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| CH 3 Express Trust  |
| **Express Trust**: one that is created intentionally –conscious act of a person to transfer property to one party, stipulating that property is to be held for the benefit of another* 2 ways: inter vivos & per mortis causa
* 3 certainties must be satisfied

**Rule: No trust is created UNLESS the property in question has VESTED with the Trustee** — i.e Trustee must have legal title to all property meant to be used to serve welfare of benef — * No vesting → no trust even if 3 certainties accounted for
 |
| **Vesting**: variables to determine whether there’s vesting — 1. Form of dealing — trust settlement/deed OR declaration of trust (gift? contract?)
2. Type of property — land, securities, money, chattels, debt
3. Opportunistic circ. — **Strong v bird** — later event that enable vesting
 |
| **Forms of transacting** 1. Direct transfer of property by settlor to Trustee
2. Contractually dealing w/ eachother
3. Declare self as trustee — **automatic constitution** — **ALWAYS** consider this one, even for disposition (*100k to Benj*)
4. Incomplete gift of asset
 |
| **Automatic constitution:** a settlor **declares him/herself as trustee** of a property for the benefit of another, so long as there is **CLEAR EVIDENCE** that settlor intended to **be legally and unconditionally bound**! **(Carson v. Wilson).*** Legal title remmain w/ T-or → Vesting of legal title in trustee is not an issue
* must be sufficient evidence of INTENTION to become the trustee of the property for a 3rd person ***(Carson).***
* While oral trusts are permitted in BC (**Law and Equity Act, s.59**), it’s better to get Trust Deed in writing.
 |
| **Elliot v Elliot Estate (2008) (OSCJ)** — Physical Transfer NOT req for personal declaration **F:** Testator left disabled dependent daughter out of will w/ intention providing through trust; evidence adduced that arranged for other children contribute from their inheritance into trust fund; * children also claimed that mother intended a GIC that was being held in the estate to be part of the trust fund - done through personal declaration of trust

**I:** whether or not a certain asset fell in Deceased’s estate of owner —if not then less tax!**C:** Mother had declared self to be trustee – transfer was not necessary as property already vested in Mother\*note how easy it can be to declare for trust — there was no writing here |
| **Gift vs. Trust:** A court will not “discover” a trust where the facts of the situation demonstrate it was intended as a gift – must entail intention by settlor to be unconditionally bound! |
| **Glynn v. Commissioner of Taxation (1964) Australia** - *illustrates power of self declaration where vesting isn’t an issue —* Beneficiaries need not be aware of the existence of a trust!**Facts**: Father buys shares issued to himself “as trustee for 2 sons”, certificate signed by father “as trustee for sons”. But, company share register only shows father as owner of the shares.* The father collected the dividends, and never told his sons about the “trust”.
* Father dies, tax man argues shares NOT held on trust by dad, but LE with remainder for sons (thus to collect tax).

**Issue**: Trust or life estate w/ remainder? **Decision**: Transfer was **valid** declaration of a trust (no life estate) – many other people knew about the trust, lots of evidence a personal declaration was made; intention to be legally and unconditionally bound. **Notes**: Retention of dividends did not negate the trust, did not create LE – may mean Father was in breach of trust if payments never received.* *if the trust is created by the simple act of a settlor declaring a trust of identified goods as being held henceforth by the settlor on trust for (i.e., the settlor intends to act as trustee) a named beneficiary, then a valid express trust will have been created by the declaration of trust.*
* \*Kids have *in rem* rights in the asset even though this was given in the form of declaration of trust many years ago without them even knowing about it
 |
| **Carson v. Wilson (1960) Ont. CA** — **Trustee/Settlor MUST demonstrate INTENTION to be immediately and unconditionally bound!** **Facts**: During life, Settlor assigned deeds and mortgage interests to benef, but gave them to the lawyer with instructions not to make the transfer effective until his death. — settlor **would retain the profits** during life**Decision**: Ineffective testamentary disposition. → not a trustSettlor was not a trustee over the assignments, and no indication he intended to be bound immediately and unconditionally. |
| **Transfer to third parties** Where 3rd party = trustee — legal title must be Transferred (vested) in Trustee in order to complete trust (**Milroy**)* Req for transfer/vesting depend on type of property involved
* \*Equity will not perfect an imperfect gift at law (**Milroy**) — but will treat **as effective,** an intended T-fer where donor has done everything he is able to do in ordinary course of business to transfer gift to a trustee (**Re Rose**)
* donation is **imperfect/**incomplete where there is only the stated promise to **make the gift — not auto constitution here**
* **Need** intention to give + execution of intention through transfer (immediate & unconditionally bound)
* If donor is bound under an enforceable **contractual** promise to deliver the property → title is taken to have vested by EQ
 |
| **Milroy v Lord** — legal title must be Transferred (vested) in 3rd party Trustee in order to complete trust **F:** Medley = settlor, execute trust in favour of niece (later married to Milroy) — Lord = Trustee* Prop = shares in a company — could only be transferred by **registering** the change of ownership in company books
* Settlor had to transfer to Trustee/Lord’s name (he must have legal title). — settlor did not → lord was not vested with title
* But: Lord also had a power of attorney over the estate. — **also acted as if Trust existed** — passed div onto benef

**D:** No change in register meant no transfer of legal title to Lord. → **imperfect trust →**  no trust created → no effective gift to Milroy as beneficiary — Lord wins — Lord held as executor in favour of settlor’s heirs* (lack of) vesting crucial here - lord had power of attorney, but there was no instruction from settlor to company about change in name
* Private declaration + ppl treated as if trust existed → no good because legal title never transfered

Notes: While 50 shares were not part of trust property, Court held that shares purchased by Lord in a Fire Insurance Company were part of trust property, as Lord owned legal title! |
| **Ratner v LH** — *illustrates general gifting principles w/r/t shares — verbal agreement not enough — agreement w/* ***Milroy*****F:** Son transferred shares to mother b/c suited tax planning. Understood that at some point in future would transfer shares back to him — Used income from shares for her own medical care* 10 years later son convinced mom to execute document gifting shares back to him – she refuses

**D: Verbal understanding that shares would be regifted found to be unlawful restraint*** **Re-gifting of shares in writing was not adequate to complete gift** – shares would have had to be actually conveyed
* Shares conveyed when name of transferee entered into Register of Shares of company
 |
| **Re Rose — Exception to Milroy —** Once settlor done everything in power to divest ownership & execute transfer → law will treat transfer as complete **F:** Man transfers shares in company to wife and son to create Trust – deceased executed transfer of shares, but company didn’t register the transfer in books until 3 months later.* \*Transfer was executed more than 5 years before death, but registered less than 5 years — tax implications — Tax if within 5 years

**R**: De facto loss of control over the gift asset by the donor is the key factor for a completed gift* **execution of transfer = effective transfer**, despite not being official: transferor done everything in power to give effect to transfer → lost control → perfection — if transfer is delayed by routine of operation of process → gift effective, perfected
 |
| **Nitting v Mordo** – In **BC torrens system**: completion of Form A + handing of transfer to trustee sufficient to effective transfer w/o formal registration at LTO * similar to MacLeod (1L) — but results diff (duplicate was not available so no gift)
* transfer had been fully given to transferee despite no registration
* Have to show intention to be **immediately and unconditionally bound** and had to have done enough to evince loss of control
* **Here:** duplicate was prob in LTO → just handing over transfer was ENOUGH
 |
| **Strong v Bird** — incomplete gifts to executors — help executors only * **Rule**: When an **incomplete gift** is made during donor’s lifetime, and donor appoints the would-be recipient as executor of estate → the vesting of the property in the donee AS EXECUTOR may be treated as completion of the gift
* Applicable for both real and personal property.
* **Strong v bird** doesn’t apply to a promise (w/o consideration) to give property at a later date
* Probate document (not the will or the trust instrument) has the legal effect of vesting deceased’s property in the executor/donnee
 |
| **Strong v. Bird** (1874) UK **F**: Stepmother loans money to Bird in exchange for lower rent; later forgives debt orally without consideration. * Forgiving of the debt — whilst a promise, had not been completed with formalities
* Bird later named executor of stepmom estate → Legal title vests in Bird ( now both creditor and debtor with respect to the same loan!).
* \*Testator’s intention did not change prior to death
* Intended legal recipient became legal owner (as executor).

**D**: intention of stepmother = voluntarily continued to pay full rent → debt foregiven despite gift imperfected during life of settlor* Stepson was trustee (had legal title in the property) → sufficient for property to be considered vested.

**Rationale:** It would be ridiculous for executor to sue himself to recover the debt – makes sense, but somewhat surprising given the restrictions in trust law re: self-dealing and conflicts of interest. |
| **Hilliard v Lostchuk** (1993) (Ont) — application of **Strong v Bird****F:** Mother sought to give son sub-divided parcel of land; pursued zoning to allow this, but died before it was completed* Son appointed executor of her estate — Other heirs claimed that gift was imperfect

**D:** Requires evidence of continued intention – here the ongoing pursuit of the zoning application sufficed* Harry was appointed executor, step into shoes of Mom and makes transfer — equity perfected gift
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| Chapter 4: The Three Certainties  |
| **Strategy**1. *Find certainty of words — precatory or not? Intention to create trust require imperative language imposing obligation*
2. *Subject: type of property, amount & value — at time trust created? What if uncertain? Fail or Resulting trust?*
3. *Object: Conceptual uncertainty? (fixed, power, or discretionary? Which test?) Evidentiary uncertainty? — what powers/discretion does trustee have?*
	1. *If Trust power — what about Baden II paths? — Don’t knows are treated as No’s*
 |
| **3 Certainties:** In order to be valid, all three certainties MUST BE SATISFIED! — Otherwise, trust is VOID FOR UNCERTAINTY1. Certainty of **words** – Intention to create a trust
2. Certainty of **subject matter** – The trust property or trust assets
3. Certainty of **objects** – Identity of beneficiary(ies)
* Trustee continues to hold legal title, but on ART in favour of the settlor (IRC v. Broadways Cottages).
 |
| **1. Certainty of Words/Intention** — must be an obvious intention that the trustee is placed under imperative obligation to hold the property **for the benefit of another**. — settlor’s conduct must evince clear intention to establish trust **TEST**: certain and immediate INTENTION to create a trust? — language sound more like a **Request OR a Direction?** * Word “trust” need not be used, but the **imperative connotation must be CLEAR**! — **Substance not form**

**Issue**: whether intent to form trust w/ obligation son trustee OR out & out gift (precatory terms mere hopes/exhortations by transferee that asset be used assist another) –* Intent simply benefit 3rd party other than transferee is too general for constitution of trust — Must be **actual intent** create trust: usually gauged by intent impose obligation on transferee hold property benefit 3rd party

\*If transferor’s intention is **uncertain** as creation of a trust → **no express trust** → person with legal title/in control of property is also entitled to it beneficially — **out and out** |
| **Out & Out gifts —** not trust — trustee has no obligation **Trusts**: imposes obligation on trustee — must confer beneficial interest to another party **Precatory Trust** — NOT TRUST — presumption of absolute gift → AVOID (I wish, I hope, I request) — **Hayman** — need to convey more than a mere WISH or MORAL obligation  |
| **Hayman v. Nicoll (1944) SCC —** Precatory words (In full confidence) does not create trust **F**: Testatrix: ‘I gift money to daughter in full confidence she will hold it according to my wishes”. * BOTH testatrix and daughter dead now — sibling claim that daughter’s executor holds money on RT for testatrix’s estate.

**D**: No semi-secret trust –at most a precatory trust (“wish”). Daughter took the money as an abs gift, NOT as a trustee.* “in full confidence”= not necessarily words that connote a trust — based on late 19th century trend → precatory

**Notes**: SCC noted change in meaning of “in full confidence” – under English law, it implied a trust. — In Canada, it merely implies a hope by the testatrix that her wishes be followed (“precatory words”). |
| **Royal Bank v Eastern Trust Co (1951) — Conduct of Benef can indicate if there is a trust** **F**: Crossman owed money to RBC; assigned rental income from property to bank* Later sold property; agreement included provision: “Stetson is to hold deed of [property] until Crossman raises a Mortgage on [property] to repay taxes and insurance premiums, also [judgment] and indebtedness at [bank]”

**D**: **How** you pursue your rights in relation to a potential trust is important; Bank sued in personam for a garnishment order on the rent income – this combined with other conduct was enough to **show that it wasn’t a trust**, didn’t act in manner that allowed for it to be characterized as beneficiary |
| **2. Certainty of Subject Matter – Trust Property/Assets****TEST**: BOTH the TYPE OF PROPERTY and the AMOUNT/VALUE of beneficial interest MUST BE IDENTIFIED w/ sufficient exactness **AT THE TIME** the trust is created — otherwise trust **FAILS →** Trustee holds both legal & benef interest (**Beardmore**). — court **lean** towards finding certainty * **Cannot have a wait and see** approach to subject matter — due to trustee’s onerous responsibilities — they must know what they’re dealing with in order to give effect to the intentions of the Settlor.
* **UNLIKE** uncertainty of intention: if trust fails for certainty of assets + transfer completed → transferee **holds asset on a resulting trust** for transferor
* **Semantic** Uncertainty: “reasonable income” can’t be ascertained
* Trust will fail if trust property is certain, but beneficial interest is not (**Sprange v.Barnard**): 10k shares in trust, some shares to A, rest to B → property clear, but benef interest is not
* **Evidential** uncertainty: no means of adducing evidence for ascertaining

To ensure subject matter is certain1. Provide reference to specific **piece** of property (ie: LTO description of land).
2. Provide reference to specific **fund** or fixed amount/proportion in a specific fund.
3. Provide a **formula** to determine the amount of the trust.
 |
| **Re Beardmore Trusts (1952) Ont. —** TEST for certainty of subject matter **F:** Separation agreement required husband to create a trust for children. Deed states: “transfer 3/5 of my net estate to kids. Transfer not to take place until I die”. Father died. **I**: Was the subject matter sufficiently certain? **D**: NO – subject matter unclear – “3/5 of net estate” was not legally ascertainable!* **Can’t have ‘wait and see’ approach.** Here, we have ‘wait and see’ how much is left after father died. Note: “3/5 of residue of my estate” probably would have been okay. “**Residue**” clarified that it’s everything that’s left.
* *Pavlich: Not clear as to why this is the rule; doesn’t it make more sense that certainty of subject matter measurement should be key date when beneficiaries entitled to payment?*
* If trust assets (type/amount of property) not described sufficient clarity **then** would be trustee vested w/ legal and equitable title
* If trust assets described sufficiently, but uncertainty relates to **QUANTUM** of benef interest (e.g., shares transferred to A, some for benefit B and rest for C) then → trustee holds trust for settlor as **resulting trust**
 |
| **Sprange v Barnard (1789) UK —** Beneficial interests declared MUST BE CERTAIN in order to raise a trust**F**: Testatrix: “I desire as my last will and testament. I bewill to my husband $300, stocks, etc; all that is remaining in stock that he doesn’t have use for, to be equally divided between my brothers and sisters” – TRUST for siblings. **D**: **Too uncertain** to make an effective trust – property **not sufficiently identified** by “remaining part of what is left” – husband got legal and beneficial title of $300 annuity. **Notes**: Is this really a good enough reason to invalidate the trust? It would be easy enough to see how much of annuity remains after trustee (husband)’s death. |
| **Burke v. Hudson’s Bay** **F:** In dealing with employee/beneficiary entitlement to surplus monies, a constantly fluctuating sum in a pension trust fund may or may not crystallize * Pension — employees take w.e the benefit is “defined” to be
* If trustee is incredibly trustworthy in his or her administration — income > entitlement to benef→ gets SURPLUS — Point of contention here
* Pension holder wants surplus → argue their assets were used to generate it
* Employer wants it — trust set up only to give defined benefit → the rest belongs to employers
* \*Surplus varies depending market condition — Court said this should be seen as a “floating trust”
* Here it **belongs to pension holders** — BUT **only because** they’re DECLARED surplus — you can also not declare it and use it as rainy day funds
* “ It appears to me that entitlement to surplus on termination [of the pension plan trust] is analogous to the entitlement of a residuary beneficiary. The vesting of actual surplus in the employees is contingent on a) the plan terminating, b) there being an actual surplus once the liabilities are satisfied and c) the employee's surviving the date of the termination of the trust.”
 |
| **Re Golay (1965) (UKCH)**How is floating trust different form w.e the previous cases outlawed?* the manner of creating the subject matter of the trust will be the determining factor.
* Problem of the floating trust is that it is a suspended trust in which a 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 a trust to a named beneficiary.
 |
| **3. Certainty of Objects –** certainty of the identify of the beneficiary* With the EXCEPTION of charitable trusts (as articulated in **Jones v. The T. Eaton**), all trusts must have a person or group of persons as a beneficiary! — see Ch 5 for Charitable trusts
* **RULE**: The beneficiary must be ascertainable for the court to enforce the trustee’s administration of a trust
* Test for certainty depends largely on the legal **vehicle** used to disposed of the property to the beneficiary. → determine whether: 1) fixed trust; 2) trust power (discretionary); 3) power simpliciter
 |
| **Fixed Trust:** fixes beneficiary by name, description or as a member of a group **+** income or benefits they are to receive * Rigorous level of certainty required – Trustee MUST provide for beneficiary/members of the beneficiary class.

**TEST FOR CERTAINTY** – Must draw a ‘COMPLETE-LIST’ of ALL BENEFICIARIES in order for certainty of objects to be validly expressed in the trust document! **(IRC v Broadway Cottages Trust).** |
| **Discretionary Trust (Trust Power)** – ‘...must distribute to one or more of my children’ — Has aspects of both Powers and Trusts. — MUST select a beneficiary, but MAY select who.* Trustee is REQUIRED to exercise a DISCRETION in selecting beneficiaries from a class **and/or** determine the quantum of interest distributed to members selected from that class.

**TEST FOR CERTAINTY** – Trust valid if it can be said with certainty that any given individual **‘IS or IS NOT’** a member of the class of beneficiaries with concern for administrative unworkability (**McPhail v Doulton (Baden No.1)**). |
| **Powers of Appointment (simpliciter)**– *‘may distribute’** Authority to distribute property that is not his (ie: **they do not necessarily have legal title**).
* The Trustee/donee of power of appointment **need only CONSIDER** whether to distribute. — no requirement to distribute to anyone
* Cannot compel donees of power of appointment to act – Courts will not intervene unless the donee acts capriciously (**Re Manistry’s Settlement**)
* NOTE: Presence of **a gift-over** in a trust document **implies** a settlor’s intention to create a power (how could settlor mandate anything if there was possibility of a gift-over?)

**TEST FOR CERTAINTY** – Trust is valid if it can be said with certainty that any given individual ‘IS or IS NOT’ a member of the class of beneficiaries (**Re Gestetner**) |
| **(i) Classification of Powers**1. **General Powers** — Wide scope of discretion; no qualification on discretion.
	1. EG: “I give you Blackacre, and you may use it for the benefit of the world”.
2. **Special Powers** — Narrower scope; discretion qualified in some way.
	1. EG: “...may give it, but only to my relatives”.
3. **Hybrid Powers** (Intermediate Powers) — Mix of both – general power, mixed with an exemptive clause.
	1. EG: “to anyone (general), **except** my brothers and sisters (narrow)”.

**(ii) Precatory Trust vs. Point of Appointment*** Precatory Trusts = out-and-out gift (‘this is yours, but please give some to Aunt Mable’);
* **Power** does not bestow legal or beneficial title **but** only the ability to determine who will receive any beneficial title.

**(iii) Trusts vs. Powers*** **Powers** — discretionary — donnee has obligation to “consider” using power — court won’t interfere as long as donee has “considered” and **not act capriciously/arbitrarily/display bad faith**
* **“Dispositive** power”: ability to exercise discretion and bestow trust property, either as income or capital upon benef
* “**Administrative** Powers”: — Special type of power that gives the Trustee discretion in their use of trust property to **respond** to unforeseen and changed circ.
	+ \*Discretionary powers may also be **circumcised** by settlor of trust → **trustee must know** what they can/can’t do
* **Trust — refers to** Mandatory obligations – Trustee MUST distribute according to the wishes of the settlor – if not, risks being sued for breach of trust! — Courts **will intervene** to give effect to the intention of the settlor.
	+ Trustee is under a fiduciary obligation to exercise the appointment as described and distribute to the beneficiaries.

**(iv) Discretionary Trusts vs. Powers**1. Fiduciary Nature - Discretionary Trust is still a trust – has a fiduciary obligation. — **Powers lack** this characteristic.
2. **Administrative unworkability** [“Evidentiary uncertainty”] — **major distinction** between power from discretionary trusts — despite same test for certainty
	1. not an issue for powers (**Hay’s Settlement Trusts**)
	2. BUT it can make a discretionary trust void.
 |
| **4. History:** * Complete list used to apply to fix AND discretionary trust — IS/IS NOT for *powers*
* Growing use of trust powers (discretionary trusts) in large pension plans made reliance on the COMPLETE LIST test untenable
* Proponents of complete list for trust powres — absence of complete list means only subset of benef class can be identified → benef can’t terminate trust
* BUT the rigidity of the COMPLETE LIST TEST undermined testator's intention – IS OR IS NOT test provides needed flexibility.
* Baden 1: IS/IS NOT test for Trust power — trust power require practicality
* \*if Trustee of trust power doesn’t allocate → court can replace him
 |
| **5. Conceptual Uncertainty, Evidential Uncertainty, and Administrative Unworkability*** **Conceptual Uncertainty** – Can you identify what the group actually is?
	+ Satisfied through the COMPLETE LIST and IS OR IS NOT tests
	+ If this is not satisfied, the trust/trust power(discretionary trust)/power of appoints is VOID!
* **Evidential Uncertainty** – Whether evidence can be adduced to **determine** if an individual is part of an enumerated class of beneficiaries.
	+ EG: Where number of beneficiaries is hopelessly large -“All the residents of Greater London” (Lord Wilberforce in Baden I).
* \***POWERS** **will not fail due to administrative unworkability/evidentiary uncertainty**. (**Re Hay’s Settlement**)
* **Trusts/Trust Powers** (discretionary trusts) – **can be VOID for administrative unworkability!**
 |
| **Baden II — Facts**: Trustees of Baden I came back to court for assistance into how to administer the trust. — **Trust power — (**Re Baden 1 said Is/Is not test) * Executors could determine who IS a relative, but not who IS NOT. — What does it mean to be a “relative”?

