- Tax avoidance case in relation to a forestry investment scheme
- A sham in taxation context is designed to lead the taxation authorities to view the documentation as representing what the parties have agreed when it does not record their true agreement. The purpose is to obtain a more favourable taxation outcome than that which would have eventuated if documents reflecting the true nature of the parties' transaction has been submitted to the Revenue authorities.

Armitage v Sanctuary Propvest:

- The issue is whether it is reasonably arguable that Mr Armitage is the beneficiary of a constructive trust in relation to the property, where Sanctuary Propvest is the trustee.
- Following factors indicate lack of intention to set up a genuine trust/ company structure:
 - a. Circumstances of the creation of the trust and purchase of property arguably at direction of Mr Armitage, at a time when he was prohibited from owning property.
 - b. Mr Dunn's lack of business knowledge, specific property purchase and lack of knowledge of Mr Crump, lack of substantive involvement. He played no role in the trust or company other than to sign documents on request. He was the puppet.
 - c. The signing of bank cheques and possible forging of signatures suggested by Mr Dunn.

- d. Mr Armitage's control of the actions and affairs of the company
- In essence, Mr Dunn's whole involvement appears to have been façade to hide Mr Armitage's control. The corporate veil should be lifted bc the company was a sham. Then whether the Sanctuary Trust was also a sham? They set up the trust not intending for it to operate as a trust at all - but rather as a vehicle which Armitage would not only control but treat as his own without reference to the others. Mr Armitage is treated as the beneficial owner of the property.
 - Conclusion: it is arguable that the company as well as the trust was set up to enable him to won property whilst bankrupt hence setting up structures that were never intended to operate according to their legal tenor. These issues arising, it is therefore seriously arguable that the Official Assignee has an interest in the property through Armitage's beneficial interest.??
 - *Establish whether the intention was to create a trust?*
 - Should caveat over property legally owned by Sanctuary Propvest Ltd lapse?
 1. Was Sanctuary a genuine company or a sham?
 - Sham
 - Shares in Sanctuary Propvest beneficially owned by Sanctuary Trust
 2. Was the Sanctuary Trust a genuine trust or a sham?
 - **Sham:** the document is a façade, a false front, concealing the true common intention of the parties
 - Relevance of conduct?

Whose intention is relevant?

- Certainty of Intention: What the settlor intended and it has to be known by the trustee - they have to know they are the trustee. They need to know the property is held on trust. They need to have a common intention to create a trust.
- Paul v Constance?
 - Mr Constance's - Settlor's intention
 - How does this case differ from Burton/Armitage? The settlor and the trustee are the same person.
- Re Burton?
 - Deceased Mr Burton - Testator's intention
- Armitage v Sanctuary Propvest?
 - Settlor + trustee
- [Clayton v Clayton 2016 NZSC 29]
 - Modern Clayton - (not tracing). World famous

- Example of a case where the powers reserved by Mr Clayton to himself that such really there was no trust.

Essential to express non-charitable trusts are three certainties: certainty of intention to create a trust, subject matter and objects. CI 15 Trusts Bill 2017 purports to restate this.

2. Certainty of Subject Matter:

- Property is essential to a trust.
 - Existing Interest in Property: Legal or equitable; Vested or contingent; In possession or future
- Certainty: CI 15 Trusts Bill: Trust must identify trust property clearly and with reasonable certainty.

HAI Ford and IJ Hardingham Trusts, Commentary and Materials (1990) 297:

- For a trust to be established, the obligation of the trustee must be one with respect to property. Any recognised interest in property may constitute the subject matter of a trust. The interest may be legal or equitable, vested or contingent, in possession or future, defeasible or indefeasible. And that interest may be an interest in any sort of property be it tangible or intangible.
- Expectancies are not capable of immediate disposition and thus cannot form the subject of a trust. They can only form the subject of a promise to create a trust and such a promise, as we have seen, is only specially enforceable in equity if given in return for valuable consideration.

Palmer v Simmonds (1854) 61 ER 704:

- Ms Rosco's testamentary trust was invalid because it imposed a trust over "the bulk" of her estate. The Court held that Ms Rosco had not designated the subject matter of her trust with sufficient certainty.
- Testamentary trust - gave his residue to Thomas Harrison
- **Gift of residue** to Thomas Harrison " for his own use and benefit, as I have full confidence in him that if he should die without issue, he will.... Leave the bulk of my residuary estate to William...."
- This would not be enough to impose an obligation any more than it did in Re Burton - under today's law it would likely fail under certainty of intention to create a trust.
- Too uncertain as to what the subject matter of the trust is "bulk"

Commissioner of Stamp Duties (Queensland) v Livingston [1965] AC 694:

- The Privy Council held that for purposes of estate duty (succession duty), which was then payable in Australia, there was no liability until the residuary estate had been determined.
- The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realisation are very far from being interchangeable terms.
- At the date of Mrs. Coulson's death, therefore, there was no trust fund consisting of Mr. Livingston's residuary estate in which she could be said to have any beneficial interest, because no trust had as yet come into existence to affect the assets of his estate.
- 1/3 residue of husband's estate gifted to widow.
- Husband's estate not fully administered when Widow died
 - In Australia and in NZ until 1993 - when you died and your estate was worth more than a certain amount of money, you had to pay an extra tax (both countries abolished it). Bc they found the cost of retrieving the estate duty was significantly higher than any estate duty they would receive. This was happening bc people was dying without assets duty to creating a trust in their lifetime. The underlying duty is important. Commission of estate duties failed to collect the tax in the widows estate, bc it was uncertain what she was going to get until it was finally administered.
- Once they have completed the administration and have a total amount - they now hold that amount of residue on trust for the beneficiaries. That's the point at which the administrator becomes a trustee.
- The administrator needs to wind up the estate for the beneficiaries.
- What the court is saying: the administrator is in a position like a trustee - a kind-of-trustee, he has an obligation to deal with those assets for the benefit of the beneficiaries.
 - Similar to **Clarke v Ramez** - "a sort of trustee" as the vendor; nonetheless is subject to certain duties, they have a primary duty of taking reasonable care/ preserve it so the buyer gets what they bought. They are not free to deal with it entirely as they wish as subject to certain duties - same here.

- CSD wanted to include widow's share of her husband's estate in her estate for estate duty purposes
 - She didn't beneficially own the assets of the residue.
- Why did CSD fail?

Livingston reflects the property theory of trusts, focussed as it is on the subject matter of the trust and unwilling to recognise that estate beneficiaries may have any rights in regard to the residue prior to administration of the estate being completed other than the right to due administration of the estate. The next case shifts the focus and is often cited in support of the obligational theory of trusts. Why is that? How does it differ from Livingston?

Hunter v Moss [1994] 1 WLR 452 (EWCA):

- Mr Moss had declared himself to be a trustee for Mr Hunter of 5% of the share capital of Moss Electrical Company Ltd (MEL). Accordingly, the Court made an order that Mr Moss had held 50 shares out of the total of 1000 shares in MEL on an express oral trust for Mr Hunter
- Mr Moss appealed that decision on three grounds: first, that there was no declaration of trust; second, that there was no certainty of subject matter, because the 50 shares had not been identified out of the total share holding, and third, that there was an error in the calculation of compensation ordered. The Court of Appeal upheld the High Court's finding of a declaration of trust
- In the present case there was no question of an imperfect transfer. What is relied on is an oral declaration of trust. Again, it would not be good enough for a settlor to say, "I declare that I hold fifty of my shares on trust for B," without indicating the company he had in mind of the various companies in which he held shares. There would be no sufficient certainty as to the subject matter of the trust. But here the discussion is solely about the shares of one class in the one company.
- **Issue:**
- Was this a gift or a trust? *Jones v Lock*
 - To establish a gift: intention to make a gift and delivery - no delivery here (failed to transfer shares to Mr Hunter).
 - To establish a trust: Lock says you can't do this. Gift is complete divesting of your asset- you hold onto nothing. However, if you declare a trust then you are transferring beneficial ownership but not the legal ownership. The intention to create a trust is very different from intention to create a gift.