**D: Courts will endeavour to find certainty** (all three judges found certainty, with varying consequences on the administration of the trust!)**Stamp** J’s **Rigid approach**: BOTH conceptual and evidential certainty required! (re: trust power). → i.e can’t have a class where ppl may potentially be “dont know’s” → **RUBBISH** * + Here, “relative” means “next of kin”, which is not difficult to prove.
	+ Description of object that tolerates a category of potential benef of whom it is uncertain whether they meet class description is NOT ALLOWED

**Sachs** J’s laissez faire approach: Only conceptual certainty is required; no evidential certainty just means NO distribution to that person! — **don’t know’s are treated as no’s —** A “maybe” merely means no distribution to that person; **Megaw** J: Trust is valid so long as certainty works for a “substantial number” of beneficiaries; **can have a substantial number of maybe’s as long as there are large number of YES’** * + A trust power can withstand maybes, but they must be in proportion to the members it can evaluate with certainty; use common sense
 |

Review the practice questions at end of this ch and determine whehter something goes into “strategies”

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| CH 5 Purpose Trust |
| Def: express trusts in which **no actual person is identified as a specific beneficiary**, but the trust has been constituted to meet the desire of the settlor/testator to apply trust assets/funds **to advance a special purpose.**Focus = what is a beneficiary – note the distinction between private purpose & charitable purpose trusts. |
| **Non-Charitable (private) purpose trusts** are **VOID** because there’s no benef to enforce trust — Astor/Beneficiary principle |
| **Re Astor’s Settlement Trusts - 1952 - CHD** **F**: 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” **I**: Is this trust administrable? **R**: Trust is **void** because only beneficiaries are persons who are **unascertainable** → difficult who could initiate proceedings to enforce the trust |
| **Exceptions to Private Purpose Trusts (Big 4)****1. Animals and 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 (usually enough time to administer to the animal)
* Usually there is a residuary beneficiary to 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 — There Usually will be a **residuary beneficiary**
 |
| **2. 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 not allowed, 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

**Denley Rule**: **Purpose trust + defined class of objects** = outside the mischief that the prohibition on non-purpose trusts attempts to stop (no beneficiaries to enforce it) * You have a purpose explaining why you’re giving the gift — but you can’t gift with a purpose without beneficiaries
 |
| **Re Denlies - 1969 - CHD****F:** Testator wanted to give money to facilitate a sports ground (**recreational purpose**) – * instead of creating a trust around this purpose, he created a trust that would suit the employees of a company (**identified actual people**) – who would be the ones who could use the particular facility he was going to fund
* “where the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is general outside the mischief of the beneficiary principle”
 |
| **Keewatin Tribal Council v Thompson - 1989 - MQB** **F**: 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** = to provide residential facilities, but to do it in a way that avoided property taxes Court
* Indirect **beneficiaries** of the the trust **=** 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
 |
| **3. Gift for Unincorporated Association to Further Objectives****Definition:** members joined together by contract around common purposes — “clubs” — must be more than an **amorphous** group of individuals — “current members” = okay (**Cocks**) — “current & future members” — **amorphous** = fail * Political parties are often not good enough because of the **frequent** change of membership
* Testator/Settlor can find a compatible **club** to their objective and leave money to the UA
* \*Your gift can specify amendments to the “contract”
* Have to be careful because the **rules of the organization** determine how the money is utilized
* Common situ.1: T leaves funds to official in unincorporated association with the intention that it be shared in common between **current** members = **valid** (**Cocks**)
* Common Situ. 2: Gift to official in the association and 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 → member who dies or resigns from the club has no claim to the gift
	+ PAVS - a roundabout way to make a purpose trust - it is effective — BUT your money may be used up quicker
 |
| **Re Retchers -1972 - CHD*** Gift to society, before it was received society dissolved and amalgamated 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 Russell, 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**

**Court**: 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** **F:** Gift was to an order of nuns which the trustee could select — given to contemplative nuns = non-charitable gift **I:** 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? **D:** 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
* Not a charitable trust because contemplative doesn’t fit public benefit of charitable — no benefit to the world having 2 dozen nuns praying for the world
* **Lack of individual beneficiaries (continuing into future) + lack of charitable purpose → fail**
 |
| **Re Lipinki’s Will Trust Gosschalk v Levy — g**iving to “person” but looks like purpose — bizzare case**F**: 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

**I**: Is this a private purpose trust that is valid?**R:** 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 purpose = what is supported by the association → trust funding that purpose = okay
* Beneficiaries of the association could enforce the purpose

\*\*\*PAVS - case has been criticized — 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\*\*\* |
| **Bottom line: GOTTA be concerned about what your project is, who to give, what your client want** **Mixed purpose (p. 125)*** **Attaching a non-charitable purpose onto a Charitable purpose**
* Eg. give money to a charity **determinable** if an instruction to maintain a non-char purpose is not complied with, **combined with** a gift over of the money, on determination to another charity
* Non-charitable part has to be **relatively small** — **Re Dalziel** (non-char part was way too big, that portion alone could eat up the entire gift)
 |
| **4. Private Purpose Trusts as Powers*** Powers of appointment: **doesn’t require l**egal persons to be objects for a valid trust
* 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 isn’t exercised, the money becomes **held on a RT** 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
 |
| **B. Charitable Trusts*** A form of express trusts = all rules apply w/ **exception of certainty of objects** — **there are no** specific individuals as beneficiaries
* **Cy-pres rule** applies — to keep charity alive where there is tolerable uncertainty
	+ \*not available when there are giftovers — cy-pres is used to give effect to testator’s intention when current mechanisms are frustrated — see what testator desires — giftover indicates intention → no role for cy-pres
* Crown = enforcer of trust
* Legislation like the Income Tax Act rely on case authority that interpret Statute of Elizabeth for classifying organizations as charitable
* certainty of purpose must be **clear** (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. Admin of trust assets can take the form of a permanent endowment — income is generated from investments and used to further the specifically identified/declared charitable purpose
2. Funds are put into assets that are then deployed by the trustees to fund specific purpose charities or foundations
* Political purposes to 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
 |
| **Analysis**: determine whether it falls within one of the 4 categories form **Pensthal** — Then see if there’s “public benefit”* Is it open to public? Look at size of group — all matters of **advocacy**
* How court fits into Pensthal will depend on values
 |
| **Charitable Purpose:** 4 categories of Pensthal Relief of **poverty** — Advancement of **Education** — Advancement of **Religion** — **Other** purposes beneficial to community |
| **Native Communications Society of BC v MNR —** identified the preliminary considerations to determine whether a particular purpose can be regarded as charitable - **accepted 4 categories** from **Pensthal**1. Charitable purpose must address appreciable section of society who are **not relatives** – purpose must be beneficial to the community — come within“spirit and intendment” of Statute of **Elizabeth**.
2. Whether a purpose would or may operate for the public benefit determined 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** — after satisfying at least one of **Pensthal** → find public benefit component * PB Distinguishes charitable purpose from private purpose
* Charitable purpose trust cannot be a private benefit masquerading as a public benefit

\*Trust set up to alleviate **poverty**, advance **education**, or advance **religion** are regarded as PRIMA FACIE benefiting public — **Rebuttable Presumption**  |
| **1.Charitable trust must address an appreciable section of society - must be truly public*** Must have sufficient number of potential beneficiaries — benef are not linked to each other by relationship to a common person — can’t be neglible

**2.Charity must exude a public element - this will rely on advocacy skills*** **Oppenheim** - charitable trust failed because its purpose = 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 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
* **Gilmour** - gift on trust to 20 contemplative nuns does 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
* **Re Scarisbrick** - relations = broad enough → suffortive of charitable trust

**Charitable purpose must promote the public wellbeing or policy as determined by the court, not the settlor*** **National anti-vivisection:** Not necessarily charitable simply because settlor of members of society believe that what is doing is for public benefit
	+ Acts are not charitable if Court doesn’t think it benefits community
	+ May be enough for Ct to find charitable act do not offend policy **provided that** purpose conforms to at least one of the 4 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) **F**: T bequeathed money for those in family that, in the opinion of her son and daughters, were in needy circumstances **I**: Does this serve the public widely enough? **R**: Court: Could be held that by the word “**relations’** included relations in an 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** - just show charity is beneficial to public **F**: 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 and promoting “pro-choice” stances

**I**: Is purpose invalidated where it is politicized? **R:** 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 |
| **The Penthsal categories are FIXED —** but general principle is ever changing — cultural values change — so **changes to criteria of admission** is permitted**1. 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 → For aged/disabled— valid even when not necessarily poor
* 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** **F**: Society's purposes = giving info and advice to members of the public and researching and disseminating information on population control **I**: 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 **R**: Met the **public benefit** test, and although charity assisted the poor, it did not qualify under this particular heading **because it was not directed to the relief of the poor** * Noted the fact that there is no means test in terms of clients who came in (i.e. rich people could use services)
 |
| **2. Charitable trusts created for advancement of education*** Education is widely defined - not confined to academic subjects — but not all knowledge qualifies
* 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**: broad definition of education — doesn’t have to be university or even high school level “So long as info 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 — PAVS** - case demonstrates importance of meeting the public purpose criteria**F**: T had bequeathed collection of art into a charity with the intention of enabling education around artistic pieces **I**: Did this satisfy the requirement for “advancement of education” **R**: Gift was **not for public benefit** - expert evidence concluded 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 =/= educate, but to further the repute of family — collection of art is **worthless**
* 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?*)
 |
| **3. Charitable trusts created for advancement of religion*** Moving target — Until the 20th century there was a strong Christian bias
* English court focused on “worship” as connection
* **South place:** essential attributes of religion are faith and worship
* Advancement of religion contains organizations/trusts to erect/maintain holy places, organizations/trusts promoting religious observances, etc.
* Public component of PB test is more clear - charity must apply to a relatively large group of persons
	+ **Gilmour** - there must be come 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 can relate:1. Relief in a supernatural being or principle
2. Acceptance of canons of conduct correlated to that belief
 |
| **Re South Place Ethical Society - 1980 - CHD —**  **absence of worship → fail****F**: Objects of society = the study and dissemination of ethical principles and the cultivation of rational religious sentiments **I**: Whether SPES was a charitable body **R**: Problem here was that society did not engage in “worship” in the sense of adoration of some numinous entity — **absence of worship!*** Mere appreciation (worship for humanist religions) is not good enough

\*\*PAVS - decision followed United Grand Lodge of Ancient Free and Accepted Masons of England 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\*\* |
| **4. Trusts for other purposes beneficial to the community*** **Wider** category that brings in new ideas — depends on **general cultural idea**
	+ 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
* **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
* Use some **creativity**: sports → health → medical → hospital → other purposes!
* 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 health
6. Protection of animals (Re Moss)
7. **Improvement of public spaces —** bridges, ports, havens, causeways — public works
8. Monitoring of corporate governance
9. Charitable gifts to vicinities or areas

\*\*\*Can’t be political  |
| **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 localeCT: 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 |
| **Mixed Charitable and Non-Charitable*** L&E act s.47: if person gives property in trust for charitable purpose that’s linked to a noncharitable purpose instrument + the gift would be void for uncertainty or remoteness→ the gift is not invalid but operates solely for benefit of charitable purpose
 |
| **Certainty of Objects and Cy-Pres*** Public purpose beneficiary is unclear — court called to provide **clarity** so trust won’t 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
* Also, 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 not → court may direct trust property to be used to secure some other charitable purpose
* Settlor must have a charitable intention in order for court to apply Cy-Pres — **would you have created the trust w/o this invalid portion?**
	+ If invalid portion is inherent to purpose of trust → no good
	+ If portion is simply mechanism to implement the trust and separable from clear intention to further charitable objectives → cy-pres
* **Re Fitzpatrick** - cy-pres order should combine the virtues of proximity, usefulness and practicability with mind to the testators 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** — paramount objective test **Rule**: If **paramount objective** of the testator (of the will) 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 — What is the fundamental intention?****F**: Concerned educational scholarships that couldn’t be awarded to persons who aren’t white Christians **I**: CY-Pres? **R**: 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 settlor would not have established the trust if it could not be executed in the way specified in the instrument → no general charitable intention, and the trust **fails** at that point
* **Here** - intention of the donor = 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:
	1. If the charity has ceased to exist before the will is executed = gift lapses
	2. 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
	1. Will fail if purpose is too vague or uncertain that the court cannot execute it at the date of testator’s death
	2. If disposition is impractical at day of disposition → gift fails altogether — next of kin take
 |
| **Re Boyd - 1969 - OHC** **F**: 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 **R**: 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** **F**: 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

**R**: Clear general charitable intention, so required the funds to be applied to related charities in the area |
| **Sidney and North Saanich v BC** - 2016 — cy-pres extends beyond failure of object — to failure of admin matter **F**: Trust for: community cultural, athletic and recreational purposes of residents in an electoral district * Original surplus to be applied for maintenance for parts of land where it was no longer appropriate
* Asked for amendment of terms and additions of others — not using cypres to recast purpose, but to prevent impeding of the purpose of the charitable trust

**R**: Cy-pres doctrine **extends beyond remedying failure of objects (to failure of admin matter)** — **threshold req** for invoking cy-pres = finding that carrying out existing trust terms is either impossible or impractical— can be interpreted broadly → does not require absolutely impracticalCy - empowers court to introduce or adjust admin trust machinery to accommodate contemporary conditions so charitable purposes can be sustained * **Policy:** charitable objects should not be frustrated by trust’s admin provisions
 |

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| CH 6 Formalities, perpetuities, revocation  |
| **Main difference from Fully-Secret Trusts:** * With **Half-Secret Trusts**, everything must be done **before the Will is made**
* With **Fully-Secret Trusts**, everything must be done **only before the time of Testator’s death. — don’t necessarily even have a will**
 |
| **Fully Secret Trust:** benef in the trust = **trustee** for some secret benef — “trustee” must have knowledge of this role b4 death of testator — \* “actual benef” isn’t even hinted in the will * If testator made no will: the trust **operates on reliance** that named-benef/trustee assured testator that he’ll use property for benefit of secret unnamed benef → won’t give effect to fraud
* Can’t rely on wills legislation to benefit just cuz actual benef was not named
 |
| **Requirements for a Fully-Secret Trust**1. Testator **INTENDED** that the beneficiary named in the will it to hold the legacy in trust (as trustee) for the real beneficiary (See **Ottaway v. Norman**)
2. During the testator’s lifetime, he **COMMUNICATED** to named beneficiary that he intends the named benef to receive property on testator’s death as a trustee, in trust for the real benef
3. The named beneficiary (ie: the trustee) **ACCEPTS or ACQUIESCES** to the testator’s proposal to act as secret trustee (See **Re Boyes**)
	1. Must accept proposal before; although instructions may be given after. — if trustee doesn’t accept → takes gift **on out and out**
	2. **Must be told names of beneficiaries** before testators death (although can be done after the creation of will) (**Re Boyes**) — otherwise secret trust fails & resulting trust is created for A’s estate

**\*Secret Trusts still subject to the 3 Certainties: Even where reqs of a secret trust are met, certain aspects of the trust can be found invalid due to uncertainty of subject matter.**  |
| **Ottaway v Norman (1972) UK —** enclosed under req 1**F:** Father left house, money, and residue of estate to CL spouse (w/ secret trust for his son) — * Spouse agreed to be “primary Donee” — but in her will she left ½ of her estate to son (Plaintiff)
* Son sued spouse’s estate

**I:** did she agree to hold property for benefit of son? A: Valid intention, acceptance and communication of a secret trust * Son got house, but not money → because it was uncertain whether “Everything” or just house to be held on trust
* Here Req for secret trust met, but subject matter was uncertain!
 |
| **Re Boyes (1884) —** failure to communicate name of true benef **F**: Testator left property to his solicitor “absolutely”; solicitor had drafted the will, appointed as trustee to provide for a woman and child the testator did not want to mention in the will.* Testator failed to give timely communication of the trust (never mailed letters).

Decision: Instructions never communicated, therefore secret trust is INVALID.* Solicitor held the property as trustee for “next of kin” (as per Wills Act).
 |
| **Half-Secret Trusts** — **Benef named = actual trustee AND this is stated in the will** (unlike fully secret) — True benef still unnamed — Can’t be created by intestacy: unlike fully secret trust **Requirements for a Half-Secret Trust**1. Testator **must** communicate to the named beneficiary that he is to hold the property in trust for the true beneficiary **before** the Will is made! (In **Re Keen**) (as opposed to fully-secret, where communication must take place only before settlor dies).
2. Testator **must** **communicate** to the named beneficiary the identity of the true beneficiary **before** the Will is made (no apparent rationale for this difference – but suggested rationale by Lord Sumner in **Blackwell v. Blackwell**).
3. B must indicate his acceptance before or at the time the Will is made!
 |
| **Blackwell v Blackwell (1929) HL** **F**: Disposition in Will “for purposes indicated by me to them...to such persons indicated by me as they see fit”.— Before the Will is drafted, 3 people agree to hold legacy on trust for lady and her child, who testator does not want named in Will. — but address was provided **D**: Gift was made on trust, but no beneficiaries specified – Court holds that trust was fully communicated to testator at time of will’s execution.* Parole evidence is allowed to enable proof of the identify of the beneficiary indicated in the will – this is allowed because the evidence does not serve to vary the will, it simply gives effect to testator’s wishes.
* Viscount Sumner “It is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the law of trust”.
 |
| Rectification S.59 of WESA: Court can use s.59 to rectify and give effect to testator's actual intention disclosed by extrinsic evidence a) an error arising from an accidental slip or omission,b) a misunderstanding of the will-maker's instructions, orc) a failure to carry out the will-maker's instructions. |
| **General rules pertaining to legality of qualifying conditions or limitations**: Some conditions are VOID 1. Compliance with public policy
	1. Eg. **leonard scholarship**: can’t go to ppl who are not christians — anything that requires benef to meet specified racial, gender or sexual orientation benchmarks = invalid
	2. Restraint on marriage are against PP only if they’re intended to promote celibacy or induce a divorce
2. Compliance with legal standards of certainty in the wording used to create the contingency
	1. What does a “good catholic” mean? — How jewish does one have to be/not be?
	2. For **cond sub:** where you **can’t see precisely** and distinctly what the qualifying condition is → void and struck out rendering fit unqualified
	3. For **cond precedent**: is/is not test applies — from power simpliciter
3. Presence or absence of undue restraints on alienation — Deal with in chapter 8
4. Consequences of void conditions — Influenced by Jarman

**Land** devised upon void cond: cond **precedent** → devise is **void** — Cond **sub** → devise **absolute****Personal** estate on void cond Cond **precedent** → civil has allowed absolute in some cases BUT CL says gift and cond = void Cond **sub** → devise abs |
| **REVOCATION BY THE SETTLOR – CANNOT UNILATERALLY TERMINATE TRUST*** Once a Trust has been created, the **Settlor leaves the picture completely** – **cannot** unilaterally **undo** what they have executed (See **Bill v. Cureton**)
	+ Settlor may include powers in the express trust for the amendment or revocation of the trust.
	+ The Settlor may also revoke the trust **before** it is constituted!
* **Without a reservation of this power, only the beneficiary** under the rules of **Saunders and Vautier can terminate the trust!**
 |
| **Bill v. Cureton —** can’t undo trust once created unless revocation power**F**: Settlor gives assets to Trustee for benefit of “husband, children”. — LE for self, then LE for husband, then to children * The Trustee accepted – the transfer was perfected.
* However, the Settlor didn’t actually end up marrying or having any children – wanted to undo the trust.

**D**: Settlor **couldn’t undo** trust – if she died w/o a husband or children, trust assets would revert to her estate. — but she can’t have money now * She’d need cooperation of **all other** benef to collapse trust, but can’t since they don’t exist
* Pepys MR: a voluntary settlement, where the trust is actually created, is **binding** upon the author…— not entitled to the assistance of this court to release herself from it....”
 |
| **Metro Toronto Pension Plan*** *City/settlor couldn’t control over trust fund that had been transferred irrevocably to trustees:*
* Central element of creation of trust = transfer of property
* Essence of a revocation = removal of property or assets from the trust — Absent a power of revocation, the transfer of property to a trust is absolute
* The settlor disposes of the property **irrevocably** to the trustees in the same way that one makes an outright gift
* Once the trust assets are received by the trustee they are held for the benefit of the beneficiaries and the settlor loses all right to control the property
 |
| **Schmidt v Air product: even a broadly worded amending power does not imply power to revoke — amendments mean change, not cancellation**  |
| **Nolan v Kerry:** employer may not remove pension contributions in trust unless a power of revocation has been expressly included in the trust at time of its inception — no settlor intervention w/ pension funds unless permitted by specific clause |

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| CH 7 Resulting Trust  |
| **Implied /resulting trusts DO NOT DEPEND on the expressed intentions of a settlor.**In a RT, the equitable interest **jumps back** to the grantor/settlor/testator’s estate while the legal interest is held by the grantee as trustee.* Implied/resulting trusts: Trusts based on unexpressed, but presumed intention.
* Constructive trusts: Trusts imposed by law, irrespective of expressed or implied intention.

**CONCEPT OF THE RESULTING TRUST*** Traditionally, both ARTs and PIRTs were regarded as examples of trusts giving effect to the common intention of the parties
* EG: the settlor’s presumed intention NOT to give beneficial interest to the Trustee.
 |
| **TWO CATEGORIES: ART and PIRT.**Distinction first laid down by Megerry J in **Vandervell’s Trusts 2** (1974): ARTs serve to prevent UNJUST ENRICHMENT of the beneficiary by receiving a beneficial interest greater than initially intended.* Unjust enrichment prevented by having beneficiary hold legal title of assets in question with ART in favour of settlor.
* No need for “presumed intention”, occurs AUTOMATICALLY (Re Vandervell’s Trusts)

PIRTs are based on PRESUMED INTENTION not to give beneficially in circumstances of gratuitous, or “voluntary” transfers.**Doctrinal path in Canada set in assumptions around common intention and NOT unjust enrichment.** **CRITIQUE OF DISTINCTION:** Brown-Wilkinson JL in **Westdeutche Landesbank v. Islington:*** justification under unjust enrichment gives the transferor a proprietrary interest in the assets of a bankrupt transferee → preferring the transferor over other creditors in the insolvent estate.
* I.e should proprietary relief be given to someone as a victim of unjust enrichment that he or she actually instigated, by transferring the LEGAL TITLE to the transferee?
* Should the remaining equitable interest of the transferor act in rem and in preference over other creditors of the transferee who is almost certainly bankrupt?
 |
| **AUTOMATIC RESULTING TRUST (ART)*** **Idea**: situation where property appear ownerless — equity fills the gap by assigning title to person with most acceptable claim
* Arise where settlor transfers property to Trustee on an express trust for the beneficiary, but the trust **FAILS TO TAKE** (uncertainty of objects, etc) **OR** does not exhaust all the available beneficial interests in the trust property.
 |
| **(1) Situations Where ARTs Occur****(i) Transfer of legal title to trustees in a TRUST THAT TURNS OUT TO BE VOID*** Results with express trust fails for one of the **THREE CERTAINTIES** (**Broadway Cottages**).

**Where a trust fails due to uncertainty of objects (or any of the three certainties), the would-be trustee holds legal title in an ART in favour of the Settlor!**  |
| **Broadway Cottages****F:** not possible to draw up a complete list of all objects in a discretionary trust = trust declared invalid. **D**: Court orders that trustees hold legal title on ART for benefit of settlor. |
| **(ii) Transfer of legal title to trustee WITHOUT DISPOSING FULLY OF ALL THE EQUITABLE INTEREST****GIFT**: If disposition is abs gift (not only in trust) → trustee may keep the remaining surplus of equitable interest.  |
| **Re West —** Trustee not getting surplus **F**: Testatrix left property in trust for sale to pay debts, funeral expenses, legacies.* Trustees performed as directed; claimed there was a surplus.

**D**: Next-of-kin got surplus. Trustees hold legal title, but on resulting trust for testatrix’s next-of-kin, who hold equitable estate.* **Trustee shouldn’t get EQ title in surplus (still hold legal) unless clearly disposed to him**
* No intention to give trustee here — more clear that trustee shouldn’t get the surplus
 |
| **Lord Eldon in King v. Dennison — highlighted two types of transfers:**1. A gift of assets personally but from which existing debts must first be discharged (as in Re Foord)
2. A gift that is subject to certain purposes described as trusts (as in **Re Wes**t).
* In type 2, beneficial interest of surplus belong to heirs.
 |
| ART requires initial EXPRESS TRUST: Assets will be treated differently depending on the structure of the transfer scheme:* If **pension** structured as a trust, then surplus will depend on trust law and purpose of trust.
* If **pension** plans structured as a contract, then surplus subject to contract/plan provisions.
 |
| **Schmidt v Air Products Canada Ltd. (1994) (SCC) — pension****F**: Two companies (Stearns-Roger Canada Ltd and Catalytic Enterprises) merged to form Air Products, which then dissolved and had $9million surplus in combined pension plan.* Company claimed surplus was held for it on ART. — Beneficiaries claim surpluses was theirs.

**D**: Court examined documents creating each pension plan – looked for terms dealing with dispositions of surplus.* Surplus attributed differently under each pension scheme.
* Catalytic plan was created as a trust (**defined contribution)**, and as such pension plan belonged completely to beneficiaries (money stayed with them).
	+ defined contribution plan not possible for it to have a surplus
* Stearns plan was created under K — since no trust was created the surplus of funds reverted back to company.

**Notes**: Similarly, if there is a pension short-fall, then beneficiaries are left with a deficit.* Pensions must now have provision explicitly dealing with fund surpluses.
 |
| **(iii) Transfer of property to another, subject to a specific LIMITATION or CONDITION PRECEDENT WHICH HAS NOT OCCURRED or BEEN ACHIEVED****Quistclose Trust**: **Where primary condition or purpose on loans fails to be executed, the borrower holds the money as a resulting trust in favour of the lender/transferor.**3 REQs: **1)** There is a transfer of property that is **2**)Subject to a specific purpose, condition, or limitation **3)** Which has not been fulfilled Usually arise in context of loans * By placing condition on loan, lender has equitable interest (**right of reverter**) to the money.
* As such, if condition not met, the borrower holds the money in trust of the lender (**ART**).
* **Twinsectra** — by establishing a specific purpose → the parties intended to make a relationship fiduciary → RT
* Not the same as ordinary loan — **Threshold/key = whether party intended the money to be at free disposal of recipient (Twinsectra)**
 |
| **Barclays Bank v. Quistclose Investments (1970) (UKHL)** **F**: Loan was made for specific purpose that wasn’t carried out – money was only to be used to pay a dividend (condition precedent on funds).* RR borrowed from Q to pay dividends —RR goes bankrupt b4 dividends paid out
* Q argued for money – while recipient holds legal title to money, it owns beneficial title.
* RR had account w/ BB, opened for the purpose of loan with Q
* RR also owed money to BB → BB wants to keep the money to offset money owed

**I**: Was money to fall into general estate of recipient business to pay off creditors, or does it revert back to grantor through a resulting trust? **D**: **Q trust is created where** creditor has lent money to debtor for a **particular purpose** or base on a particular condition, and the debtor has **used the money for some other purpose** (ie: has not met the condition).* Any money inappropriately used can be traced and belongs to debtor.
* Property did not become part of general property of the borrower.
* Specific purpose of the loan **must be** **fully identified by the lender to impress a duty** on the borrower to use the amount solely for the purpose agreed to by the lender.
* Lord Wilberforce: Explained result in **TWO-STEP analysis:**
1. Primary duty – tantamount to trust for specific purpose. (which kinda not allowed…)
2. Secondary duty – equitable, works like an ART – Where primary duty fails, the secondary duty (the ART) arises.

**Summary**: when primary trust (an express trust) fails, → ART activated **Notes**: Q trust gives another means of privileged protection to a creditor (besides obtaining security in the form of a mortgage). This raises a few points, however:* Exception to general rule that a lender has no interest in money once advanced to a borrower or its agent.
* Gives the lender an **equitable interest in the money** – a priority claim over other creditors in the event of insolvency. — Lender has in rem right in the property.

**Essay Topic**: Is this a case of the doctrines of contract and trust being improperly conflated, leading to a lender having an in rem right to money under a loan contract?* To me, no, it’s just a use of trust principles to enforce the terms of the contract;; easier remedy that having to seek damages (may not be any left). Proprietary remedy warranted.
* Particularly if the borrower becomes bankrupt – gives creditor preferred status fro funds advanced for an unfulfilled objective (if it’s a condition on the loan).
 |
| **Twinsectra Ltd v Yeardsley (2002) (UKHL) — QTrust: Consideration by the UKHL** **F**: Y took loan from T for purpose acquiring property — T would only give loan if backed by solicitor’s guarantee – Y’s solicitor wouldn’t do it so a different solicitor did* Loan given to solicitor who promised to **only release it to his client for use in purchasing a property**
* Solicitor released to client unconditionally; **client used it for other things**; solicitor eventually went bankrupt
* T sues Y on basis Quistclose Trust

**D**: **Threshold Q: Whether parties intended money to be at the free disposal of the recipient**Three stages to Quistclose trust1. When money advanced for purpose, lender has EQ right to see applied only for that purpose
2. Once applied the lender becomes ordinary creditor
3. If purpose not carried out → look to intentions of parties from circs of case and terms of their agreement

**Here**: Twinsectra had proprietary relief of **of tracing (in rem remedy)** due to the Q trust  |
| **Re Westar Mining (2003) —** Q type funds can’t be used to satisfy debts outside of purpose**F**: Joint venture coal mine: W owned 80%, P owned 20%* W also held position as manager of mine; to operate — Poscan owed W money pursuant to JV **operation expenses** → **paid into JV account after W’s bankruptcy**
* Suppliers/employees of mine said funds in Jv acct had express purpose trust for them — BMO (**creditor of W**) wanted the money too

**D**: JV agreement provided W had 2 capacities: owner and manager; received funds in JV acct as latter → **can only use funds for purpose of operation** * JVA = mutual intent that money JV Acct **not property of W** and W can only use for operation of mine, not for self
* Bank (main general creditor) aware of special purpose of JV Acct and exempted from monthly sweeps of W’s accts; confirming that it was **separate from W’s funds**
 |
| **(iv) SURPLUS OF FUNDS after trust purpose has been achieved (Re: PURPOSE TRUSTS)****Where a trust exhausts only some of the trust property, thus leaving a SURPLUS of funds after the purpose has been fulfilled, a resulting trust for the transferor / settlor may arise in respect to the surplus** (**Re Gillingham**)**Distinction between this and #2:**This category is focused on PURPOSE TRUST – there is generally an unincorporated society whose members are designated w/ carrying out a specific purpose.— Recall: “purpose trusts” are limited to those enunciated in Statute of Elizabeth. |
| **Re Gillingham Bus Disaster** — **Where contributors NOT easily identifiable, pay to court:** RT imposed in favour of contributors, with money payable to court for administrative simplicity.**F:** Funds raised to pay for funeral expenses of army cadets killed in a bus crash. A surplus results. **I**: How should surplus be distributed? **D:** Traditionally, surplus of non-charitable benevolent fund held on RT for subscribers.* This fund came from public donations – how to return surplus (how do you identify contributors?)
* **Court HELD that resulting trust principles applied:** Money to be paid into the Court, with contributors expected to come to the court and collect their residue share of the money.
	+ RATIONALE: If money goes uncollected after a specific amount of time, it becomes state property anyway. Might as well have it payable to court for administrative simplicity.
 |
| **Re British Red Cross Balkan Fund (1914) — Where contributors ARE identifiable: Surplus shared ratably among contributors – held as ART for individual subscribers.** **F**: Fund raised by public subscription for assistance of wounded in Balkan War – surplus leftover after veterans were assisted. **I**: What to do with surplus funds? **D**: Surplus was ratably held on ART for individual subscribers, who were all identifiable (veterans).Court held:1. Contributors could be provided with pro rata share of money, if they can be located.
2. Under doctrine of cy-pres, the court created a new fund whose objects are as close as possible to the contributors of the initial fund.
 |
| **Unincorporated Associations: CLUBS as a bypass to SPECIAL PURPOSE TRUSTS*** UA created when there are two or more people (Re Buck) come together to further a common purpose (sports, politics, social, religious).
* Club /organization collects money from members; can collect through solicitation, fundraisers, dues, etc.
* This is fine so long as club is operational, but what if club **dissolved**?
1. Can be allotted by contract through organization’s constituting documents, or
2. The organization can be argued to constitute a trust: — Claim the money put forward in trust for benefit of organization’s members, who have merely chosen to use the money for a particular purpose.
* What happens to money after unincorporated association DISSOLVES?
1. Money held on an ART by members?
2. Money held by members under rules of contract (equity is equality)? OR
3. Money surrendered to Crown as bona vacantia?
 |
| **Hatchett-Stamford v AG (2009) (UKCD)** **F**: Unincorporated animal rights association (league); had 250 members in 1960s* By 2006 H-S only surviving member and League had 2.5 million in assets
* Wanted to wind up and transfer to active animal charity – sought court order declaring T trustee of assets
* AG was defendant since such an order would imply funds not bona vacantia

**I**: Who gets the money? **D**: A gift to UA can fall into **3 cats: Must** **see how gift was given** **1)** gift to members at date as JT; → property rules apply**2)** Gift to existing members subject contractual rights — UA determining how money should be used;— **usually this —** “general revenue”→ look at the contract **3) on trust** for purpose of association as quasi-corporate body Members beneficial right to assets subject contract between them → trust principles apply* UA w/ 2 or more members can by majority/unanimity vote alter contract b/w them – could call for division of assets; these rights are contractual not equitable
* When cease to be member → lose interest in assets – e.g., death
* Association dissolves when only one member and they are entitled to the assets – barring contractual provisions

**HERE**, nothing to say that anything other than contractual principles should apply, which says that members holds in JT What was transferee intention? — If you don’t know then break it down to Trust, contract, property |
| **C. Presumed Intention Resulting Trusts (PIRT) —** PIRT occurs when there is:1. A purchase of property in the name of another OR
2. A voluntary transfer of property to another; AND
3. There is NO CLEAR EVIDENCE concerning the actual intention of the transferor about who is intended to benefit from the transfer.

Examples:1. A sells good to B but transfer is made to C → C presumed to hold legal title of good in PIRT for B.
2. A voluntarily transfers (gifts) good to B, with no consideration → B is presumed to hold legal title in PIRT for A.

**(i) Effectively, a ‘Rebuttable Presumption’ —** Court presumes that if X gratuitously transfers property to Y, X did not intend to do so beneficially. — last **as long as** no evidence of intention to the contrary by testator → **Rebuttable**: where counter EVIDENCE exists suggesting X intended to transfer beneficial interest in the property to Y as out and out gift → abs gift! — Actual intention as manifested by conduct is binding (Eisner)**— Evidence will determine whether transaction is:** out and out gift w/ title vests in donnee **Standing v. Bowring)**  OR an express trust in which legal title alone vests in transferee  |
| **Evidential Issues*** Preclusion of Evidence: In certain circ, even though rebutting evidence is available, a court **may** **preclude** its production, and render the evidence inadmissible!
	+ EG. court may not recognize evidence explaining why transfer occurred if it shows **illegal scheme**
* Unclear Evidence: If the destination of the equitable interest is UNCLEAR, then prima facie there is a PIRT and a trust is imposed on the transferee for the benefit of the transferor.
	+ Transferor is PRESUMED to have retained equitable title with bare legal title vested in the transferee (**Dyer v. Dyer**).
 |
| **2. Rebutting the Presumption*** Onus of **Rebutting** of PIRT – ordinarily on the transferee (ie: he has to show that the transferor intended the passage of beneficial title with legal title to them).
 |
| **Oord v Oord** – successful rebuttal of PIRT **F:** Husband, wife, son, daughter in law became owners of a **house in JT** — parents paid for it**I**: whether or not bill (son) or jackie were beneficial owners of the property? (clearly legal owners, names on title) — or was it PRT for payer?* If **PoA** applied → not an issue with bill — BUT it does not apply to daughter in law

**D**: presumption that the son & daughter in law hold title on RT **rebutted** — both bill & jackie owned outright as JT* Reason for arrangement was to bring about/continue/embellish relationship of harmony of these 4 ppl — gifting legal title alone isn’t sufficient to carry out this motivation
* Evidence showing NEVER expected of payment by Wiebe from Bill or Jackie → enough to rebutt — **Not a lot here**
* Ghost of **PoA** operating: when dealing with PRT in familial arrangement → easy to rebut
 |
| **Pecore**: at the heart of the presumption is the allocation of the burden of proof saying, “where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended…. * **presumption of advancement should apply equally to mothers and fathers**
 |
| **Eisner v. Baker (2007)** — Situation w/ RT did work — failure to rebutt PIRT* Couple living together, she had child from previous relationship — they argued alot so moved to salmon arm hoping to stop fighting
* Male Inherits money during the decision — he buys house
* During course of purchase, women puts her name on the document — he learns of it, but doesn’t do too much, trying to keep the peace and “avoid turbulence”
* Relationship fails → split — she claimed half house

Court found “knowing what was taking place” wasn’t enough to rebut presumption* Facts clearly indicated that Rob did not intend to benefit amanda, but **had merely allowed** her to interfere and insert herself into transaction **to appease her**
 |
| **Re Vinogradoff** * Grandma transfer war loan stocks into joint account held in her and granddaughter’s name
* Grandmother received dividends and on death, bequeathed her interest to a 3rd party
* Found held that grandmother held all stocks beneficially → legatee owned entire interest in stocks **because presumption not rebutted**
* Granddaughter held no beneficial interest
 |
| **Standing v. Bowering (1885) (UKCA)** **F**: Plaintiff transfers British Consol bonds (perpetuity bonds) into joint names of herself and her godson, to whom she was NOT in loco parentis (in the place of the parent – ie: not a guardian, etc).* She seeks to re-transfer the stock into her own name only.

**D**: There was prima facie a RT — but **displaced** by evidence of intention.* Evidence showed she intended to benefit him legally and beneficially.
* Re-transfer fails – was an outright gift.
 |
| **Nishi v Rascal Trucking —** Purchase Money RT: contribution expressly w/o conditions/req = a legal gift **F:** R leased land from N’s lover — who used to own land through a mortgage * R fked up land and liable for fine — didn’t pay — N’s lover gave upon mortgage → bank foreclosed and being sold off
* R wants to lend money to N so N buy property, R wants interest in property — N refused
* R still offered funding “**w/o any conditions or reqs**”
* After sale R sued for 50% interest in property based on purchase money resulting trust

**D**: PMRT species gratuitous transfer resulting trust: occurs **when** advance $ towards purchase price and don’t take legal title* To **rebut** must show that transferor intended money as a gift or intended to retain no beneficial interest
* Focus on Evidence of b4 or during transfer — though evidence subsequent to transfer help
* **Here**: complex facts around relationship, payment, legal obligation to city, mortgagee and to each other + R’s initial promise to N all served to rebut presumption
* R’s language: “contribution made without any conditions or req and these instructions are irrevocable”
 |
| **(ii) Joint Bank Accounts —** Standard form contract provisions (ie: right to survivorship) DOES NOT REBUT PIRT – **not sufficient** evidence to rebut PIRT (**Niles**) * Implies that something more is necessary (ie: a specifically drafted provision) — also look at actions of the transferor (**Sawden**)
* Purpose of standard form bank agreement pertains to relationship between depositors and bank, not between depositors themselves!
 |
| **Niles v. Lake (1947) SCC —** bank document not enough to rebutt PIRT **F**: Arnott opened joint account with her sister – JA had right of survivorship.* When Arnott dies, sister claims everything in the account.
* Executor argues that all money is the property of Arnott’s heirs, not her sister specifically
* lake produces agreement that she and arnott entered into in creating the account — which says: money are owned out-right (out & out) by the two sisters

**I**: Has PIRT been rebutted in sister’s favour? Does JA (right of survivorship) rebut the PIRT? **NO****D:** Bank used a standard form document for the account creation, which did NOT rebut presumption of RT.* Bank agreement does not deal define the relationship of the joint depositors inter se. — used more to protect themselves from claims against them as result of RT
* Sister therefore had legal title, but RT created for money put in for deceased in favour of deceased’s heirs.

Note: Abella J in more recent **Pecore**: “The wording of bank document should be deemed clear intention; common sense dictates this – should have to adduce evidence that joint tenancy was just intended re access to funds in acct and not beneficial interest in right of survivorship |
| **(iii) Joint Bank Accounts + Declaration by depositor to give balance to co-tenant*** Where joint bank account is set-up to help look after depositors affairs + a declaration by the depositor to give balance to co-tenant on death
	+ this is NOT “avoidance” of Wills Act (perfectly allowed).
* But courts will sometimes interpret this as a “testamentary gift,” and in violation of Wills Act.

**Express declaration of intention by testator is SUFFICIENT evidence to rebut PIRT!*** Satisfactory **affirmative** proof of intention to confer beneficial interest displaces Presumption of RT
 |
| **Russell v. Scott (1946) Aus HC — declaration rebutted PIRT** **F**: Testatrix opened joint bank account in both her and nephew’s name. She put money in account, enabling nephew to withdraw and care for her. — Testatrix told solicitor that money in account **would belong t**o nephew upon her death (declaration). **I**: When she dies, did the account form part of the estate? **D**: Account money did NOT form part of estate! — Nephew had obtained “present right of survivorship” when testatrix **declared her intention** to solicitor (reflecting joint ownership of money). – vested FI and thus not testamentary* Equity tries to give effect to intention of testatrix.

Note: Because it was Aunt Nephew, there was no PoA; instead, prima facie PIRT. |
| **Express declaration of intention by testator/testatrix MAY BE SUFFICIENT EVEN where the declaration amounts to “avoidance” of the Wills Act.** **Young v. Sealey (1949) UKCD —** too late to change **F**: Testatrix opened joint account with nephew. — intended to confer NO beneficial rights during her lifetime, but he would get the money in the account upon her death.* Upon her death, Executor of her estate claimed the money in the account.

**D**: Court found that her joint account bank agreement, and declaration that nephew would have no beneficial rights, amounted to avoidance of Wills Act.* However, longstanding court practice to recognize such outright “transfers of legal and equitable title upon death in favour of surviving JT” was TOO ESTABLISHED in England and Ontario to change it now.