- Mr Moss declared on several occasions he said he was holding it on trust for Mr Hunter. When dividends were paid on those shares he paid those 5% shares to Mr Hunter.
- Hence, intention to create a trust was established.
- Was the subject matter certain? Why?
 - Which shares were they? What 5%? The court said that does not matter bc there is only one type of share.
 - It is sufficiently certain to constitute or comply with the requirement. This would not have been the case if the company had different types of shares.
 - More relaxed attitude to certainty of subject matter.

Consequences:

- Would *Livingston* be differently decided after *Hunter v Moss*?
 - In *Livingston* we are unsure of the residue, but in *Hunter* we know it is a fixed number of those shares.
 - *Hunter* would still have invalidated *Livingston*
 - What we would have known is what portion of the residue *Livingston* was supposed to get - it could have been nothing.
 - This is where we see the courts relaxing the certainty requirements.
 - CI 15 Trusts Bill - only needs to be "reasonably certain" not absolutely certain.
 - Moving away from the property theory towards the obligation theory - *Hunter* is often cited as the obligational theory. Mr Moss was subject to obligations that he himself created for the benefit of Mr Hunter.
 - One example of the difference between the proprietary theory and the obligational theory.

Proprietors of Wakatu v AG [2017] NZSC 17:

- Two of the Supreme Court judges (Elias CJ and Glazebrook J) relied on *Hunter v Moss* to find that the Crown's arrangements with the Maori Proprietors of Wakatu were subject to an express trust.
- Part of the deal was that 10% of the land would be reserved for Maori (the Tenth) and that none of the land occupied by Maori would be taken. The Crown breached its obligations by not allocating all of the Tenth and by including occupied land as part of the Tenth. It also alienated some of the land

to a Bishop for educational purposes, which would not have been solely for the benefit of Maori.

- The lower courts did not accept the argument that the arrangement created a trust or otherwise a fiduciary relationship between the Maori tribes and the Crown.
- Supreme Court overruled the Court of Appeal, finding that the arrangement gave rise to a fiduciary relationship. Elias CJ and Glazebrook J also held that the arrangement met the three certainties for an express trust.
- Relying on *Hunter v Moss* they held that the non-allocation of some of the Tenth's did not defeat the trust for lack of certainty of subject matter. The parties had identified a process for allocating 10% of the land surrendered and that was sufficient for purposes of the certainty requirement. The other three judges of the Supreme Court did not address this point.

3. Certainty of Objects:

- A private trust is a relationship, not an entity. The relationship is between the trustee and the beneficiaries. The **beneficiary principle** states that a trust must have one or more beneficiaries. This makes sense, because you can't owe obligations to yourself; there would be no accountability framework
- CI15 Trusts Bill: An express trust must clearly and with reasonable certainty identify the beneficiaries or permitted purpose.
- Why?
- Exceptions:
 - Charitable trusts: charitable purposes, public benefit and unfortunate if people couldn't feel like they could actually give funds to charities
 - For a trust to be charitable - has to be for relief of poverty, educational purposes, religious purposes. Also has a public benefit.
 - *Re Denley* type purpose trusts: links in with what cl 15 is the permitted purpose. Purpose trust is established for a purpose, and the question is who's going to enforce it
- **Perpetuity Rule:**
 - All trusts, except charitable trusts, must vest absolutely in beneficiaries within a prescribed period of time.
 - Only charitable trusts can be created in perpetuity (trust that goes on forever)
 - Trust period: The period of a person who is alive plus 21 years - affectively two generations

- Perpetuity Act - 80 years (1964 a long time, but now its about 2 generations)
- One of the proposals in the trust bill is to repeal the perpetuity rule altogether and replace it with 125 years.

Objects of trust:

1. Recreation for employees (cl. 2c)
 2. Recreation of others allowed by trustees (cl. 2c)
 3. For hospital in remainder
- Is this a valid trust?
 - Not a trust for beneficiaries, is a purpose trust but there are people who you can readily identify who can enforce this trust and hold the trustees to account. Doesn't fall far from the beneficiary principle
 - If so, has it changed the beneficiary principle?
 - Doesn't fall far from it, just an extension
 - Would **Morice v Bishop of Durham** now be valid?
 - First one (morice) , the property is not disposed of, the second (re Denley) the beneficiaries
 - *Morice v Bishop*: viewing the trust as a property construct
 - *Re Denley*: not worried about that, looking at accountability, obligations, who can enforce this trust.
 - Still fail for its reason, still don't know who the beneficiaries are.