Note: How can court just ignore the Wills Act? |
| **Sawden Estate v. Watch Tower Bible — strategem** of using JA enough to rebut presumption**F:** When Sawden created will, took into account of children — left residuary of his estate to Bible* But just b4 he died, he took all of his money & put into **joint** **bank** account w/ his sons
* Bible argued that you can’t use PoA anymore (sons are adults, not dependents) — also can’t take into account of contract w/ bank per **Niles v lake**
* Claimed money feed into account= money being held in RT for estate & bible is heir

**D**: Charity loses — presumption is rebutted — out & out gift* Sawden clearly didn’t want Bible to get it — **easiest** way = put money into bank account (understood right of survivor) — the strategem illustrates intention, unlike Niles, where only bank doc was relied upon
* + unlike **Young**, evidence disclosed immediate gift of beneficial interest → not testamentary position
 |
| **Presumption of Advancement —** circumscribed today — generally operates in transfer from * Parents to minor children — since **pecore** — only applies to minor children
* Husband to wives — treat with caution

**Effect**: beneficiary as transferee get legal and equitable title **w/o n**eed to rebut PIRT **Onus of proof:** onus shifts to transferor to show intention that excludes operation of PoA **Rationale**: notion that natural affection leads to outright gifts!**Historically**: reflective of social practice — different today — but Mehta it works w/ traditional marriage |
| **Operation of PoA:** Parent to child only applies to MINORS (**Madsen Estate, Pecore)** * Husband to wife: not abolished in BC — will look to whether marriage is traditional
* Wife to husband: no PoA at CL — husband presumed ot hold on RT for wife (re mailman)
 |
| **Eisener v Baker (2007) (BCSC)** **F:** GF snuck her name on the bill of sale for house; BF bought house w/ his money — **no intention** of having her name on bill of sale or knowledge that she put her unwitnessed signature on there **Decision**: Evidence regarding the functioning of the relationship is admissible; here the BF had no intention of even putting her name on the title let alone gifting any sort of title especially beneficial |
| At CL: PoA extends to loco parentis “in place of parents”  |
| **Mehta: PoA upheld between husband and wife — traditional marriage**air india crash — husband, wife, children dies — estate of husband vs estate of wife * Wife’s estate consisted of assets purchased w/ husband’s money for tax purposes
* Husband’s estate claimed PIRT — wife’s estate argued PoA

D: PoA upheld — Husband was primary provider — wife = housewife  |
| **REBUTTING PRESUMPTIONS — EVIDENTIARY RULES (**applies to both PA and PIRT) * PoA can also be rebutted by evidence of transferor’s **real intention**
* But evidence limited by **timing & Illegality**
 |
| **Timing**: court will **only look** at evidence from transferor regarding things that occurred **before the transaction** or **at the time of hte transaction — NOT after — Shepard** |
| **Shephard v. Cartwright (1955) HL** **F:** dad alotted shares to 3 kids w/o their knowledge — later told them to sign withdrawal (kids didn’t know significance) — dad used proceeds for himself — Kids claimed against dad’s estate **I:** can you take into account of events happening 5 years + AFTER the gift? → NO, inadmissible **D: look to intention of transferor at time the transaction was made** * “Subsequent declarations post gift are admissible as evidence only against party who made it, and not in his favour”
* Kids got interest! — PIRT yielded to PA

Note: Similar to “**revocation**” idea — once you gift, you can’t get it back (but note this is **implied** trust here, that revocation stuff was more for **express** trust) |
| **Illegality:** Upshot of illegality * Court won’t hear evidence used to rebutt presumption of advancement if it is tainted by illegality (**Schuerman**) → transferee keeps
	+ Not giving effect to illegal evidence — Ex turpi causa — (from a base cause no action arises)
* Court will **accept** evidence **if** it shows an illegal motivation in which there is no obvious / clear infrastructure to **actualize** motive (**Goodfriend**)
* Court will accept evidence to reject PA based on Locus Poenitentiae — Repentance + make up for any illegality (pay tax) (**Tribe**)
* Court may choose not to hear any evidence regarding illegality used to rebutt presumption of resulting trust (**David, Gorog**)
* Evidence of illegality OKAY if used to show something else or if not central to case: Evidence pertaining to fraudulent or illegal conduct MAY BE ADDUCED where case can be pleaded **without relying on the illegality. (Tinsley) — gets around Schuerman rule**
	+ \*The illegality evidence was not used to rebut the P-RT — never intention to for Tinsley to hold legal & EQ
	+ Schuerman: illegality evidence used to rebut P-A — “Never intended to lose EQ — transfer to avoid creditor”

**If illegal → PIRT favours Transferor, PA favours transferee**  |
| **Scheurman — LEADING CASE** **F:** husband convey house to wife to protect property from creditors (intention to defraud creditors is contrary to fraudulent conveyance legislation) * Wife agrees to hold until danger passed — transfer w/o consideration — **hold as volunteer**
* Debt paid off, creditor never sued — wife sells house, husband sues claiming PIRT

**D:** husband loses — title stays w/ wife — to allow evidence of illegal motive/intent in order to rebut PoA would enable litigant to prosecute case w/o clean hands * Intent to defraud → unclean → can’t seek equity’s assistance, even when they didn’t defraud (rule was **loosened by Goodfriend)**

**Policy:** this approach **problematic as it** gives transferee a windfall, even in situation where they are complicitious in fraudulent conveyance  |
| Locus poenitentiae: Illegal intent simpliciter is NOT ENOUGH to preclude evidence that would rebut PA – must actually be able to carry out the fraud (regarding non-existent causes of action). * Enabled ordinarily excluded evidence to **rebut** the PA where the parties never actually carried out their illegal scheme, and “**repent**” of it
 |
| **Goodfriend —** accept evidence of illegal motive where no infrastructure to actualize motiveF: wife swapping — Mrs. G tricked Mr. G — C might sue for “alienation of affections” — hoax * Persuaded Mr. G to transfer farm to her → then leaves Mr.G, who seeks PIRT

**I:** does exclusionary rule apply when evidence showed a scheme that could not be carried out? → NO **D:** G wins — C’s claims were **unrealisable** — nothing in law said he could be creditor → even though G’s motives were impure, no legal basis for this shit → **Allows** evidence to rebut → PIRT!* No creditors were prejudiced in anyway here — see also **Tinsley**
 |
| **Tribe v Soiseth** F: T&S met in law school, married, moved into condo purchased by T’s parents — * Title in T’s name, granted second mortgage to parents and an option to purchase that registered but never exercised
* On divorce T sought order that EQ title remained w/ parents and **adduced** evidence that legal title only w/ her for tax purposes (this was **before PECORE** so advancement still applied)

D: scherman never overruled (court skipped over in goodfriend) — this evidence sullies court, judge doesn’t want to help Tribe skirt tax law * But court invited Tribe to repent & invoke locus po → **pay capital gains tax**
* Make sure you withdraw from scheme before illegal act is given effect to
 |
| **Pari delictum rule — parties equal at fault** * Court may simply chose to ignore the evidence of the wrongful conduct altogether, and let the matter be decided by the competing presumptions (PIRT vs. PA) (**David v. Szoke**)
* Works against transferee w/ deceitful intent to transfer → PA not there trump PIRT
 |
| **David v Szoke**F: P & D pooled moneyt o buy house as joint owners* P later convenyed interest to D, per her advice they don’t want to leave house vulernable to potential litigation — he has drinking problem — convicted of DUI
* She left him, sought ot retain legal and eq ownership of house — P sought title as PIRT

D: Evidence showed P did not intend to make conveyance a gift — PA didn’t apply — **for P — PIRt*** P & D both had unlawful motive/intent to protect property from judgement
* When case was decided, **there were no impeding actions against P, nor any creditors**
 |
| **Gorog v. Kiss (1977) Ont CA** **F**: P owned farm, transferred title to sister (defendant) on advice of solicitor, for purpose of defeating plaintiff’s creditors (was being sued by former business associated).* Later, plaintiff called on defendant to re-convey the property, but she refused (PA vs. PIRT).
* Sister had onus of rebutting PIRT; PA does not apply as transfer was from brother sister.

**D:** Court found **for plaintiff**; defendant held farm on TR for plaintiff (gave effect to PIRT).* Transfer from brother sister, so PA does not apply.
* PIRT could not be rebutted by evidence because of illegal purpose behind the conveyance.
 |
| **Tinsley v Milligan** **F:** P & D (lesbian lovers) purchased house — title registered only in name of P, both had contributed payment, common intention = TIC * Didn’t jointly register to enable D to **fraudulently get social assistance**
* The two had a falling out — Title in Tinsley’s name — M lived init, T wants to recover it

**D:** Despite illegal motive, M could succeed if case could be pleaded **without relying on illegality** * PIRT — for M because D/M paid half of purchase price → P held on RT
* PIRT gave M her portion of EQ title regardless of whether there was an illegal purchase
 |
| **Nelson v Nelson —** novel, wasn’t accepted in either Cdn or English house of lords **F:** mother & kids, Mom had property, transferred into son and daughter to **scam welfare payments** * She later wants title back — daughter didn’t want to return it, argued PA — Mom argued using “**tained evid”**

D: in this age, many people sscame govt — lots of opportunity for regulatory infractions that are “technically illegal” → should hear it → **require Balancing** of adverse conseq of granting vs not granting relief → **2 criterias**1. Proportionality: Conseq to P for losing due to exclusionary rule should be **proportionate w/** seriousness of illegality
2. Sanction of evid exclusion must further purpose of statute → look at punishment in statute → **don’t over punish**

For Mother — she’d lose home → too serious * Act didn’t contemplate penalties beyond those set out in the statute — i.e losing home
 |

|  |
| --- |
| CH 8 The beneficiary |
| **Nature of Benef interest in Trust property** * Owner of property has **Real Right** in it — utendi, fruendi, abutendi/disponendi

Legal Title — Trustee* ALL legal rights and powers associated w/ property management & control
* Trustee powers = administrative & dispositive — include:
* Making contracts, exercising power to maintain or enhance value of prop, pass benef to beneficiaries

**Equitable/Benef Title*** In rem rights in individual items of trust assets (**Baker v. Archer- Shee**) + personal rights against the trustee (**Shalit v. Nadler**) to enforce
* Trustee’s compliance with terms of settlement; and
* Trustee satisfying his or her fiduciary obligations – must act:
1. In good faith, taking reasonable care in dealing with things in trust;
2. In beneficiary’s best interests;
3. To make only authorized dispositions of trust property.
 |
| Sub-trusts* SPLITTING OF BENEF from EQ: Beneficiary 1 transfers beneficial title to Benef 2 → B1 gets EQ, B2 gets benef → B1 adminiters income from trust asset for B2
* Trustee stays the same
 |
| **Keeping role of Trustee and beneficary separate & distinct —** very important — benef has no legal capacity to exercise administrative or dispositive power over trust property — **STRICT RULE*** Beneficiary only has right of action against Trustee for **breach of trust**; has NO ABILITY to exercise real right (in rem) (such as disdraining/seizing property), which only lies with the trustee!
 |
| **Schalit v. Nadler (1933) KB —** benef trying to exercise trustee powers **F**: Beneficiary attempts to disdrain (seize) for unpaid rents against property in which he had equitable interest. **D**: Invalid distraint! Should have been executed by Trustee or Agent. Beneficiary only has a personal right (in personam) to bring action against Trustee for breach of trust;* **Disdrain is exercise of real right (in rem)** – right which only lies with legal owner.
 |
| **Re Bagot’s Settlement —** allowed Beneficiary to act as **agent** of trustee where pragmatic — mod to “benef can’t do what trustees are supposed to do”**F:** P = benef of farm property in trust for life — remainder to children — P thgouth she should manage property instead of trustee because trustee was not an expert at farming **D:** Court has discretion to gallow benef to act as agent of trustees and collect rent — as a way to “reduce expenses to lowest practable limit”  |
| **Nature and scope of Benef title — Set meal vs A la carte** **Issue**: is “Equitable Title” referable to the **individual** **things** that make up the Trust Fund **OR** to the more **general expectation of trustee performance** under the general duty to properly administer the Trust Fund?**Set meal vs A la carte aren’t mutually exclusive — depends on facts**  |
| **Baker v. Archer-Shee (1927) HL —** A la carte in UK, Set meal in NY — what about discretionary?**F:** Beneficiary argues she did not “own” the individual items in the trust, but rather, owned cluster of personal rights against Trustee for proper administration of property.* Fund included stocks, where income generated from trust fund stocks did not enter UK.
* UK tax authorities argued for “ownership” in stock for tax purposes
* Beneficiary argues that she only had interest in income stream; not in actual stocks

**D**: beneficiary has **distinct equitable interest in individual items of property in the trust** (rather than interest in property administration of trust as a whole). — **i.e A la carte** * **Problem** - hard to fit in w/ **discretionary** **trusts** – beneficiary is only a potential beneficiary – given appointment is contingent on the exercise of trustee discretion.
	+ Nature of beneficiary’s interest under discretionary trust is of rights against the trustee for proper administration, NOT TO ITEM ITSELF (Garside v. IRC - 1968).

**Dissent**: Viscount Sumner – viewed equitable ownership as extending only to the FUND AS A WHOLE, because:* Trustee is one with dispositive powers (can dispose of property); beneficiary cannot.
* Trust property changes quickly (ie: large pension plans) – seems kind of ridiculous to say beneficiary has interest in each individual fraction of a stock in a pension plan.

Problems with Sumner’s Dissent:1. Beneficiary can terminate trust at any time and acquire outright (legal AND equitable) title in property under rule from Saunder v. Vautier.
2. How do you RECONCILE between beneficiary have right to administration of trust as a whole and beneficiary’s in rem right to “trace” individual items of misappropriated property?
* Where trustee has fraudulently parted with trust property and third party is not a bona fide purchaser for value, the beneficiary can recover from that third party – in that respect, **right is in rem in each item**, in addition to personal right against trustee for breach of duty.

Note: In Archer-Shee v. Garland, A-S won as it was found that NY law mirrored Viscount Sumner’s dissenting option in Baker v. A-S. — **i.e set meal in NY** |
| **Disposition of EQ Title — Settlor to Benef** — Major formality under wills act — if trust constituted upon death → if benef to be successful, they have to comply with wills estate, succession act * 1st need a **valid will —** If no valid will → follow laws of intestate succession

For inter vivos: also some formal req * In case of Land — under statute of fraud (with exception to manitoba and BC) — require equitable interest to benef to also be in writing — Usually a gift so no contract
 |
| **ASSIGNMENT of title from Benef to new Benef** **Section 36 — Law and Equity Act** – recognizes written document, signed by the Beneficiary, delivered to the Trustee, to assign beneficial entitlement from beneficiary 1 to beneficiary 2.* Explicitly give the Assignee (benef) the r**ight to bring action against the Trustee**, w/o having to sue through the original beneficiary (who may have died; disappeared),
* This was not possible at common law, although it was possible in equity.

**Req**: for complete effective transer of eq estate form benef to sub benef 1. Assignment must be absolute (no conditions) & for the whole interest of assignor
2. Assignment must be in writing and signed by assignor
3. There must be notice to trustee
 |
| If Formalities not satisfied → Common law applies – assignee must either:1. Pursue the action through the assignor (previous beneficiary); OR
2. If interest transferred is absolute, appeal to EQUITY (**Timpsons Executors**)
 |
| **Mechanisms in which EQ interest may be disposed** 1. **Benef can assign it to 3rd party directly —** “I immediately and irrevocably assign my rights as sole benef of ABC trust to Em) — writing required
* S.36 if you give debtor trustee notice in writing about assignment → B1 can fall out of pic, **B2 can deal directly** and enforce trust against trustee
1. **Benef can direct trustee to hold prop in trust for 3rd party —** As beneficiary of the ABC Trust, I, Bloggs, direct my trustee Tewksbury to now hold my entire interest for the benefit of Biggles” –
2. **Benef can declare self to be trustee for the transferee** — (“I, Bloggs, now hold my interest as beneficiary under the ABC Trust on trust for Biggles”). — 1 form of sub-trust .
* Although ordinarily there are no formalities in a declaration of trust, where a beneficiary declares himself/herself trustee for an assignee of the equitable estate, compliance with s. 36 is not required though prudent to ensure the original trustee’s powers are abrogated.
1. **Benef assign interest to new trustee to hold on trust for new benef — typical subtrust**

**\***Except for method 3 — **s.36 req** disposition to be in **writing** and accompanied by written **notice** to original trustees  |
| **Timpson’s Executors v. Yerbury (1936) —** failure to assign **F**: Property located in NY, created to benefit UK resident. Beneficiary tries to transfer beneficiary interest to children. — validity of assignment in Q* Tax reasons: if transfer valid, mom wouldn’t be taxed on it.

**D:** No valid assignment — letter did not bestow on children any rights against trustee — mom had given a “revocable mandate” → transfer incomplete **until** acted upon — **can be revoked —** Note: This case shows how classification can be important in tax arrangements. |
| **Priority among assignees — GENERAL RULE:** Priority between claimants is determined by TIME – the **earlier** being preferred (qui prior est tempore, potior est jure)  |
| **RE: Wasdale** **F:** benef assigned same beneficial entitlement to 2 parties — both assignees notified trustee at the time of their respective dispositions **D**: **1st in time is first in right** → though first assignee informed a trustee who later died → his priority was maintained despite 2nd trustee did not get notice  |
| **Protective Trust —** protect benef from themselves — spendthrift trust * Terminate benef’s right to income in certain circ — “you get interest until you attempt to dispose” → **has to be determinable interest**  — usually done through determinable LE
* Often: upon such event → both capital and income in trust are shfited to **new benef** (kids of original benef) — creates **incentive not to sell EQ interest or call for trust**

**Typical Mech:**1. Give determinable interest in favour of B1 — (shitty child)
2. On occurrence of **determining event**, the trust prop is held on 2nd trust → discretionary trust in favour of a class of obj/benef (usually B1’s children, or settlor’s other children)
* **Events** usually being: B1 attempting to assign EQ estate to another; bankruptcy; attempt to charge his interest
 |
| **Defeasible interest** — “on condition that, but if, subject to” ARE VOID → Benef get trust property abs — because:1. HIstory: conditions that barred or restricted alienation were void — determinable interest were not
2. Condition subseque is strictly construed — if uncertain → struck down
3. Settlor can’t trust property on protective trust for himself — many reasons, mainly against public policy
 |
| **TERMINATION OF TRUST BY BENEF** — Rule from **Saunders v Vautier** **Benef can terminate** — call for trust by directing Trustee to give back legal title provided: 1. Beenf has attained **majority** (BC 19 years old)
2. Beneficiary is **compos mentis** — of sound mind
3. Beneficiary is **absolutely entitled** to the trust — i.e settlement not contingent, must be **vested in interest** — **\*can collapse while enjoyment postponed**

To determine whether property has vested: “was there postponement of vesting in interest or possession?” — Court will **lean towards** finding **early vesting —** * Gift-over clause indicate interest is contingent (determinable) → benef won’t be able to terminate trust
 |
| **Saunders v Vautier — 1841** **F:** trust to accumulate dividends until benef turns 25; B turned 21 (majority) & claimed assets of the fund **D:** Vautier was sole benef + income vested in him by law at day of the gift, only enjoyment postponed until age 25 → can **call for trust — w/r/t** postponement of enjoyment, benef’s freedom of prop should be privileged over testator’sBut, cannot ignore conditions if it relates to the VERY RECEIVING of the interest! (ie: if interest is contingent). |
| Rationale: similar to those regarding RAP * Law perfers outright ownerships — as opposed to trust ownership
* Policy prefers freer ownership — freedom that maximizes use, enjoyment, dispo of prop is best for society
* No ruling from the grave
 |
| **Fargey v Fargey Estate —** Equity favours immediate vesting, leans against postponement of vesting/possession**F:** Donald = testator: “if 1 or more son pre-deceased him, then shares of that kid would to go to kid’s kid” — i.e grandchild* Here, 1 son died, leaving 2 kids — matthew (majority when Donald died,) — Joseph, was a minor — both could only enjoy after turning 25
* Matthew wanted to take his share b4 he turned 25 — NOT after the entire trust

**D**: Wording/interpretation favoured early vesting * Trustee must invest and keep investing — pay income as maybe necessary… for the grandchild’s maintenance or education — during his/her minority — any income not used go to capital — upon 25, **distribute** capital of sub-share
* **Distribute** + **ability to use for maintenance**→ suggest only a postponement of possession → vested → Matthew could ignore Donald’s age req 0
* court should prefer early vesting
 |
| **Re LYsiak (1975) —** contingent circ around gift construed as conditions speaking to postponement of enjoyment**F:** Testator bequeated estate to wife and son living in Ukraine — clause postponing distribution of residue “until benef are free to receive benefits w/o interference of societ regime” **D**: Gift was immediately vested in executor, with broad discretion to determine manner and timing of benefits (enjoyment) – **vesting of the gift was not suspended, just the distribution!*** ‘policy of Chancery has always leaned against the postponement of vesting or possession or the imposition of restriction, or an absolute vested interest’.
* Discretionary aspects exercisable by trustee **seen as repugnant** to full investiture of interest; and condition regarding to end of Communist regime was uncertain.
* Presence of a gift over indicates that interest not vested — **lack of such clause** suggest vested
 |
| **Re Carlson**  — Saunders doesn’t operate — vesting of interest is contingent on future event → can’t call for trust F: Dad died, left will — wife get $1, Old get 10%, Janice (major), Chris (minor) * Assets not to be touched, all income to be used to maintain and educate Chris — when he turns 21 → estate broken down → 10% of **then ascertained asset** to old son, 45% each to Jancie and Chris
* Janice wants it now — argued distribution postponed, interest vested

**D:** intention was to split after chris turning 21 — can’t ascertain **then residue** now * Chris could use both income + capital of residue for edu → inconsistent w/ immediate vesting → vest later
 |
| **Saunders V Vautier** in **discretionary trusts** * Benef must have abs interest to terminate — which is NOT POSSIBLE under discretionary trust (particularly Baden type) — class very wide

**RULE: Where feasible, the beneficiaries of a discretionary trust can combine to ‘call the trust’. —** all of the beneficiaries in the discretionary trust MUST:1. Be identifiable under the trust such that they can act together as **sui juris** (legally competent) AND
2. **Unanimously** agree to terminate the trust (Re Smith).
* EG: If 2 parties jointly own EQ interest in trust property, they can act **jointly** to demand transfer of legal title into their joint names.
* NOTE: Life tenants and remainder person – all sui juris – can combine to call a trust. (Re Smith)
 |
| **Re Chodak (1975) Ont HC** **F**: Testator gave whole estate to Trustees for entire benefit of various beneficiaries. Trustee given wide discretion, and sought direction re: validity of the discretionary trust. – delivery of packages to children in USSR w/ no gift over **D**: Discretion was INVALID; testator had attempted to bequeath absolutely and then restrict their right to take absolutely via discretionary powers to trustee.* benef got immediately vested interest on testator’s death, with time and payment only postponed per Trustee’s discretion (similar to **Re Lysiak**). — ordered equal division
* Cannot make absolute gift subject to T discretion re manner/time of payment – need make entirely dependent on T discretion **or have gift over** (abs of gift-over suggested vesting)
* Trustee had discretion to fix differing % of shareholdings DOES NOT AFFECT the ability of beneficiary to call the trust in unison!
 |
| **Re Smith (Trustee) v. Aspinall (1928)—** termination through combination of successive EQ interests **F**: Testator gave Trustees of estate to pay, at their abs discretion, income for maintenance of wife and/or children as a mortgage, **remainder** to children.Wife and children combined and assigned beneficial interest as mortagors to another party. **D**: If all the objects entitled to income **1)** act in unison (and **2)** are sui juris), they can terminate/direct trustee in a discretionary trust. |
| **Division —** trust is division and 1 or more benef are sui juris and abs entitled → they can **individually** call on trustee to transfer to them their proportionate share of trust property* Won’t if party can show that division of asset can result in scenario that’s unfair
* Terminating a trust is easy when the trust property is limited to money; but gets complicated when the trust property are shares or land.

Division can occur where is only result in a minor reduction in value of the trust property.* Giving one beneficiary controlling stake = too high a destruction in value of other shares.
 |
| **Re Sandman [1937] (UKCD)** — Call for shares by sui jurist beneficiaries ALLOWED even though it meant trustees would no longer have control of the company.* No reason to believe benef wouldn’t use voting powers in many ways that was bona fide.
* This distinguishes Sandman from Duker – as in **Duker** one beneficiary stood to be a controlling shareholder – result in undue influence over value of other shares/company.

Trustee discretion re: ‘undue hardship’ on other beneficiaries:* Doesn’t matter if property held in trust for sale with power to postpone sale – trustee can refuse to terminate trust if he or she believes special circumstances would cause undue hardship on the other beneficiaries.
 |
| **Lloyds Bank v Duker (1987) (UKCD) —** Qualified saunders, refused division — undue hardship**F**: All beneficiaries agree to terminate the trust (trust assets = shares in company), but one beneficiary stood to get controlling stake. **D**: Reduction in value was too great (controlling shareholder shares would have been worth more than the remaining shares of the other beneficiaries and, he could **control** the company in way that hurt minority beneficiaries (ie: appoint himself manager, pay himself high salary and declare no dividends).* Share had to be sold, and majority beneficiary got his share of the money (form which he could buy the shares). Division of shares = sell and give money
 |
| **Re Marshall (1914) (UKCD) —** no automatic entitlement to call for division where trust property is land **F**: Certain benef called for ¼ of shares of a large company, as it would take 20-30 years for all beneficiaries to be eligible. → hardship on other beneficiaries → not entitled to call for division  |
| **Limits to termination — Pensions** **Saunders v Vautier** DOES NOT apply to large pension – they are governed by Pension Benefits Standards Act 1985 regarding termination/distribution of assets — for large pensions, trust is just a **vehicle**  — objective = provide benefits  |
| **Buschau v Rogers Communication Ltd (2006) (SCC)** **F**: B was one of 112 RCI employees who were members to pension plan; defined benefit w/ large actuarial surplus* **Q:** whether pension plan members could call the plan under the rule in **Saunders** — not in this case, but smaller pensions may be possible
* Pension funds not gratuitous: employees either contribute directly or view as delayed remuneration; can’t terminate pension w/o defeating social purpose of financial security to retirees

• Since employees only have contingent interest in surplus subject to plan cancellation cannot employ Saunders w/ non-non vested interest |
| **VARIATION OF TRUSTS****In general, court will approve variation of trust where:** 1. Basic intention of testator will be kept alive by proposed variation — (**Russ**: **not bound** to preserve basic intention of settlor) — *it’d be nice if you can keep intention*
2. Proposed variation is for **benefit** of minor, unborn, unascertained and incapable beneficiaries AND where — (**Russ**: benefit is objectively determined, **Steed**: subjectively determined)
3. A prudent adult motivated by intelligent self-interest, and a sustained consideration of the expectancies & risk of the proposal made, would be likely to accept the arrangement? — **Bentall** “good bargaining”
 |
| **CL Rule:** courts have no power to authorize variation of trust — even if all adults assented to change & change would benefit the beenf who were minors as well **(Chapman v Chapman)****4 Exceptions — i.e areas where Court can vary** 1. **Administrative terms** can be varied if there’s an unforeseen emergency such that trust is threatened and the circumstances were unanticipated by the settlor — court can only vary trustee’s management powers, not authorized to vary quantum or type of benef interest — hard to invoke
	1. Has to protect trust poperty in some way — eg. effect repairs to buildings
2. **Maintenance jurisdiction** – allows court to direct payments to benef if they need money to live in a manner appropriate to trust expectations (ie: if child beneficiaries are inadequately provided for)
3. **Conversion jurisdiction** – allows the conversion of an infant’s trust property from realty to personalty, and vice versa.
4. **Compromise jurisdiction** – enables a court to give approval for those not sui juris in any judicially sanctioned compromise of a dispute.
 |
| **Trust Variation Legislation** — on whose behalf court can vary **S.1** — court approval of variation — can 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) **Contingent interests** - any person, 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, — **doesn’t include adults who are simply missing** * “Interest” of ascertained or not → those with **meaningful albeit contingent property interest** — doesn’t include ppl w/ mere hope, heir presumptive, or those in trust pursuant to wide power of appointment
* Present interest contingent on some future event → settlor **can’t take it away**

(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* NOTE: Legal LE is regarded as a deemed trust so the court is given powers to vary life estates where there are successive beneficiaries).
* Arrangement means any proposal vary/revoke trust In **re Steed’s Will Trusts** (2) Court can agree IF IT’S SATISFIED that the variation is for the “benefit of the parties interested”.

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.**S.2** can’t approve per s.1 unless it is to be **for benefit** of that person — very hard to tell * Financial advantage from tax reduction may work — but not always (**Re Westin’s Settlement)**
 |
| **Assessment of benefit rules:** 1. Benefit must be assessed as benefiting the group targeted by the statute
2. Test for court approval does not req complete elimination of risk but a balancing — test = good bargain test
* would a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies & risks, and the proposal made, be likely to accept?
 |
| **Re Burns (1970) BCSC —** successful variation due to tax benefits/financial interest**F:** Settlor sought consent of unborn persons to an amendment to his (defective) trust settlement. * Proposed arrangement would enlarge investment powers of Trustees;
* All living beneficiaries were sui juris, and agreed to arrangement

**Decision**: Court GAVE CONSENT on behalf of unborn persons* Tax minimization, advancing financial interests of beneficiaries = appropriate variation.
 |
| **Re Westin’s Settlements (1969) —** financial benefits may not be enough to vary trust **F**: Amendment to improve tax position of benef — wanted to discharge English trust and appoint 2 new trustees in Jersey (Channel Island) to avoid UK capital gains tax inaugurated in 1965.**D**: Denning MR REFUSED CONSENT for beneficiaries lacking capacity; **financial benefits not the only consideration** in determining what benefits a minor.* “Social and education” benefits are also important. — especially since the family is loaded — increased tax won’t affect their lives — point **you could attack to distinguish**
* “I do not believe it is for the benefit of children to uproot from England...simply to avoid tax...can’t expect them to wander earth to avoid tax — Children are like trees: they grow stronger with firm roots”. (Denning MR).

\**Role of courts = protect those who can’t protect themselves*  |
| **Re Remnant’s Settlement (1970) (UKCD)** — approved variation based on Family Cohesion & greater bredth of Marital choice → OVERTURNED testator intention **F**: Trust with contingent interest; forfeiture clause if beneficiaries practice Catholicism.* Arrangement proposed deletion of the clause to prevent family conflict.

Decision: Court APPROVED variation, because:1. it benefited beneficiaries (wider scope of potential spouses) — despite financial losses AND
2. it would prevent serious dissension among family members regarding enforceability of forfeiture clause
 |
| **Re Harris (1974) (BCSC)** — social, emotional, and psychological well-being of underage beneficiaries can be OUTWEIGHED by disproportionate financial disadvantages.**F**: Mother of an emotionally devastated family (father committed suicide) sought variation re: **disproportionate financial dispersions**. Mother wanted harmony, equal sharing. **D**: Court **REFUSED** consent, because it would financially detriment the son, who was to receive more under the current terms of the settlor’s instrument.* Also, unborn children of son (who were also beneficiaries under the trust instrument) would not benefit at all from the “harmony” and “equal sharing”.
* Have to balance potential family/social benefits w/ assured financial cons – here family cohesion was supposed — no animosity yet b/c of the split and there may not have been
 |
| **Russ v. Public Trustee (1994)**  — proper test in court exercising consent = **prudent advisor (Objective)** — can contradict (many will) intention of testator **F**: Trust arrangement would have resulted in termination of old trust, creation of new one ...(this is very complicated). **D:** Proper test re: discretion to consent is that of prudent advisor. **Bottom line:** prudent advisor governs: not testator’s intention (permitted variations are often at odds with that intent)Note: This case differs from ruling in **Re Steed’s Will** – more of a paternalistic decision where court took a subjective approach to determining whether consent should be granted.* In **Re Steed,** Court held that provision in trust was there to protect subsequent beneficiaries, as such it would be contrary to intention of settlor to allow trust to be called.
 |
| **Re Tweedie**: Court held paramount consideration = possibility of unborn realizing a financial benefit; when likelihood is small, then liberal interpretation of “benefit” is appropriate* **PAV:** can include **psychological and family benefits** for the living beneficiaries which can be potentially at odds with with what unborn provided differences are slight
* Financial benefits seem to come first — non-financial lurk in background
 |
| **Bentall Corp. v. Canada Trust Co. (1996)** **F:** Varying pension plan structured as a trust; 97% of beneficiaries approved of new arrangement.* Wanted to vary defined contribution pension plan with $6.7 million surplus; give $2 million to members; $3million to Bentall; and $1.7 million as a “contribution holiday”.

**D:** Court used 1b) to vary trust — used “good bargain test” where arrangements are driven by **financial considerations.** * **good bargain test:** would a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies & risks, and the proposal made, be likely to accept?
* Good bargain here (97% approval influenced greatly)→ Varied on behalf of benef whose interest in contingent (implying there were unascertained ppl who would benefit) — not all of union members approved.
* Court has jurisdiction because some unascertained persons may benefit from arrangement in the future – interests of members is SPLIT into presently-held interests (entitlement to fund available to support pension) and future-contingent interests (division of surplus in event Bentall terminated plan).
 |

|  |
| --- |
| CH 9 Appointment, retirement, removal of Trustees |
| **Nature of Trustee:** * can be any person — legal and natural
* Has power and duty (as to which and to what degree may be described and limited in trust instrument) to **control** assets through: administration and Management
 |
| Role often defined by mechanisms of appointment:* **Express trust** — may come about from personal declaration, deed
	+ Important to understand specific term — otherwise the fallback provisions of equity kicks in
* **Resulting trust** — Eg. Automatic Q trust? → work in fiduciary umbrella, but limited to “special purpose” of Q trust — need for trustee to take care of assets will be determined by facts
* **Constructive trust** — Occurs when court makes declaration of trust
* **Trust instrument provisions + principles of equity = key** — note the flexibility that admin powers give (eg. maintenance and advancement)
 |
| **Trustee should be:** responsible, level-headed, business like approach with capacity for good judgment (to utilize for benefit of beneficiaries) * Aunt mabel/uncle harry (ppl in whom testatrix has confidence in)
* Corporate trustees, Securities investment specialists as part of mutual fund schemes
 |
| **Public guardian** — trustees for people who are legally and physically disabled* Public guardian has supervening powers over **charitable** trusts in BC — when gift to non-existent charitable organizations — complaints about alleged misuse of charitable assets
 |
| **Trustees de son tort** — **non appointed**, inter-meddlers in the affairs of an existing trust may be “deemed” trustee → impose fiduciary duty → liable for breach of trust * **Trigger**: ppl who think he’s trustee but legally, he is not
 |
| **Advisors** to & “**protectors**” of the trust. — Not intermedllers, but persons w/ power to designate beneficiaries and * carry some admin responsibilities including powers to veto trustee action affecting “**asset protection**” on tax matters.
* *Appointed to protect trust*
* Eg. cayman island trusts — investors in cayman will be trustees → very remote
	+ So some settlors nominate another person to keep eye on foreign trustees
 |
| **McLean Revocable Trust v Patrick*** Settlement gave protector power to monitor and supervise trustee's → DUTY
* If settlor does not want this to be duty → word it so — **wording must be specific**
 |
| **Appointment**: Can be done by appointment by: settlor, statute, court order * Typically by Settlor — Trustee MUST accept — Refer to deed of trust
* Trustee MUST have legal capacity, and fulfill statutory qualifications (eg. residency)
* Trustee gains authority through **vesting** of asset, or under **a will** through letters of admin
* If multiple trustees → hold property as **joint tenants (presumption)**— unanimity required for all decisions UNLESS trust deed provides otherwise
	+ If one dies, the surviving trustees continue. — Only when the last trustee dies does the trust pass to his/her representatives who then become trustee.

**Where trustee dies,** continuance of trust occurs through trustees **appointed** by:* express power to appoint, contained in settlement
* General statutory power (**Trustee act**)
* Combined benef under principles of **Saunders**
* Court on application by majority in interest and number of benef

Court may appoint trustee where trust settlement is silent: trust won’t fail for want of trustee |
| **Appointment by statute under Trustee Act — since appointment and removal, retirement are tied, some legislation will be used for both naming and removing trustee****Power of surviving trustees to appoint new trustees – Section 27** – deals with trustee appointments where appointments not covered by trust document. * Trustee may die, become incapacitated, leave the country/disappear, or just not want to be trustee anymore.
* Note: s.27 allows trustee to be absent for up to one year.

**Section 27 – Power of surviving trustees to appoint new trustees** (1) If a trustee, either original or substituted and whether appointed by any court or otherwise, is **(i) dead**, **(ii) remains out of BC** for more than 12 months, **(iii) wishes to be discharged** from all or any of the trusts or powers reposed in or conferred on him, **refuses** or is **unfit** to act in them, or **(iv) 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. |
| **Appointments by Court Order****TEST**: For whether Court will approve new Trustee – Section 31 – Courts may appoint new trustees where it “ is **expedient**” to do so.* “**Expedient**” refers to situations where persons designated to appoint in will or instrument CANNOT do so for whatever reason.

**Section 31 –** **Power of court to appoint new trustee** – If it is **expedient** to appoint a new trustee & it is found inexpedient, difficult or impracticable to do so w/o the assistance of the court, it is lawful for the court to make an order **appointing** a new trustee(s), whether there is an existing trustee or not at the time of the order, and either in substitution for or in addition to any existing trustees.**CASE LAW TEST**: Guiding Principles for Court to consider set out in In **Re: Tempest** **include**:1. Wishes of the settlor/testator – especially regarding undesirable characteristics.
2. Persons who do not have axe to grind (have no ulterior motives) – either towards settlor or beneficiaries.
3. Persons who will promote and not impeded execution of trust.
 |
| **Vesting of assets in new Trustees – Section 29*** **Automatic vesting** in new trustee for many types of assets (**except** mortgages, shares transferable by registration in company’s books)
* Instrument of appointment generally serves as vesting instrument too!
 |
| **Retirement:** * When there’s 2 + trustees → trustee can declare desire to be **discharged of duty** — declaration must be **served** on the other trustees
	+ Once accepted → retiring trustee will cease to hold assets in that capacity & be divested of trust property
* Retiring trustee must indicate desire unequivocally → should notify all other trustees and benef
* Cease all meddling once discharged → otherwise may be held liable as **trustee de son tort**
* If you don’t properly discharged → still owe fiduciary duty
 |
| **Removal:** **(i) Under Trust Instrument*** Look first to Provisions in **trust instruments** set out by settlor/testator — otherwise look to **trustee legislation** or general principles of equity
* Usually, power of removal is given to a designated person – i.e. **protector/guardian**
* Very common due to emergence of dodgey offshore trusts.
* Protector/Guardian in legally precarious position – if too much non-fiduciary power allotted, then trust could be viewed as an agency rather than an actual trust.
 |
| **(ii) Under Trustee Act Section 30** – sui juris beneficiary (w/ support of majority in interest and number) **can apply to court** to have trustee removed for REASONS that are **expedient** to the operation of the trust. — **eg. trustee incompetency, bankruptcy** * This may be necessary when differences among beneficiaries have **precluded** termination under **Saunder v Vautier**. — I.e if you can’t kill the trust, remove the trustee
* New trustee can be appointed by the Court under **section 31**

**S.30 — Removal of trustees on application** – A trustee or receiver appointed by any court may be **removed** and trustee(s) 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. |
| **(iii) Judicial Removal of Trustees*** Court will also remove trustees where it’s clear that their continuance would be **detrimental** to execution of the trust.
* **Governing criteria: Welfare of the beneficiaries!**
 |
| **GENERAL RULE for removing trustees: Removal requires an applicant to point to (Conroy):**1. Acts or omissions that endanger the trust property OR
2. Show want of honesty, appropriate capacity, or reasonable fidelity.
* The main consideration is the **welfare** of the Bs collectively (dissension b/w some Bs and the Ts is insufficient) — **is trust asset at risk?**
 |
| **Conroy v. Stokes (1952) BCCA —** CRITERIA FOR REMOVAL = welfare of beneficiaries! **F**: TJ removed Trustees on application from 2 of 5 Beneficiaries;* Did not find misconduct or breach of trust by Trustees;
* TJ DID FIND “friction” between 2 beneficiaries, testator’s widow, and trustees.

**D**: Appeal Court set out CRITERIA FOR REMOVAL = welfare of beneficiaries! (See Above)* **Here**, failure to produce accounts once DID NOT amount to impairing welfare of beneficiaries (persistent failure, however, probably would).
* CA **OVERTURNED** trial judge’s removal order!
 |
| **Re Consiglio Trusts (1973) Ont CA —** inability for trustees to work together (impossible/improbable for continued admin between trustees) → remove (misconduct not req) **F**: Official guardian and benef brought application which claimed it was “virtually impossible for Trustees to agree on anything regarding efficient management of trust” But no misconduct. **D**: misconduct is NOT prerequisite. — there was only deviousness here — **removal ordered*** Applicant MUST SHOW that, because of situation between Trustees, **continued administration of the trust has become impossible (or improbable).**
 |
| **Re Newton Trust** **F**: clashes between co-trustees — 1 of whom is beneficiary * Allegation against particular trustee (to be removed) was that there was lots of issues around feeds/costs + attempts get at beneficiaries
* Ploys — eg. 1 trustee had major holding in army & navy, fired president — this delinquent trustee kept nominating this president as trustee replacing some outgoing trustee
* beneficiary/trustee actually suggested good candidates for replacement trustee

**D**: **trustee should leave** → another person available to take his place * Court doesn’t need to find misconduct to remove trustee
* **Welfare of the beneficiary = uppermost consideration**
* Conflicts between co-trustees = legitimate basis to remove trustee where relationship has become dysfunctional
 |
| **Critchley v critchley:** list of **grounds** for trustee removal: **dishonesty, deception, failure to give proper accounts, failure to file taxes, failure to act as prudent investor**  |
| **Court** won’t move quickly to remove trustee, but appropriate and measured grounds will move court do it —use supervening power over trust admin to appoint and remove trustee * May even set out mechanisms for administering trust
 |
| **Radford v Radford Estate**— set out factors that court will look in removing trustee * Shows at bottom line: it is expediency in promoting efficacy of trust assets for beneficiaries at play
1. The court **shall not lightly** interfere with the discretion exercised by a person in choosing the person or persons to act as his executors and trustees. — freedom of property respected
2. Interfering with the discretion and choice of a settlor/testa in preparing his last will and testament must not only be well justified, but **must amount** to a clear case of **necessity**. → respect choice of testatrix
	1. Clearest evidence should be adduced to show this is most sensible course to take
	2. Court also concerned w/ business reputation of trustee you seek to remove (court sensitive removing based on friction — **stigma** towards person being removed → don’t do it willy-nilly)
3. Removal of an estate trustee should only occur in the clearest of evidence that there is no other course to follow.
4. In deciding whether to remove an estate trustee, the court’s **main** guide should be the **welfare of the beneficiaries.** → **Test**: expediency around welfare of benef determinative in making decision
	1. Must be shown that if you don’t remove trustee → will likely prevent proper execution of trust (point of **Newton**)
5. It must be shown that the non-removal of the trustee will likely prevent the proper execution of the trust.
6. The removal of an estate trustee is not intended to punish for past misconduct; rather it is justified on the basis that **past misconduct is likely to continue** and that the estate assets and interests of the benefs must be protected.
	1. Simple minor single instance of miscond (eg. accounts not handed down to benef in timely way) → NOT going to form basis for removing trustee
	2. Single instances of fraud will do it
	3. Minor admin breaches, unless very frequent, are not like going to be basis for removing trustee
	4. Court wants to pay high deference to choice of trustee made by settlor
 |
| **Bunn v Gordon (2015)** (p.346, note 48) — consistent antipathy towards benef = basis for removing someone as trustee |
| **Residency and Taxation of Trusts** Where is trust resident?**Residency**: Trust ordinarily resides where the trustees reside * However, note **Garron (2012)**— p.346 — **CL residency test** for trust = situ of its central management where the **control of the trust** actually takes place
	+ here 2 trustee resided in **Barbados** but the **central management and control** of them was in **canada** → subject to tax laws of Canada → which has high tax rates for tax
* \*Prior to **Garron**, resident of trust = where trustee was → taxing regime of jurisdiction determines what tax consequences for trust to be → 1 vehicle where a trust can attend to avoid a taxation in the jurisdiction of beneficiary

**Taxation**: Trusts are separate tax entities* Payment due by trustee, where inadequate beneficiary must pay (trustee has indemnity). — once paid payments to benef are tax free — Usually taken by revenue from trust asset
* If little to no revenue → beneficiary to pay taxes (since they’re benefiting off it)
 |

|  |
| --- |
| CH 10 Trustee powers, rights, duties, and immunities  |
| **Before you do analysis for duties — always consider how the person’s fiduciary duties have come about — are they the trustee?** * Are the officers with significant control s.t they’re more like directors (**Can-Aero**)?
* Trustee by PIRT?
* Constructive trust (**Crighton**)
 |
| **(i) Three Substantive Duties (as opposed to administrative or operational):**1. Take and get control of trust property;
2. **Duty to invest** so capital fund is preserved from risk, and yields a reasonable return;
3. **Impartiality** – Investment must be made in a way that in even-handed between different classes of beneficiaries (ie: life tenants vs. remainder persons).

**#2 & 3 = TWO BROAD ASPECTS of Trustee Investment** |
| **Trustee's’ Power of Delegation*** **Take control of property — 1st step** = collect and store assets — may require agents → **delegate**
* AT CL, trustees were subject to maxim **‘delegatus non potest delegare** ’ – “a delegate cannot in turn delegate to another” — **can’t** apply this rigorously (administration of trust is complex)
* Today, trustees are **entitled to appoint agent**s to perform many acts of admin regarding trust. — but has to be PRUDENT in selection — **what would prudent investor do?**
 |
| **Speight v Gaunt (1893) (UKHL) —** trustee can retain 3rd party (bankers, brokers) to execute admin of trust — but must be in normal course of business, or from moral necessity **F**: Trustee appointed a stockbroker as agent who **misappropriated** funds. Trustee had followed standard business practices re: purchase and sale of shares (received “bought note”). **Decision**: “Bought Note” was essentially worthless, but Trustee NOT LIABLE. — **no breach of trust** * Trustee followed the **standard business practice.**
* Trustee cannot delegate away the duties he holds, but can, in the administration of the trust, avail himself to the agency of parties (bankers, brokers, etc).
 |
| **Section 7 – Power to employ SOLICITORS and BANKERS (1)** A trustee may appoint a solicitor to be the trustee's agent to receive and give a discharge for money, or valuable consideration or property receivable by the trustee under the trust, and a trustee is not chargeable with breach of trust merely for having made or concurred in making that appointment. **(2)** A trustee **may** appoint a banker or solicitor to be the trustee's agent to receive and give a discharge for money payable to the trustee under or because of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee is not chargeable with a breach of trust merely for having made or concurred in making that appointment. **(3)** This section **does not exempt a trustee from any liability the trustee would have incurred** if this Act had not been enacted, if the trustee permits the money, valuable consideration or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor to pay or transfer it to the trustee. **(4)** This section applies only if the money or valuable consideration or property is received after July 1, 1905. **(5)** This section does not authorize a trustee to do anything the trustee is in express terms forbidden to do, or to omit anything the trustee is in express terms directed to do, by the instrument creating the trust. |
| **Re Wilson (1937) Ont CA —** can’t delegate away fiduciary obligations — **BE CAREFUL****F**: Testator entrusted estate to trust company, in favour of beneficiaries. — Offer made to purchase 1 property, directed to GM of trust company, who rejected it and failed to communicate decision to the Board.* Board had allowed GM to manage the trust estate as he thought best (essentially, **delegating** their authority).