Discretionary trusts:

- Who are the beneficiaries?
- How and when are they to benefit?
 1. Income to my wife and remainder to my children equally.
 - Income to the wife and capital to the children and getting that when the wife dies. On her death, their duty is to divide the capital equally between the children. Trustee needs to know who the children are.
 2. Remainder to my friends equally
 - Hard to see who qualifies as friends. Duty is impossible to carry out.

3. My shares on trust to distribute between my children in such proportions as my trustees shall determine
 - Trust power, trustee must do something
4. My shares on trust to pay as much of the income to my children as my trustee may determine in their absolute discretion. Any undistributed income to be capitalised
 - Mere power - no obligation to distribute
 - Mere power as compared to trust power is what is disgusted in **McPhail v Doulton**
 - The trustee must consider whether or not to distribute, if they don't do this they would be acting capriciously which is breach of trustee duties.

a. The Beneficiary Principle

- The general rule is that a trust must have one or more beneficiaries, who can enforce the trust. In absence of this, the trust is usually void.
- Charitable trusts are an exception to this rule, as they are established for a purpose rather than for a benefit of a person.
- The charitable trust must be for a public purpose, for the public benefit and capable of being controlled by the court.
- If the trust is not charitable, then there must be an identifiable person who can enforce the trust - this is known as the "beneficiary principle"

Morice v Bishop of Durham (1804):

- Leading authority for this principle. The case concerned the residuary gift in Ann's 1801 will which she left to the Bishop of Durham to dispose of "to such objects of benevolence and liberality as the Bishop in his own discretion shall most approve of".
- Since the Bishop was clearly not the beneficiary, the question was whether the objects of "benevolence and liberality" were charitable so that the gift could be enforced as a charitable trust.
- It was held that the residue cannot be said to be given a charitable purpose as the trust is too indefinite to be disposed of to any other purpose
- Gift of residue in Ann Cracherode's will to the Bishop of Durham to dispose of: "To such objects of benevolence and liberality as the Bishop in his own discretion shall most approve of".

- Is this a gift or a trust? A trust - as it was not for the gift of the Bishop
- If it is a trust, is it valid? Who is going to supervise him to hold the Bishop to account? Who are the beneficiaries? The objects?
- None here, unless it is a charitable trust. If not, what is it?
 - Is the bishop under a duty for charitable purposes - "objects of benevolence and liberality"
 - The court held: not charitable as the trust is too indefinite to be disposed of to any other purpose. Taking a narrow view of what charitable trust is.
 - Then what is it? A resulting trust for the donor - for Ann's estate; intestacy.

Leahy v AG of NSW [1959]:

- Where a large grazing property in NSW was left on trust "for such order of nuns of the Catholic Church". It was conceded that the phrase "orders of nuns" were not charitable in the legal sense. The court held that the trust could be saved from invalidity only if charitable orders were selected.
- Contemplated nuns are not seen as a public benefit and are not charitable - therefore an invalid gift. There is legislation however that allows the court to save a gift if the gift has an overall charitable purpose. The gift to nuns clearly had a charitable intent, so it would survive so long as it went to only religious orders.

b. Purpose Trusts

- Recently, a second exception to the beneficiary principle has been admitted. The type purpose trusts where this exception was formulated.

Re Denley's Trust Deed, Holman v Martyn [1969]:

- Concerned a block of land that was to be held on trust for recreational and sport purposes.
- Two arguments: one that the trust is void for its uncertainty or two that it is a purpose trust - a trust providing recreation which is void on the beneficiary principle
- "Where the trust is expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle"
- Concluded: individuals for whose benefit the trust was designed were capable of ascertainment at any given time and that the trust was not void for uncertainty of objects.