**D**: Board’s failure to consider offer = a breach of trust – A trust company is personally responsible for exercise of judgment; cannot escape responsibility by delegating another (here, the GM) to exercise judgment. **— may no longer be applicable —** Compare to **Fales** — Bull JA REJECTED in obiter that only corporate directors can exercise discretionary powers for corporate trustees – argued this amounted to treating each director as a trustee.* According to **Fales**, entire company is the trustee, not individual directors, as settlor expects corporate structure to effect trust process. → re wilson may be treated differently after **fales**

**Erosion** from **Re Wilson**: Today, corporate board members typically delegate actual investment decisions to specialized experts, so rule from Re Wilson should only be seen as extending to fiduciary obligations generally, not actual investment decision. [rule has since been eroded by modern practices in corporate trusts] |
| **Duty to Invest — potential** triggers: shitty return, favouring 1 party over another — See DC & SC **In General:**1. Trustee not bound to avoid all risks;
2. Trustee not liable for errors of judgment made while acting with reasonable care, prudence and circumspection **(Re Godfrey**).
3. Exoneration of technical breaches may occur under s.96 of Trustee Act.

**Settlor can set parameters and:**1. Authorize the trustee to make any type of investment having regard to the purposes of the trust (income-generating vs. capital value enhancement because of need to supplement income);
2. Set the standard of investment; AND
3. Set the circumstances of its application.
 |
| **i) CL Duty/standard of Care re: investments** – trustee takes obligation to act as an ordinary prudent person taking care of his own investments, mindful that those investments are to benefit persons for whom heis morally obliged to provide. (**Spreight v. Gaunt, Fales**).* This **OBJECTIVE STANDARD** shifted law away from previous subjective standard (**Re Whitley)**
* Trustee is not required to beat the market and is not responsible for general downturns.
* **S15.3 exonerates T from liability** if losses were a result of implementation “plan/strategy for investment trust property” and reflected “reasonable assessments of risk/return” that prudent investor would adopt – **affirms portfolio theory**

**(ii) Statutory Standard of Care re: Investments****15.2 trustee act: Statutory 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.**Standard of Care:** Should there be a spectrum of Trustee competencies (higher for corporate, less for lay-persons)?? |
| **Fales (1974) SCC —** “ordinary prudent” + “diff ppl are expected diff competencies” + court can selectively relief trustee **F**: Widow and CPT= trustees to manage estate for benefit of wife and children in succession.* CPT invested property into “risky” stock; invested on **speculation** — “blue chip wouldn’t let subsidiary fall”
* Trust company intended to convert stock into “authorized investments”; but **held onto stocks for too long**, and then lost $$$$ — 60% of fund in company for 3 years despite indication of failure — **argued widow sentiment (fail)**

**D**:There was a breach of trust — Trustee didn’t act like a prudent business person* Gift to benef in succession → **trustee w/ discretion to retain are under a duty to convert** “asa “adv” p” where asset consists solely of shares in closely held company
* Standard of care require dof trustee = “expected to act as ordinarily prudent person would act”.
* CPT liable for breach of trust, but mother acted “honestly and reasonably” → relieved under s.96 of Trustee Act.
	+ **“Same standard” for all trustees but people are at different competencies/proficiencies**
* When trust for sale w/ power postponement: heavy burden on T to show that in situation loss resulting from delay of sale, that delay was reasonable and proper in circumstances

**S96 (Bull JA):** not construed in narrow sense; honest/reasonable conduct necessary but not sufficient: must show fair to excuse; court must endeavor put itself in position of T at time of breach; relief depends on circs of each case  |
| **(iII) Ability of Courts to exonerate trustees from liability****Section 96** - **Jurisdiction of court to relieve trustee of breach of trust.** If a trustee, however appointed, is or may be personally liable for a breach of trust, but has acted honestly and reasonably, and ought fairly to be **excused** for the breachand for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court **may relieve** the trustee either wholly or partly from that personal liability.”**(v) Type of Investments in which Trustee may invest – Section 15.1 & 15.2 of Trustee Act*** Before 2002, Trustee Act limited investments to maximum percentages of specific investment types (ie: real estate, mortgages, securities), and their location outside Canada (“ authorized investments”). — Now, much simpler [see below].

**15.1** Investment of trust property1. 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.

**15.3** Not liable for reasonably planned investment losses - “A trustee is not liable for a loss to the trust arising from the investment 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**.” |
| **Nestle v. National Westminster Bank (1993) CA** — Investment decision should not be judged in HINDSIGHT: Need to examine the prudency of Trustee by examining the reasonableness of the investment decision **at the time it was made!** **F**: Testator left LE to wife (54,000), remainder to granddaughter; Will instrument authorized investments, power to retain (Trustee had wide discretion). — In 1986, granddaughter got remainder interest but **claimed it should’ve been worth a lot more** (received 270,000, claimed fund should be worth 1.8 million). **D**: trustee had fallen short of maintaining real value of fund. BUT**, nonetheless, claimant FAILED** — Trustee had deliberately invested conservatively because it benefited life tenants (to ensure there was a remainder!).* + Invested in tax-exempt bonds; shielded trust from inheritance tax. — motivation
	+ Bank showed that prior to 1959, equities were very risk assets).
 |
| **(v) Exclusion of investments on MORAL GROUNDS** Trustees cannot refuse to make investments on moral grounds, if such investments would be of greater benefit to the beneficiaries if invested in other alternatives. — **“take personal feelings out”*** ASIDE: [not in case] But, if sui juris beneficiary shares the trustee’s moral belief, such restraint in investing could arguably be a “benefit” to the beneficiary.
 |
| **Cowan v. Scargill (1985) (UKCD)** **D**: Trustees must put aside their own personal interest and views. → predominant goal = secure reasonable financial return → must not refrain from making investments that are beneficial to benef because of the views trustees hold* Doesn’t mean you can’t exclude stocks on ethical considerations provided it won’t negatively impact financial gains
* Where trust to provide financial benefit to Bs then **usually means maximizing financial returns**
* “Benefit” is wide and not limited to $, but **trustee who uses non-financial criteria should continue to be obliged to meet the usual standard of prudent practice**
* If assets return equally financially can evaluate w/ other criteria
 |
| **3. Fiduciary Responsibilities: Trustee’s Duty of Loyalty to the Beneficiary** **General Rule: Trustees, as fiduciaries, MUST NOT place themselves in position where their interests may conflict with those of their principals/beneficiaries.** (**Keech v. Sandford**). * Must exercise duties and responsibilities in good faith, and in advancement of the interests of the beneficiary.
* **cannot pursue own interests or 3rd party interest ahead of that of Beneficiary**
* **Trustee must not profit at expense of benef (Boardman v. Phipps)**
* Trustee may only contract with benef in transactions that **are fair**, in which there is **full disclosure** in all matters.
 |
| **No-conflict rule holds true — BUT how you determine conflict is more relaxed** **Old Strict Approach:** Trustees cannot benefit from info obtained in the course of fulfilling trustee duties **(Keech)****Boardman Dissent:** Watered down abs standard to “real sensible possibility of conflict” — **not absolute anymore!** — duty of loyalty speaks to real and sensible conflict as opposed to any conflict**CanAero**: **EASED Keetch** — Standards of loyalty, good faith, avoidance of conflict and self interest must be assessed on **CASE-BY-CASE basis (i.e NOT ABS)**, by assessing FACTORS: * **Position** of office — **nature** of corporate opportunity, **ripeness**, **specificness**, director’s **relation** to it — **amount** of knowledge possessed — **circ** in which info **obtained**, whether it was **special**/**private**
* “**continuation**” of fid duty, where alleged breach occurs after termination of relationship — circ under which relationship **terminated**, discharge or resignation or retirement?
 |
| **Keech v. Sandford (1726) — strict approach** (0 tolerance even when no fraud/dishonesty)— more relaxed now**F**: Trustee held lease on trust for beneficiary who was a minor. Trustee (as tenant) sought to renew lease on behalf of beneficiary, landlord refused to renew the lease if it was connected to a minor. — **seemed shady*** Trustee entered into new lease, but now on his own behalf. — Benef sued Trustee for assignment of a lease.

**D**:Trustee to hold lease for Beneficiary. — should not have taken lease **because potential “conflict”** with beneficiary’s interests (even though landlord wouldn’t have given it to beneficiary anyway).* Even though Trustee wasn’t fraudulent, he should have let lease run out rather than renew it for himself.
* **This rule deters trustee from setting up these impossible circumstances to benefit trustee — don’t even try to act contrary to interest of beneficiaries**
* Floodgate argument: To allow trustee to have lease would yield unacceptable consequences, set dangerous precedent. — you want to deter trustees from fraudulently doing this
 |
| **Boardman v. Phipps (1967) HL —** case be decided differently today: **dissent would prevail —** Watered down abs standard to “real sensible possibility of conflict” — not absolute anymore! **F**: Trust with interests in 2 companies; Trust’s solicitor wanted to do something about one of the companies * Solicitor and 1 beneficiary suggested trust should acquire a majority stake in company and improve its profitability. — **Trustee REJECTED this idea.**
* Solicitor and client went out and bought shares for themselves, w/o consent of all beneficiaries.
* Investment very successful; one beneficiary arguing they breached fiduciary duties. — wants $$$$

**D**: Def were held to be fiduciaries – acted as agents of the trust by inquiring about the company; thus breached fiduciary obligations! — \*the problem was boardman here — if it was just tom phipps then it’d be hard to fault him — you’d have to argue trustee de son tort but no good! * Boardman and phelps were paid generously despite disgorgement — recognition of their contributions

**Dissent**: Watered down abs standard to “real sensible possibility of conflict”— duty of loyalty speaks to real and sensible conflict as opposed to any conflict — Emphasized that trustees as a group had opposed purchasing further shares in Company for the trust and so, realistically, there was no conflict!* Also, trustees favoured the purchaser by Phipps and Boardman, as it put majority control in friendly hands.
* **‘possibly may conflict’** = a reasonable man, looking at the relevant facts and circ of the particular case would think there was **a real sensible possibility of conflict,** not that you could imagine some situation which might, in some conceivable possibility...result in a conflict”.

\*flag “complexity of modern business” |
| **Peso Silver Mines (1966) SCC**  — under strict principle, there would have been disengorge, but **loosened** rule hereFacts: Peso was offered a number of mining claims; Directors of Peso refused them due to lack of funds.* After refusal, Cropper (a director of the company) launches his own company, which buys the mining claims.
* Peso sues arguing claims were held for peso under C trust — director breached his fiduciary duties to company.

**D**: ‘no conflict’ principles are strict, but be careful interpreting them in light of modern practice. — be flexible dealing w/ modern corporate arrangement * Croppe**r NOT IN BREACH** of fiduciary duty to Peso; Directors had acted in good faith by rejecting offers.
* Information received by defendant was not confidential (although Cropper likely wouldn’t have obtained it had he not been a director). — Defendant acted in capacity as an individual.

Dissent (Norris JA): History of corporate scandals means rule should be strictly enforced; possibility of fraud of public loss so real that there should be increased recognition of fiduciary position. — complexity suggesting stricter rule |
| **Reconciling between Keech v Sandford & Boardman v Phipps AND Peso Silver Mines*** Basis for no-conflict rule is not compensating beneficiary, as typically they lose nothing.
* Courts used this approach as in 18th/19th centuries, it was widespread practice for trustees to purchase assets from insolvent estates they were required to liquidate (at below market prices).
	+ This practice is long gone, so perhaps the more flexible approach in Peso Silver is preferable.

NOTE the approach taken in CanAero v. O’Malley [below]. — Less strict than Keech or Boardman , but more strict than Peso? Fiduciary duties extent to corporate officers as well: Senior officers in position of “top management” are, in appropriate circumstances, to be treated in same way as corporate directors concerning fiduciary responsibility – and not “mere employees” (as found by Ont CA). |
| **CanAero v. O’Malley (**1974) SCC — No-conflict strict appraoch loosened, but D still lost here **F**: Defendants where officers of CanAero, but not directors. CA in business of aerial photography and cartography.* D eventually started they own company to compete with CA, won a contract with the govt of Guyana
* CanAero lost → sues for breach of fiduciary duty, due to conflict of interest.

**D**: As officers, D were placed in the **same position as directors**, because they had effective control over the company.* Even though defendants were not acting in bad faith, they were still liable as “faithless fiduciaries”!
* senior officer owes fiduciary duty despite not being a director
 |
| **Self-Dealing VS Fair-Dealing rules**1. Fair-Dealing is less risky, because: beneficiary = seller, buyer = trustee → selling of beneficial interest* **Self-Dealing → Trustee is BOTH seller and buyer** (both sides of transaction = high chance of fraud!) → trying to eliminate beneficial interest through this dealing
* **Self dealing Transaction voidable at complete discretion of benef**

2. If Fair-Dealing Rule is satisfied, and Trustee purchases all of the trust assets, the TRUST TERMINATES as trustee will have lawfully acquired both legal and equitable title.* Self-Dealing CANNOT PRODUCE THIS RESULT, transfers to trustee or nominee result in survival of trust, UNLESS property comes into hands of bona fide purchaser for value.
 |
| **(ii) SELF-DEALING RULE:** rule renders VOIDABLE any transaction where a trustee purchases trust property FOR HIMSELF, or more commonly, sells his/her property to himself as trustee (unless expressly authorized).* More likely to be a valid bargain when EQ interest is sold – as beneficiary is the seller and trustee the buyer

**RATIONALE:** hard to tell whether the trustee has really served the interests of the benef well and secured the best price |
| **Holder v. Holder (1968) UK** **F**: Father left assets in trust for children, with children as trustees. One child (defendant) appointed as executor of father’s estate, but renounced position shortly after doing a few tasks, not formally removed as trustee.* Other Trustees sold farms to D — D **played no part** in the decision – D purchased farm at public auctions and at fair market price. — 1 beneficiary decided to challenge this as self-dealing.

**Decision:** Sale was outside mischief of self-dealing rule = OKAY!* D bought farm for fair market price at public auction.
* No “real conflict”, defendant renunciation was well-known and public.
* Note: This case marks UK departure from rulings in Keech and Boardman – (was Holder exceptional?)

**SCC** adopted Holder in **Molchan**: Need flexible approach – rigidity can lead to “patent injustices”. |
| **(iii) FAIR-DEALING RULE:** Beneficiary sells beneficial interest to Trustee* Beneficiary has EQ interest that can be sold and transferred to another person.
* If sold to Trustee → Fair-Dealing Rule kicks in.

RULE: If beneficiary alleges a conflict, the onus is on the trustee to prove that Fair-Dealing Rule has been satisfied.  |
| **Crighton v. Roman (1960) RULE:** Trustee must “make full disclosure” and show:1. No fraud of concealment of advantage by trustee; 2. Beneficiary had independent legal advice; every kind of protection; full information; 3. Consideration was adequate.Fair dealing trans still voidable by benef **if** trustee has not given full disclosure of what the transaction means to the benef**F:** mining claims are purchased by roman, roman + 2 other ppl (creighton, featherstone) all paid for it— roman uses peacock as trustee, sells the claim for $$ + shares in a hugely profitable mining company* Roman & peacock tried to get a release from creighton, who owed money — in consideration for forgiving the debt, creighton had to release his shares in the mines!
* C never informed of wealth attached to the shares → which was well known by R & P, but didn't inform C

**D**: Roman was considered to be holding beneficial interest of Creighton on constructive trust → fiduciary * **Failure to give full disclosure → release was invalid**
* Although fair dealing contract, there was no fair disclosure...
 |
| **Duty of Impartiality:** s.37 of uniform trustee act abolishes the respective rules in howe and earl of chesterfield **Duty:** Where there is 1+ beneficiary, law **presumes** trustee has a duty to act **IMPARTIALLY** between benef (ie: some beneficiaries don’t benefit at another's expense). — **assumes** impartiality = intention of settlor or testator**Rebuttable Presumption:** settlor/testator can DIRECT OTHERWISE in the trust instrument (ie: prescribe partiality or indifference to it), which prevail over presumption* The duty imposes great burden on trustee — make sure assets yield sufficient return → further restraint exposes them to breach of trust → lots of trusts contain provisions that exempt trustees of this duty
 |
| **Usual causes of uneven treatment:** where trust deals with beneficiaries in **succession** (ie: life tenants with remainder persons). 1. Nature of asset causes unequal treatment — high yielding but high risk of deteriorating asset → prej Remainder
2. Trustee’s assembling portfolio of asset that generates uneven treatment
3. Return from asset that are rapidly exhausting base value — eg. mine
4. Property that could be either ecapital or income depending on transferor’s characterization — eg. certain kinds of shares → forces it to be lopsided between LT and remainder

Where property causes **inequality** → trustee have to sell assets, “convert” them into assets that won’t favour 1 benef over another  |
| **Miles v Vince —** 2 trust — req to be impartial to classes of benefs * Family trust — real estate as principal asset, children as beneficiaries
* Insurance trust — wife and children as benef — proceeds from life insurance policy
* Sister = trustee of both trusts
* Sister took proceeds from insurance policy and used them as a loan to the real estate trust
	+ No income flowed from insurance fund under this loan → prej widow
* Court: investment strategy didn’t meet prudent investor standard — also **breached impartiality** → breach of trust, ordered removal
	+ Not prudent investment for insurance trust → widow got nothing
	+ Failure to be impartial: favoured 1 trust over another
 |
| **REMEDIES FOR IMPARTIALITY*** To be impartial, Trustee may have to restructure the investment portfolio of the trust assets. → accomplished through “ conversion” and “ apportionment”:
* ‘Duty to Apportion’ is typically a corollary to the ‘Duty to Convert’, but it may be excluded if conversion alone is sufficient.

(1) **Conversion** – Trustee sells some of the trust assets and redirects (“convert”) them into authorized investments that favour neither the income account nor the capital account; ANDAccomplished by either by:a) Directing income into capital fund (favours remainder person) OR b) Allocating sum from capital fund and using it to generate income (favours life-tenant). |
| **Howe v Lord Dartmouth —** need to sell assets and reinvest proceeds that enable 4% income stream for LT Rigid terms1. Where a testator/testatrix — doesn’t apply to inter vivos trust (settlor)
2. leaves residuary
3. Personalty — **Not realty**
4. to persons by way of succession and
5. the residue includes a wasting asset (including unauthorized or reversionary asset)

then the trustee must:1. sell the personalty that is a wasting asset (or unauthorized or reversionary asset),
2. invest the proceeds in authorized investments (property), and
3. use the income for the benefit of the LT beneficiary while the corpus of the fund is preserved later use by the persons holding the remainder interest.

**\*Wasting assets** = deteriorate over time ot things that are worthless — eg. Mortgages, cars, ships, watches, copyright**Unauthorized investments** = speculative shares —- remainder likely prejudiced **Remainder in things** = no current enjoyment → prejudice LT **Apportionment:** When asset sold — prior to sale, income received is not paid in specie to LT, must be apportioned — 4% goes to LT, rest goes to base of trust * If < 4% — wait until property is sold, take some of the purchase price and make for the 4% on years of underperformance
* 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. If not → the value is taken at the first anniversary of the testator’s death.
* If the duty to apply is in an inter vivos trust (because the testator expressly requires impartiality), the value of assets are assessed at the date of the trust.
 |
| **Earl of Chesterfield trust apportionment formula: — apportionment for specific type of assets** For apportionment after sale of non-income producing assets that **are** reversions, remainders, life insurance policies * Sale price - $ needed to generate sale price at the date of testator’s death (subj to 4% compounded return)
* Eg. sold for 100k 3 years after death → needed 89k to generate that — 89 \* 1.04^3 = 100
 |
| \*Rules in **Howe and Chesterfield** set out rules for impartial treatment of successive benef w/r/t perosnalty in a **will** (i.e testation)— but trust instrument may eliminate the rules — or endorse sentiments **in *inter vivos*** — and alter some aspects of the rule — **see below**  |
| **Express Trust for Sale/concert** – implies intention to **convert**!* implies a testator intention for **impartiality** among the beneficiaries. → howe & chesterfield applies!

**Clauses implying partiality:*** Express Trust to Retain
* Authorizing total discretion of trustees w/ investments
* LT directed to receive income “in specie” — would prej remainder

\*Possible to have clauses that expressly want impartiality, or even extend impar to real estate  |
| **Express Trusts for Sale with Powers to Retain or Postpone*** See which clause is **dominant**: where power to postpone or retain is dominant → may argue exclusion of duty of impartiality
* Power to Retain may also imply an ability to enjoy in specie.
* Power to Postpone implies inevitable conversion. — can also carry an intention by testator that the life tenant beneficiary enjoy asset in specie
 |
| **Lottman v Stanford —** unless expressly included in trust instrument, land = outside purview of Howe F: Testator left estate to Trustees for benefit of wife as life tenant, remainder to children.* Express trust for sale w/ power to postpone
* Trustees requires to sell “personal estate” but given wide discretion to postpone conversion.
* Assets were sold, except 1 parcel of land, which was rented to a son on 20 year lease for low rent (so low it didn’t even cover property taxes!). → Wife sought relief.

**D**: lower court held **Howe** should be extended to cover real estate as well → **denied by SCC — Howe DOES NOT APPLY to real estate** – refused to extend rule to cover it.* Widow NOT ENTITLED to notional interest from real estate, only limited to actual income generated (ie: 0)
* Howe was also excluded from personalty — due to provisions concerning converstaion of personalty (detailing how to use capital for LT)

**Note**: This case is in line with In re Oliver (1908) Ch, where combined assets in personalty and realty in deceased’s estate were not treated together as personalty for purpose of applying H v D.For realty, LT entitled to rent and profits in specie; with personalty, LT entitled not to income in specie, but entitled to 4% of value of personalty  |
| **Lauer and Stekl (1974)** BCCA/SCC — intention of testator trumped — HvD irrelevant **F**: Deceased estate (daughter = LT; grandchildren = remainder) had both realty and personalty.* Trust to convert (i.e sell) ALL the estate, but w/ wide powers to postpone or retain property.

**D**: Court characterized **clause for conversions as primary and dominant**. Here, trust to convert with wide discretion extended to **ENTIRE ESTATE** (unlike Lottman).* Not a knock on HvD — wording of clause for conversion implied Intention to lump personalty & realty under impartiality — unlike Lottman (trust to conver for only personalty)
	+ Wording of trust instrument = essential to distinguishing Lauer and Lottman
* required payment from all assets to LT at fixed rate.

A power to postpone does not usually entail power to postpone indefinitely (unless clear intention of that)  |
| **Royal Trust Co v. Crawford (1955)** SCC — failure to displace req of apportionment **Facts**: Testator left heirs in succession: wife as life tenant, nieces/nephews in remainder; estate consisted of securities/shares.* Huge dividends declared and paid to widow (which reduced value of company by 75%).
* Will had trust for sale with wide powers of postponement of conversion and retention.

**Issue**: Did power to postpone conversion displaced req of apportionment? — did all or part of dividend ought to be apportioned as income (for LT) and capital (for remainder)? **D**: intention to displace req of apportionment must be clearly gauged from will and surrounding circ* While testator wanted wife to live in comfort, testator did not want encroachment on capital above all else. — Conservation of capital clause suggest “living in comfort”
* Where there’s direction to convert + power to retain → see if power to retain is **merely ancilliary** — if not, find evid suggesting LT is entitled to income in specie
* COURT ORDERED APPORTIONMENT!

**Dissent**: (Cartwright and Estey JJ): thought paragraph of trust instrument indicated intent for wife to get “any surplus income”; justified wife getting enormous dividends at expense of remainder (niece and nephews). — PAV: cultural values, widow > nephews/nieces |
| **Trusts to Retain VS. Powers to Retain —** signif factor determine whether there’s duty to impar* Trust to Retain **excludes** Rule from **Howe v D** – implies NO DUTY of Impartiality.
* Power to Retain **does NOT exclude** **Howe v. D** – need to look at circumstances [see **Royal Trust Co** above].
	+ Will trigger duty of impartiality **unless** clear contrary intention from Settlor — [intention absent in **re Smith**]
 |
| **Re: Smith (1970) Ont HC —** duty to impar triggered w/ power to retain **Facts**: Precatory clause in father’s will;wanted son to care for mother. — * Son made **inter vivos** trust, income from shares in Imperial Co. to mom as LT, remainder to son. — small yearly income, insuff to support widow’s living standard
* Widow asked Trustees to vary investment portfolio to invest in company with higher yield, but son wanted to keep shares → trustee sided w/ son

**D:** Trustee had been partial to remainder person (son) — erroneously construed power to retain as a trust to retain * Trustee followed advice of remainder person, rather than seeking advice.
 |
| **Impartiality in case of Settled Shares in a Company*** Assets of a corporation are its CAPITAL.
* Corporation use asset to generate profits, and distributing it as INCOME in form of **dividends** (income → LT) **OR** **Shares** (Capital → remainder)

**Re Waters — General Rule (‘Form is Substance’):** courts look to **intention** of the company/Board — see which form to distribute the funds to shareholders (classify shares as income or capital?) — BUT, there are EXCEPTIONS (see Welsh). |
| **Re Waters** — preferred shares treated as capital * Seems like impartilaity jettisoned by trust of an estate constiting of settled shares
 |
| **Re: Welsh (1980)—** intention of testator paramount — if no clear intention, use “form is substance” **F**: Testator gave LE to second wife, remainder to children from previous marriage.* Wife receives dividends, then dies, leaves her property to new husband and her own children.
* Capital assets sold off and distributed as “dividends” (as characterized by the company).

**D**: Treated dividends as CAPITAL, NOT income — to hold otherwise would be contrary to testator intention (i.e to care for widow in her life, pass his capital to children) * Where children of deceased are claimants → court will naturally lean in their favour and prefer their claim over competing claims by children who are strangers to deceased
* If form is substance followed → his kids gets little — company capital liquidated and was disbursed as dividends (similar to **Royal Trust Co**)
 |
| **Apportionment of Debts and Other Disbursement*** Trustee admin req estate management, including payment of trust estate debts and disbursements. — still subj to **impartiality**
* → may req apportionment of funds as capital and income in assessing payments as legacies, taxes, insurance premium, cost of repairs, debts
* **Under BC sttatute: unless testator requires otherwise, payments of debts are to be made out of capital**
 |
| **Trustee’s Duty to Provide Information*** Traditionally, thought inappropriate for Trustee to provide beneficiary w/ info about trust.
* Now, beneficiary has a RIGHT to require a trustee to provide info that will enable a judgment whether the trust is or is not being properly managed.
* Beneficiary (including discretionary and contingent), on reasonable notice, has a right to see trust accounts, investments, trust doc, and all reasonable information concerning the management of the property.
* But, NOT ALL information is subject to this duty [See Re Londonderry’s Settlements]
 |
| **In Re Londonderry’s Settlements (1965) Ch —** “Reasonable info” regarding the beneficiary’s right to info DOES NOT INCLUDE documents concerning the exercise of trustee discretion.**F**: Beneficiary had interest in distribution of income among a class of discretionary beneficiaries – wanted the agenda and minutes of the meeting in which discretion was exercised.**D:** Beneficiary NOT entitled to doc concerning exercise of a discretionary power of benef selection (ie: the reason Trustee came to its ultimate decision). — otherwise no one would want to be trustee**Note**: If Trustee is acting in bad faith, obligation can be enforced by court order. |
| **Schmidt v Rosewood Trust —** **F:** modern case — discreitonary benef sought info about offshore “tax haven” — because this info was an aspect of a benef’s proprietary right — Schmidt — was personal rep in his father’s estate — as person who settled the offshore trus, he had strong claim to disclosure of document of info relevant to the matter — D: modern approach allows disclosure when opinion is clearly dealing w/ issues of benefit to both trustees and benef — eg. seeking direction on how to proceed based on construction of a prov. In the trust — As opposed to an opinion on a trustee’s breach of trust Dont’ disclose if opinion shines light on breach of trust * Should disclose where it is to benef’s benefit to kknow & not diliterious or shining bad light on trustee
 |
| **s.28(4) Uniform trustee Act** — circ where benef is not entitled to info — circs where * Disclosures would be detrimental to best interest of a beneficiary (possibly diff benef than the one requesting info), the trust property or the admin of trust
* Situation where trust has ownership in corporation & trustee is director
* Reasons for exercising a failing to exercise a power
* Places an unreasonable administrative burden on trustee
* Places the trustee in breach of a properly assumed obligation to keep a matter confidential
 |
| **Trustee Duty to account —** Beneficiaries entitled to inspect accounts, but are not entitled to instantaneous response!**Sanford v. Porter (1889) Ont CA** **D**: Duty of Trustee is to make accounts available for inspection and examination. If Beneficiary lives in remote location, may need to mail copies of accounts — Every case depends on the circumstances. **Note**: Today, instantaneous response is easy with internet; however, maintaining accuracy and currency may not be. |
| **Trustee Remuneration:** * At **Equity**, trustees expected to act voluntarily, meaning services they render are unpaid.
* MODERN APPROACH, remuneration is regulated by the terms of the **trust instrument**.
* Can also be governed by a **contract** between Trustee and **sui juris** Beneficiary – but not advisable as **subject to undue influence attack.**
* Courts retain inherent jurisdiction (**Boardman and Phipps**), and can order compensation.
* Remuneration - **Section 88(1) of Trustee Act** - “*trustees are allowed expenses plus “****a fair and reasonable*** *allowance*” **not exceeding 5%** on the gross aggregate value of all the assets for their “care, pains and trouble” and administration.” — **5% = 1 time deal**
* **F**or s.88(1) – Lump-sum remuneration is preferred to percentage amounts
 |
| **FACTORS/guideline for setting remuneration (s.88(1)) (Re Sproule):**1. Magnitude of the trust (“value and complexity”)
2. Care and responsibility arising from trust
3. The time occupied in performing trust duties
4. Skill and ability displayed by trustee in managing trust assets
5. Success which has attended its administration of trust assets.
 |
| **Re Sproule (1979) Alta CA** **F:** 1 asset, but large interest in units/shares of company, which did NOT PRODUCE INCOME.* Benefs argues for lower fees, since Trustee was little more than passive guardian.
* Trustee argues **care and management** of high value assets was **inherently risky — required constant monitoring**, argued for remuneration as % of asset value.

**D**: **Court** expressed preference for lump sum over % – would only use % in special cases.* See guideline above
* TJ awarded $100,000 in fees – CA lowered this to $30,000.
 |
| **Care and Management Fee – S.88(2) of Trustee Act** – Trustee can also apply annually for “care and management fee” **not exceeding 0.4%** of average market value of assets.* Court or Registrar, if delegated, determines remunerative amounts.

**TEST for s.88(2)** – to obtain “care and management fee” under s.88(2), TRUSTEE MUST RENDER a general summary of the estate and of his services performed in the care and management of the estate. (**Re Pedlar)****FACTORS for setting “care and management fee” under s.88(2):**1. Value of the estate assets being administered;
2. Nature of the assets being administered (ie: business, farm, investment portfolio)
3. Degree of responsibility imposed on Trustee (including duration of trust)
4. Degree of ability demonstrated by trustee
5. Time expended by trustee in course of care and management
6. Success of failure of trustee in care and management
7. Whether or not extraordinary service was rendered in care and management
 |
| **Re Pedlar (1952) BCSC** **D**: Trustee Act permitted “care and management fee” in addition to remuneration.* Trust mustee give general summary of estate, services rendered (see: **Sproule**) but this DOES NOT automatically entitle Trustee to s.88(2) fee!
* Court can determine % - up to 0.4%.
 |
| **Trustee Indemnity** * Basic principle of EQ (not law) that benefs who get all the benefit of the property should also shoulder the burdens.
* Trustee may be liable for trust debts as legal owner, but in equity debts ultimately on the shoulders of EQ owner, **UNLESS** there’s a good reason for trustee to be responsible.

**In General:** Trustees are entitled to an **INDEMNITY** for all debts they incur in executing the trust, UNLESS there’s a “good reason” for trustee to be solely responsible (**Re Reid v. Yorkshire and Canadian Trust**):* Trustee have claim against the funds of the trust to meet any contractual obligations they incur in administering the trust terms.
 |
| **Where there is “good reason” for trustee to be liable**In **Hardoon v. Belilios**, Lord Lindley gives eg. of trustees dividing the trust into smaller trusts in favour of several beneficiaries – would be unfair to cast the increased liabilities of those divided trusts onto the sole sui juris beneficiary. |
| **Re Reid v. Yorkshire and Canadian Trust (1970)** — Benef being situated in country not subject to taxes on trust property is NOT a “good reason” to eliminate trustee’s right to indemnification! **F**: Trustee in UK, benef in BC, asset in UK — asset value in uk < taxes owed — trustee seek indem* Remainder person and absolute benef argued that indemnity of the UK-based Trust, for taxes paid in UK, should be confined to value of assets in UK.

**D**: Here, Trustee was personally liable because UK legislation made it liable.* Trustee paid money because it was personally accountable for it by UK statute.
* Beneficiaries **can’t refuse to indemnify using** “foreign state is precluded from suing in this country for taxes due under the law of the foreign states” (i.e Harden rule)
* Harden only applies where there’s an attempt by foreign state to extend ‘sovereign authority’ in BC. → trustee COULD SEEK INDEMNIFICATION from BC beneficiary.
 |
| **Powers of Trustees** Sources/ way to curtail power:1. Trust instrument, Common law, Trustee Act**Fox:** where trustee has abs discretion — trustee to exercise discretion w/o check or contorl by courts as long as **no mala fides** in its actions * Administrative Powers: Trust for sale – carries power of manner of sale – ss5 & 6
* Appointment of solicitors & bankers – s. 7
* Use of insurance – s. 8
* Compound debts – s 23
* Expenditures for repairs and improvements – s 11
* Investment agents – ss. 15.5 & 22
* Maintenance of persons — ss.24,25
 |
| **Control of Trustees by Benef** * Benef & court ensure trustees executes their duties proerly — where trustees have discretion/power, they only need to consider whether to exercise it — \*don’t have to eplain their reasons to exercise or refrain
 |
| **Re: Brockbank (1948) (UKCD)** — court will enforce discretion given to trustee (appointment). **F**: Testator appointed wife as B of life estate, remainder to children.* 2 Trustees with power to appoint a professional Trustee. — 1 Trustee to retire;
* beneficiaries insisted his spot should be replaced by a bank. — remaining trustee refuse

**D:** Court REFUSED beneficiaries’ request – this was a matter within the discretion of the Trustees.* Beneficiary could not interfere – essentially had **2 options:** (1) accept trust or (2) terminate it as per Saunders v Vautier & suffer any financial consequences
 |
| **Butt v. Kelsen (1952)** — Trustees as directors + disclosure → See **Konig, Re Martin** **F**: Through control of shares, Trustees appointed themselves as sole directors of the company * Beneficiaries unhappy with management — wanted all docs in Trustee’s possession.
* Trustees refused, they had duties to company as directors

**D**: Beneficiaries cannot control trustees who are directors.* Beneficiaries have same rights as shareholders, but no more!
* However, beneficiaries can compel Trustees to vote the shares as directed!
 |
| **Konig v Hobza**  confirmed Butt, benef don’t have shareholder rights in corp simply because they have EQ interest in shares **Re Martin**: Butt does not restrict benef access to info only available to normal shareholders — where trust has controlling interest in corp & trustees are directors → court has to balnace intrest of all stakeholders — possible to disclose! — if there’s no conflict & and it helps benfs → disclose!* Konig is Ont, **Re Martin = BC** → **can argue Re Martin more relevant in BC**
 |
| **Control by courts** **General Principle:** Only in cases of bad faith, or refusal to discharge duties should a court step in to control the exercise of the discretion of a testator**Application for Direction** – **s. 86 of Trustee Act** - Trustee can apply to court in chambers for an opinion, advice, or directions on a question of management and administration of trust property. → court does not like to be overburdened with this, especially during stalemate between trustees |
| **Tempest v Camoys** (**leading**)**—** Courts very hesitant to interfere w/ Trustee’s exercise of discretion **F:** 2 trustees w/ power of sale — benef wanted to mortgage realty to purchase a family home from the past — 1 trustee agreed, 1 refused**D:** “court cannot force trustee to take the view that it is proper to mortgage the estate” → benef lose |
| **Re Wright (1976)**  — court will interevene only where there’s real and abs deadlock (sell or retain)**F:** Trustee agreed to sell shares, but offer to purchase was rejected by 3 trustees because they believed **price was too low**.* Other trustee (trust company) applied to court for advice and direction.

**D**: Court REFUSED, asserting Trustees given a discretion should exercise it property as they see fit; without interference (even from court)* Here, simply a disagreement to price (not a real deadlock: eg. selling vs retaining).
 |
| **Re Billes (1983)** — abs deadlock — exercise of discretion impossible — court interefered**F**: Some beneficiaries (charities) were dissatisfied with small income stream (only 2%).* Trust company wanted to sell shares, but son and widow (benefs also Trustees) opposed.
* Trustees had absolute power to convert and retain shares.

**D**: Court found serious deadlock and proposed diversification of trust assets, to avoid risk + greater income, bring stability to capital value, remove conflict of interest for the son  |
| **Kordyban —** 2 criterias where there’s deadlock of trustee who were also beneficiaries 1. Court step into shoes of settlor and surmise what he woulda done on basis of trust objectives
2. Act in a way that is “just and equitable”
 |
| **Schipper v. Guaranty Trust Co. of Canada —** Intervention where trustee acts outside of trust obj**F**: Testator gave trust company “uncontrolled discretion” to administer trust for “welfare, benefit, comfort, enjoyment” of wife. — **She wanted to encroach into capital, trust company refused.** **D**: Court sided w/ wife because trust co failed to give effect to settlor's intention — **provide for wife** Court would generally refuse to interfere w/ “uncontrolled” discretion, **but** would interfere where the trustee is attempting to exercise discretion to achieve a **purpose not intended under the terms of the trust, or contrary to testator’s intentions**. . |
| Impartiality: Court will interfere to ensure that Trustee is being even-handed; fulfills duty to be impartial between beneficiaries. **Re Fleming (1973) Ont HC —**trustee overwhelmingly preferred income benef **F:** Testator gave LE to wife, appointed her as executor. — * Trust asset had surplus; could distribute as income or capital.

**Decision**: Court affirmed it wouldn’t relieve Trustees from duty to exercise discretion honestly and intelligently.BUT, court ORDERED company to distribute surplus as capital in the form of redeemable preference shares in order to be even-handed between life tenant and remainder person. — because1. Adverse tax consequences of treating surplus as income 2. Prospects of future income enhancement for the life tenant from other sources and income from enhancedcapital; AND 3. The need to be even-handed between the life tenant and remainder persons. |
| **Ousting of court jurisdiction — trustee can’t get carte blanche —** usually wording is friendlier**In General:** clauses giving trustee power to make “binding & conclusive” decisionswill be **treated as INVALID as against public policy** (**Re Wynn**)* BUT, power to adjudicate regarding matters of fact (as opposed to law) CAN be given exclusively to trustee (ie: courts show deference to trustee re: questions of fact).

Attempts to oust court jurisdiction are contrary to public policy Bs entitled to have court consider and uphold their rights  |
| **Re Wynn (1952) UKCD** **F**: Testator allows Trustees to treat Beneficiaries unequally – allowed to make “conclusive and binding” decisions. → indtended to exclude impartiality **D**: COURT HELD attempts to oust court jurisdiction are contrary to public policy;; Court have power to “construe and control construction and administration of testator’s will and estate”. |
| **Evan v Gondar:** no single provision of trustee act, nor act as a whole ousts the inherent eq jurisdiction of the court to remove a trustee — even if he is the sole trustee |
| **Privative clauses will be ineffective where trustees have acted dishonestly, or failed to:****1.** Exercise a discretion at all; **2.** Exercise the level of prudence expected from a reasonable business person; OR **3.** Act impartially between classes of beneficiaries, or acted in a manner prejudicial to their interests.**Boe v. Alexander (1987) BCCA** **F**: Pension plan gave Trustees wide authority to determine questions of coverage, eligibility, etc.* Trustees relied on seemingly exclusive jurisdictions to make final, binding determinations.
* Privative clause: “any determination or construction by them in good faith shall be binding upon all parties and the beneficiaries”.

**D**: Trustees must act according to trust law (fiduciary relationships) and are subjective to court supervision if they do not.  |
| Settlor may partially limit court jurisdiction **by delegating decision-making** ability to an independent third party – regarding decisions concerning facts (not law) — 3rd party must act reasonably and w/o misconduct **Re Tuck’s Settlement (**1978) UKCA **F**: Clause were “Chief Rabbi of London” was empowered to determine “conclusively” whether an “approved wife” met testator’s condition (aristocratic Jew). **D**: (Denning MR) UPHELD CLAUSE - This clause partially limited court’s discretion.* Court retain control where Rabbi may misconduct himself, come to “unreasonable decision”.
 |
| **Exculpatory clauses** shields trustee from liability, BUT NOT where trustee has been:1. Dishonest; 2. In willful breach of trust; 3. Grossly negligent. — such clauses will FAIL**Re Poche (1984) AB QB** **F:** Sister of deceased = Trustee; life estate to wife with remainder to daughter.* Trustee failed to gather all assets, put her mind to sale of those assets, and to act evenly between 2 beneficiaries.

**D**: Court found breach of trust through grossly negligent behaviour.* Trustee was NOT protected by shield of the exculpatory clause — removed
 |

|  |
| --- |
| CH 11 Constructive Trusts |
| **Constructive Trust —** C trust relationship is deemed by courts to have occurred after a curial decision that an existing (broken) relationship invovling assets should be treated as a trust-like association  **2 aspects** of constructive trusts: “**Institutional**” – circumstances giving rise to fidu. relationship “**remedial**” – proprietary consequence flowing if fidu. relationship established — adjust property title to give relief  |
| **La Forest: categories of fiduciary** 1. Presumed in certain classes of relation — solicitor-client, parent-child, trustee-benef — **i.e per se**
2. Fiduciary arising as matter of fact out of specific circ of relationship — **ad hoc**  — circ being “Ascendancy, influence, trust, confidence or dependence” — giving rise to fiduciary expectation — reliance that person's affairs are aligned w/ protection of that person’s interest
3. Fiduciary would be instrumental in achieve appropriate result — fid serves as a conclusion to justify a result
 |
| **Remedy:** **For C trust as remedial (tpe 3) :** There must be good reason to seek proprietary remedy — **default form of compensation = monetary award ( Vanesse) —** proportion value that has survived relationship * Only where $$$ is insufficient/inappropriate → claim proprietary — C trust as remedial is meant to address restitutionary mischief the status quo presents
* Damage assessed as disgorgement of profits (contrast w/ fid situation)

**For C trust in fid situation (type 1&2):** proprietary interest more likely awarded — though depends on facts* **Hodgkinson**: giving title meant nothing since he had title
* **Guerin**: couldn’t give title since it was in hands of bona fide purchaser (golf club)
* Damages assessed as EQ compensation (not disgorgement of benefits) — **place Claimant in position he would have been had breach of duty not occurred**
 |
| **Institutional Construction Trust — Per Se —** situ where court **routinely** impose CT over property * Hallmark = wrongdoer is inherently in a fid relationship and has breached his duty of utmost good faith —

**ANALYSIS req finding fidu relation first!*** **Common thread** to eg: breached duty of loyalty proved by P
* **Trigger**: self-dealing, confidential relation, UI

**Common examples**: **delinquents** in relationships designated by law as fiduciary.1. disloyal trustees (**Boardman**) — court give EQ title back to benef — **keech** — “lease” held on C trust for benef
2. faithless directors and senior officers of companies (**Canaero**) — title came from breach of trust/fiduciary duty → the equitable entitlement assigned to claimant → C trust
3. the delinquent agents in principal-agent (CL relation) — take agent’s property and put C trust
4. miscreant solicitors who have wronged their clients
5. overreaching partners,
6. bribers and other similarly corrupt officials,
7. undue influencers, (Pav being doctor) — it has to be person in position of power, hence fiduciary
8. breach of confidence tricksters,
9. intermeddles in trusts (e.g., trustees de son tort),
 |
| **Insitutional non-delinquent fidu.** * Vendor-purchaser — buyer of land under enforceable K has EQ interest in the property sold effective from date of sale — i.e purchaser = equitable owner → responsible for damage by act of god
 |
| **Mayo v Lietovsky** F: LT did not’ pay taxes — land sold in execution, bought by LT’s children, remainder interest came off like all other encumbrances — LT kids transferred title bk to LT in FS D: court held LT held on CT for benef — LT continued to owe duty  |
| Can’t use CIRT for correcting injustices in unmarried spousal relations — only left w/ unjust enrichment (Kerr v Baranow)  |
| **Ad Hoc vs Per Se:** Ad Hoc **expanded** list from Per Se — hallmark = “1 party is at hte mercy of the other’s discretion”* Per se = relations falling w/in relationships that EQ has recognized
* Ad Hoc = 1-off, non standardized situations — fiduciary arising because of special, unique circumstances
 |
| **Guerin, Hodgkins** expanded categories **— opened up the “per se”** — **Elder, Galambos** imposed constraints **Elder (2011) = governing criterion —** For 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
2. a defined person or class of persons **vulnerable** to a fiduciary’s control (the beneficiary or beneficiaries); **Not just reliance and dependency — there has to be vulnerability** 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.”

**Key underpinning: nature of relationship that gives rise to fid duty** **Development:****Guerin:** A breach of **fiduciary** relationship is the PRIMARY PRINCIPLE guiding the court’s discretion to impose a C trust – **need to establish fid relationship in order to impose CT!*** **category of fiduciary is not closed!** — per se category can be expanded
* Hallmark of fid relationship = **one party is at the mercy of the other’s discretion!** (VULNERABILITY)

**Lac Minerals:** endorse Frames 3 crteria & expansion of categories * Majority said **vulnerability is required (BAD LAW) —**La forest said dependence and reliance was enough
* But Majority did give C trust remedy, despite finding there was no vulnerability

**Hodgkins**: — Laforest— **vulnerability NOT required** — (power-) **dependence and reliance is enough (**in that case)* Existence of fid will depend on reasonable expectation of parties: which depends on trust, confidence, complexity of subj matter, community or industry standards **— Expanded categories**
* Look for elements of loyalty, trust, confidentiality (**found** in **Hodgkins**)

**M.(K.) v. M.(H.):** ad hoc not confined to matters involving only econ interests * Case suggested **fid duty need not arise from** “unilateral undertaking by fid” — BUT Being a parent comprises a unilateral undertaking that is fid in nature

**Sun Indalex:** **statute may form the basis of an ad hoc fiduciary duty** * Pension Plan Benefits Act – sets out care diligence skill requirements and no conflict of interest/duty of loyalty — admin had duty of loyalty to employees in the pension
* C trust wasn’t imposed though — due to incompatibility w/ Business corp act

**Galambos:** not all power dependency relationships are fiduciary — **can’t have fid w/o undertaking of loyalty*** **Critical point:** in both *per se* and *ad hoc*, there will be some undertaking on the part of the fid to act with loyalty.
* duty of loyalty won’t arise where D **lacks discretionary** power to affect the other party’s legal or important practical interests
* **Finding of Per se relationship in 1 situ. doesn’t mean it is generally applicable** → contained w/in the context of the relation — eg. solicitor -client doesn’t mean a lawyer has to be fiduciary to client outside of rendering service
 |
| **Guerin (1984)** **F:** Land was vested in ab group (Musqueem). — in order to transfer, group would have to surrender land to Crown,who would then have to transfer the land to the private party.* Musqueem surrendered land to Crown. — had conditions for crown to negotiate
* Crown couldn’t secure conditions, got fair market conditions — didn’t go back to musq for consent

**D:** Breach of trust — fed govt = **fiduciary** — dealing w/ golf club, it had power to alter the proprietary interest of musq → because they were **vulnerable**, they had **breached their obligation to be loyal and a fiduciary** * Couldn’t find established per se category — so found ad hoc because musq vulnerable
 |
| **Lac Minerals 1989— vulnerability lies at the heart of fid relation** **F:** lac = huge company, corona smaller but still wealthy — involved in prospecting — Corona = explortation — found “williams property”* entered into agreement w/ Lac — during the course of these negotiations, they disclosed CI
* During the negotiations, (unknown to corona) → Lac bought land from williams
* Corona couldn't’ sue for breach of K since there wa sno K yet
* Lac’s actions = tortious → breach of confidence — paid $$$, but Corona wanted **proprietary interest**
	+ To get property, there had to be constructive trust

**D: Croona lost on law, got C trust anyways** * Majority: C trust can only be applied where there is dependency or reliance such that there truly is vulnerability by the plaintiff on the defendant — **no vulnerability here**
* Hard to describe corona as a vulnerable person — it’s extremely wealthy — should have taken pre-caution to set up for in rem remedy — they got tort remedy anyways

**Dissent**: Dependence and reliance is enough — can’t say corona is vulnerable, but they are dependent and reliant — Because there is devious behaviour, you should be compensating… — **Good law now.. Sort of** **Policy:** Constructive trust in contractual negotiations = fear — are you really eachother’s fiduciary? |
| **Hodgkinson v Simm 1994 — category of fiduciary isn’t closed****F:** H = broker – bought a MURD in order to shelter income – went to S (accountant) to make the arrangements.* Simms didn’t disclose a scheme (kick back) to Hodgkinson – Vancouver housing market crashed — H got screwed
* H finds out what Simms did – argues he had breached his fiduciary duty, and sues him for compensation.

**D: C trust** where there is dependence and reliance — found C trust here — La Forest found elements of loyalty, trust, confidentiality → Simm’s duties went beyond skill and competence → fiduciary * Discretion, influence vulnerability and trust are non-exhaustive examples of evidential factors to be considered
* Contractual relationships of professional advisor type can become fid relation when tainted by self-interest
* Broker client doesn’t have to be fid, but does become fid when client places trust and confidence in broker and relies on expertise ot make business decisions

Dissent: vulnerability limited to circ where 1 is at mercy of the other’s discretion — suggest Simms had to have exercised total power over affairs  |
| **M(K) v M (H) 1992****F:** incest father — Court found fiduciary relationship — laches/acquiesence didn’t apply **D: ad hoc not confined to matters involving only econ interests** * **fid duty need not arise from** “unilateral undertaking by fid” — **even if needed,** being a parent comprises a unilateral undertaking that is fid in nature
 |
| **Sun Indalex 2013****F:** Pension admin conflict of interest during restructuring — shafted pensioners, to whom Sun had duty of loyalty to — imposed by pension plan benefits act provisions **D: statute may form the basis of an ad hoc fiduciary duty** * Pension Plan Benefits Act – sets out care diligence skill requirements and no conflict of interest/duty of loyalty — admin had duty of loyalty to employees in the pension —
* failed to address the conflict of interest
* C trust wasn’t imposed though — due to incompatibility w/ Business corp act
 |
| **Galambos 2009 —** Failed to find C trust **F:** Perez = part time bookkeeper — unlimited signing authority — voluntarily advanced G 200k out of her name * G goes bankrupt — \*G told Perez to reimburse herself — but she didn’t do it fully — became unsecured creditor

**D: NO C trust —** not all power dependency relationships are fiduciary — **can’t have fid w/o undertaking of loyalty*** **Critical point:** in both *per se* and *ad hoc*, there will be some undertaking on the part of the fid to act with loyalty.
* duty of loyalty won’t arise where D **lacks discretionary** power to affect the other party’s legal or important practical interests — which was the case here
* **Perez didn’t relinquish decision-making power, wasn’t vulnerable — she did it voluntarily**
* **Finding of Per se relationship in 1 situ. doesn’t mean it is generally applicable** → contained w/in the context of the relation — eg. solicitor -client doesn’t mean a lawyer has to be fiduciary to client outside of rendering service
 |
| **Elder — see rules above** |
| **CT: Remedial for Unjust Enrichment** Where: a) property has been accumulated & b) title placed solely in D’s name → may use C trust to assign title between parties to appropriately match their financial contributions **Pettkus v. Becker**: there were essentially TWO WAYS to give effect to the rights of the claimant:1. Common Intention RT (overruled in **Kerr**) — wouldn’t work here — stated he had no intention of her getting anything; AND
2. Unjust enrichment – requires [adopted by Court]:
	1. **Enrichment** by D
	2. Corresponding **deprivation** by P; AND
	3. **Absence** of juristic reasons to justify the deprivation/enrichment — cromwell 2 step analysis
		1. If there is K between parties enforcing some obligation — then there’s juris reason
		2. If inconclusive, see whether facts of case disclose reasonable expectation by parties to share the asset guided by policy considerations — **limited role**
		3. Many cases dealt with juristic reaosn as the kind of financial contribution that needs to have been made by claimant to show invovlement by claiamnt in acquisition, improvement to property

For C trust to apply to actual objects of enrichment — there must be causal connection between acquisition of property and corresponding deprivation — causal connection issue split into:* Nature or type of prop over which CT is sought (**tracy** regarding unlawful finance charges)
* Claimant’s degree of involvement in the acquisition or preservation of the property (**keerr**)

Note role of juristic reason —- court investigate the fact that there is an unclear reaosn why title in D’s name especially as there is reasonable expectation — encouraged by policy — to share the assets **Haigh v kent:** in Joint commercial venture: actually making substantial & direct contribution (and improving its value) is important — whether you had expectation in owning the land is not important  |
| **Kerr**: unsuccessful * 2 old ppl got togehter — she became severely handicap — she claimed for his property, court siad no
* She couldn’t show she’d done anything w//rt acquisition of asset — no causal connection
 |
| **Vanasse v Seguin**F: Diff setup — couple, both professional, both worked — they had kisd, she dropped her job in roder to keep kids, she then resumed — he made killing in the meantime — they decide to separate D: UE may lead to personal restitutionary award **or** restitutionary proprietary reward → i.e monetary or proprietary * Focused on assessment of compensation rather than proprietary remedy — UE, but innappropriate to grant C trust
* Difficult to assess entitlement (inbalance of asset, and claimant had contributed, but where did she do so?)
* Create New method to calculate: proportion value that has survived relationship — link between **joint effort** of both parties, the **degree** and the **accumulation** of wealth
	+ P must show clear connection between her contributions and the accumulation of wealth
	+ Only where restitution is inappropriate, insufficient → P can then seek proprietary award
	+ What was her part in assembly of such assets? Give based on proportion — Eg. 40% of total asset
 |
| S**oulos v Korkontzilas , 1997 SCC**)The Governing Principle that guides the law surrounding constructive trusts is that of GOOD CONSCIENCE rather than unjust enrichmentF: Principle & agent — agent acted outside instructions — depriving principle of desire to own land w/ bank on it * Agent told his wife to buy it — then told Prinicple that vendor no longer wants to sell — denied any involvement in vendor’s change of heart — **No financial loss**
* Principle found out — claimed C trust for proprietary interest in alnd — GRANTED

**D:** UE isn’t the unifying theme for C trust (since there’s no enrichment here) — rather, **good conscience = unifying concept** — under this umbrella, C trust recognized both for wrongful acts (like fraud and breach of loyalty) & to remedy unjust enrichment and corresponding deprivation * C trust may be imposed on either wrongful act or UE

**SOULOS TEST** for Constructive Trust1. D must have been under an **equitable obligation** — obligation of the type the courts of EQ have enforced, in relation to the activities giving rise to the assets in his hands;
2. The **assets** in the hands of the D must be shown to have resulted from deemed or actual activities of D in breach of his equitable obligation to the plaintiff.
3. P must show a l**egitimate reason for seeking a proprietary remedy**, either personal or related to the need to ensure that others like D remain faithful to their duties; and
4. There must be no factors which would render imposition of a constructive trust **unjust** in all the circ of the case; e.g., the interests of intervening creditors must be protected.
 |

|  |
| --- |
| CH 12 Remedies |
| Every duty/obligation on T confers a right to B — Important ones: loyalty of administration, prudent and business-like management, and distribution income/capital according to Bs interest under TI |
| IN PERSONAM REMEDIES: **Specific Performance and Injunctive Relief*** Specific performance – force to perform duties; injunction – force to not do something
* Look at this more in depth in a course on Eq remedies
 |
| **Compensation for Loss*** Liability for loss is based on full compensation, so called “equitable compensation” — B must be put in position would be in if breach had not occurred – “fully restore”
* Equitable damages does not take into account: causation (but cant be too slim, **Canson**) ; foreseeability of damages (remoteness) and mitigation of damages.
* Assess value of loss at date of restoration not at date of breach
 |
| **Guerin v The Queen** **F:** Musqueam had to surrender land to fed gov to have land leased → fed entered into lease w/o band’s terms* Evidence that the golf course would never have entered into a lease to the terms the Band wanted — Fiduciary duty imposed on gov under constructive trust

**D**: Court rejected fair rate of return analysis that’d compensate for difference b/w real lease and lease Band wanted — * calculated dmg based on value of land if it had been retained & developed (under Eq Band did not have to prove that it would actually have developed, under contract it would have)
 |
| **P’s loss should be calculated with full benefit of hindsight**; foreseeability is not a concern but it essential that losses compensated are only those that ON COMMON SENSE VIEW of causation were caused by breach (**Canson**)* P not required to mitigate – but losses stemming from unreasonable behavior of P will not be compensated
 |
| **Canson Enterprises v Boughton & Co (1991) (SCC) — Some dmg too remote****F**: Solicitor handled real-estate case; failed to disclose to client C that a 3rd party was making a secret profit* 3rd Party SM was also a client of S
* The property later subsided (fell into the earth) → valueless through the fault of engineers (not the solicitor)

**D**: S found to be a faithless fiduciary (breach of fiduciary duty) but not liable for subsidence because was not in any common sense way attributable to breach of fiduciary duty* Purpose of Eq damages is to restore person to position before the breach; this also includes damages that occur after the breach but are not caused by the fiduciary (as long as connected to breach in some way)

**Ignoring causative factors in assessing eq dmgs limited to what is sensible (common sense) → there needs to be a causative relation between loss and breach on a common sense view of causation** |
| **Set Off —** S 15.4 **allows for set off to function in BC** – compare gains & losses of indiv assets in trust portfolio *15.4 (1) The rule of general trust law that requires the assessment of the decisions of a trustee on an investment by investment basis if the decisions are called into question is abrogated. (2) The rule for the assessment of damages for breach of trust that prohibits losses from being off set by gains is abrogated except in respect of circumstances in which the breach is associated with dishonesty on the part of the trustee.* |
| **Dhillon v Jaffer 2016:** evolving approach to damages — “fusion” of Eq and CL — courts are going to fashion remedy that is most **equitable & sensible** — not bound by EQ or LC rules **Approach**: appraise situation, draw from different approaches to remedy the wrong — Guide in EQ = full restoration, but court may take into account of CL considerations  |
| **Compensation: unjust enrichment*** Kerr & Soulos: where C trust remedy imposed from UE → dmgs = first choice — eg. quantum meruit, valued survived from joint venture (**Vanesse, Kerr**)
* In rem remedy of C trust comes about in circs where dmg is inadequate
 |
| **Accounting for Profit*** Accounting for profits and compensation are mutually exclusive; a **P can only receive one**
* Remedy is available for breach of fid duty and breach of trust (also for unauthorized use of CI **(Lac Minearls)**)
* AoP can occur over a time period that can sometimes be very long (2 years in **Warmen**) — court approximates — essential purpose of remedy = for fiduciary to disgorge all profits attributable to breach
* Basis of remedy is preventing unjust enrichment — especially when T misappropriate funds or info and invested in profitable asset/business
* Possibly inappropriate to account indefinitely **if**: profits generated by skill/efforts/property/resources **of fid** and were introduced by fid in way that it can’t be rble said that increases in profit = product of P’s property
* Onus on D to show that an award of entire profits from business would be inequitable given the circs
 |
| **Warman International v Dwyer (1995) (AusHC) — 2 years account for profit****Facts**: D was general manager of WI — WI was distributer of Italian gearboxes in Aus; Supplier B wanted to expand business — WI refused, but D saw potential * D floated own company w/ employees from WI and contracted w/ B, in contract WI refused

**D**: Breach of fiduciary duty; accounting for profits makes sense; although allowance made for D’s skill, expertise, efforts, capital etc. — limited to 2 years b/c evidence showed relationship between WI & B wouldn’t last longTakeaway: deterrence = heart of remedy to account applies whether or not D suffesr loss * **Not a defense to** assert that P was unwilling,unlikely or unable to have made profits to which account relates
* Fid will be ordered to render account of the profits w/in scope of his duty
* Assessment of quantum is difficult — reasonable **approximation** is enough
* If loss > profits made by fid, **P must elect 1 remedy — either account for profit or EQ comp**
* Defence to application of account are available and are equitable in nature
 |
| **MacMillan:** trustee breaching duty & profiting has to disgorge profit regardless of whether P suffers loss* P = log company selling surplus logs, D = manager of P, but also shareholder of buyer of logs
 |
| **Proprietary Remedies:** * EQ in rem stops at BFPVWO
* Useful in insolvency or where asset as appreciated in value
* In rem claims: following and tracing
* Remedial C trust — applies to fid and UE — gotta show good conscience, link between act of claimant and property sought, no interferference w/ rights of intervening creditors
 |
| “**Following**” = tracking asset as it lodges into control of diff custodians — same item “**Tracing**” = identifying a new asset as the substitute for the old: money, bank accounts, shares, insurance; also purchase of misappropriated trust funds to purchase another asset (eg house, boat, car etc)* Innocent volunteer subject to tracing: his/her interest from trustee defeasible by the beneficiary

**Takeaway:** in order to trace as benef short changed by trustee, **Broad Conditions:**1. There must be a misappropriation as a result of the breach of a fid relationship or UE; there are UE w/o fid duty but tracing is afforded there
2. The trust property sought by the plaintiff should be situated in circumstances or in a form that the rules of equity recognize as traceable (i.e traceable form); and
3. No inequitable results must arise from the application of the right to trace. — otherwise rather give damages

Limits: can’t trace to BFPVWO, tracing result can’t be inequitable, claimant must show property held under fid relationship  |
| **Third parties****Trustee de son tort** — intermeddlers acting as if he were trustee — WB may be enough to constitute DST **Knowing receipt:** Person receiving or dealing w/ trust prop for own use knowing it was transferred in breach **Knowing assistance:** person knowingly assists a trustee in a fraudulent or dishonest transaction that is perpetrated by trustee or fiduciary — or person inducing trustee into breach  |
| **Knowing assistance**: 3 reqs(1) The existence of a fiduciary duty (e.g., trustee);(2) A breach of that duty by the fiduciary or trustee; and(3) A dishonest and knowing assistance by the third party in that design. |
| **Nelson v Larholt: — KA — objective****F:** bookie paid by trustee through trust cheques — bookie knew cheques belonged to estate — objective notice**D:** objectively: bookie taken to have known that cheques were paid to him by T in breach of trust → recover from bookie * **Test:** what inference would reasonable person in circ have drawn, and would he have notice?
 |
| **Air CAnada v M&L:** **KA —** scope of knowledge required by intermeddler & KA who receives or deals w/ property **F:** M&L = travel agency that sold tickets for AC — M&L required to hold money received for sale of ticket on trust * M&L had 2 directors: M & V — M put AC’s money in M&L’s acc (which was security for a loan) → breached trust, should have separated that from money held on trust—
* V knew business, secured loan, had access to accounts — not clear he gave knowing assitance to braech

**D**: M&L in breach — V Knowingly assisted: knew about agreement w/ AC, knew of risk to AC, drafted agreement → “either WB to breach or reckless in his failure to realize there was breach” → KA breach because assisted in M&L to fraudulent breach the trust **Degree of knowledge required = “actual knowledge, recklessness or WB” — BUT mere carelessness or “want of probity” is insufficient —** *Rule applies to DST and anyone knowingly assisting in fraudulent design*  |
| **Royal Brunei Airlines: KA — objective:** overruled that “knowing assistance” requires “actual knowledge”Corporate trusteee BLT breached trust, TAN = managing director**Tan liable**: assisted breach by “causing or permitting” BLT to undertake transaction in full knowledge the moneys were required to be held on trust — Tan didn’t actually know → but was reckless, objectively determined by his standard  |
| **Twinsectra:** Sims gave undertaking, now bankrupt — YArdley’s usual solicitor = Leach, who refused undertaking — Leach not held to be dishonest despite positioning self to be deliberately ignorant of nature of transaction  |
| **CFI trust v RBC Knowing receipt (wrongfully receivd property) of properties required:** 1. Properties were held in trust
2. Properties taken in breach of trust
3. 3rd party received trust properties and applied them for own use and benefit
4. 3rd party either actual or constructive nknowledge of breach of trust
 |
| **Carriere v TD:**  — **KA… reckless**F: TPC = payroll & payment processing operators —contracted w/ bank to supply banking service* TPN = wholly owned subsidiary and franchisee of TPC
* 3 accounts: operating, payroll, tax — payroll & tax = trust accounts for TPC & TPN’s clients
* Bank to withdraw from operating acc and give to Payroll & tax — sometimes tax acc had deficit due to timing
* Sued for breach, knowing receipt, knowing assistance: because bank had transfered from payroll to tax
* Also: TPC told bank to transfer $ from TPC payroll to TPN payroll — despite being trust accounts

**D: Bank** = acted recklessly to keep allowing E-banking transfer while knowing that there’s “real possibility that TPC’s past actions constituted breach of trust” — $ improperly removed **Recklessness** = knowledge of a danger or risk and persistence in course of conduct that creates a risk that the prohibited result will occur  |
| **Alternative & cumulative remedies:*** Remedies can be combined as long as they don’t lead to double recovery and is not mutually inconsistent (i.e EQ compensation + account for profit = inconsistent)
 |
| **Trustee’s defence & court help** **Exoneration:**  s.96 — courts to forgive where breahc is minor — honestly, reasonably, fair to excuse — eg. Fales * Free & informed consent of all affected benef can exonerate (eg. parent kid)

Laches, Acquiesnce, consent * If you as indiv really hasn’t taken steps to rememdy in situation of free & informed consent
* D to show P knew about it and did nothing even though fully able to launch action

Indemnity: trust indemnified usually by benef in respect of personal costs applied to protect trust assets **Right to seek help*** S.86: trustees can ask court for opinion, advice, directions on question of management and admin of trust property
* S.87 absolves trustee of responsibility where he acted under court authority — excluding fraud, misrep
* Court don’t like to be burdened — especially when there’s a stalemate in decision making among turstees
* Court **will intervene only in event of real and abs deadlock:** eg. trust w/ power to sell and retain, some wants to sell, some want to retain → deadlock
	+ Re Wright: disagreement as to adequacy of price → court won’t deal with this
* **Court said that it’d pay close attention to testator obj — and only intervene where not to do so would be manifestly prejudicial to beneficiaries**
 |