# Nature and History of Equitable Interests

What is a trust: Transfer of legal title to a Trustee, disposition of equitable title in beneficiary

* + - * B gets significant property rights toehold against T who holds special obligations in FD
      * expectation of utmost good faith from T to administer property for B

**Where do we see trusts?** Pensions, family settlements, environment, tax avoidance, corporate structure, incapacity, purpose trusts, investments, estate administration on death

three pillars of trusts

1. Bifurcation of ownership—>T holds LT, B holds ET—>both can dispose
2. B gets **IN REM RIGHTS** to the equitable interest in property (terminate, sell/mortgage, trace)
3. T owes B special obligations called **FIDUCIARY DUTIES**

A trust is the transferral of legal title to a trustee and disposition of equitable title in the beneficiary. The trustee holds and administers the property for the sole purpose of enhancing the beneficiary’s equitable interest in the property. The beneficiary has in rem rights in the equitable interest, which allows her to terminate the interest (subject to certain conditions), sell or mortgage the interest, or reclaim the actual property in the event of trustee insolvency. To give effect to these in rem rights, the trustee owes the beneficiary special obligations titled fiduciary duties. The fiduciary duties emphasize the special type of relationship at the heart of the trust—the law requires the trustee to demonstrate utmost good faith in her administration of the trust property, so as to provide the fullest benefit possible for the beneficiary.

## Maxims of Equity

* + - substance over form; equity follows the law; clean hands; laches; proportionality; priority of BFPV

## Types of trust

* + - Express: specific act that S uses to transfer title to T for benefit of B (usually in written settlement)
    - Resulting: law rebuttably presumes transfer created trust, open to parties to raise contrary evidence
    - Constructive: court imposes a trust in certain circumstances

# Express Trusts

* + - Device in equity that allows S to convey LT to T for B’s benefit
      * + S shows intention to split LT, transfers LT to T and disposes ET to B
    - S specifies what T should do—parameters with regard to utilizing property for B
    - Can be oral, T’s restrictions in rules of equity so ET can have flimsy instructions

## How to create a trust

1. *inter vivos* or *per mortis causa*? (just identify at this stage)
   * + - death trusts emerge when estate falls under control of executor who is T for legatees/heirs

2) Does the testator and trustee have capacity (*sui juris*)?

3) Third, identify the form of dealing:

A. **Personal declaration of trust by settlor** (“I hold x as a trustee for my child”)

* 1. S says he holds Blackacre for B—**automatic constitution, cannot be revoked** (**Glynn**)
  2. Mere declaration is sufficient to execute the gift (**Elliot**)

B. **Settlor may appoint 3rd-party trustee**

* 1. once S appoints T, S falls out of picture insofar as the settlement provides
  2. Must be a valid transfer to third party to effect the trust (**Milroy**)
  3. Must have intention to be immediately and unconditionally bound (**Milroy, Mordo**)
     1. once absolute gift is given, cannot revoke **(Ratner**)

C. **Contractual agreement:** settlor and beneficiary agree to appoint a trustee (business

arrangements through k) **consideration usually given**

D. **An incomplete or unperfected gift** (promise)that is **later perfected** if the title is later given (e.g. when executor gets legal title) à the rule in *Strong v Bird*

Executor gets title to the property—if executor was object of imperfected transfer of same property, the transmission on death is said to perfect the original transfer

**Hilliard**: mom applied for subdivision for son, but died before it was complete—->son becomes executor of her estate and takes title to subdivided land as her Trustee

4) Vesting in trustee (of legal title):

* + - * T must gather the assets and put title in her name (**Milroy**)
      * **Trustee Act 29**: property will vest if document says it vests

5) Formal requirements

* + - * if S has done everything possible to transfer to T, equity gives effect (**Re Rose**)

6) The **three certainties** (necessary but not sufficient)

* + - * intention, subject, object

7) Look to the beneficial interestà vesting issues (ie future interest issues)

**Elliott v Elliott Estate**

F: Lady excludes disabled daughter in will, intended for other kids to provide for her in a trust.

I: Was GIC fund part of the estate or separate?

H: Separate declaration of a trust

R: Creation of valid ET requires settlor capacity, three certainties, perfection, formalities. For declaration, must be sufficient evidence but no technicalities required.

**Milroy v Lord**

F: Trust in favour of niece, T was never made legal owner of the shares, S held LT until death.

I: Estate or trust?

H: Estate

R: To render settlement valid and effectual, S must have done everything necessary to transfer LT or declare himself T. The trust was never perfected.

**Ratner v LH Ratner Construction Ltd**

F: Guy assigns shares to mom, gets them back a few years later. Daughter and mom revoke the gift, son argues mom was a trustee the whole time.  
I: Was son a beneficiary?

H: No

R: Gift requires intent to give and delivery. An uncompleted/revoked gift cannot take effect as though it were a declaration.

**Re Rose**

F: Guy transfers shares, dies before transfer were registered.

I: Can unregistered transfer exempt deceased from estate tax?

H: Yes

R: If S does everything required to transfer property, the transfers will still pass beneficial interest in the shares even pending registration.

**Mordo v Nitting**

F: Son is a dick in family business, parents amend wills to become JTs w/ daughter to disinherit son, mom executed a transfer of warehouse to T who did not register until after her death.

I: Was warehouse trust validly constituted?

H: Yes

R: For valid inter vivos tust, must be valid act of transfer to clearly identified T. If transferor intends to transfer the property, transfer is complete when transferor relinquishes control and puts transferee in position to complete the transfer.

**Carson v Wilson**

F: Guy transfer assignments of mortgages while still alive, gives them to lawyer to deliver upon his death. Assignments were valid transfers, but violated wills legislation

I: Were transfers valid?

H: No

R: Delivery is essential to validity. If delivered to third party, must be clear evidence that grantor intended to part with the gifts. Cannot become a trust if it violates wills legislation.

**Hilliard v Lostchuk**

F: Parents give parcels to two children. Third child lived and worked on farm with mom, who wanted to give him subdivision. She dies before subdivision is approved. Daughter wanted whole property according to will.

I: Can third son claim his subdivision?

H: Yes under Strong v Bird

R: Appointment of an executor can perfect and complete a gift provided there was previous intention to give and the gift was incomplete at time of death.

An ET can arise either through inter vivos (**Mordo**) or per mortis causa (**Di Michele**).  **Elliot** sets out the criteria to create an express trust: S and T must be sui juris, the three certainties, vesting in the T, and compliance with formalities. A settlor can create an express trust through personal declaration, which cannot be revoked once it is automatically constituted (**Glynn**). Under a personal declaration, S declares that she holds Blackacre as the trustee for the intended beneficiary. S may choose to appoint a third party to act as trustee. To effect this type of dealing, S must validly transfer the property to T (**Milroy**) and have intention to be immediately and unconditionally bound (**Milroy, Mordo**). Once an absolute gift is given, it cannot be revoked (**Ratner**). S and B may contract together to appoint a T for adequate consideration. If an incomplete or imperfected gift is later perfected, the law will uphold the transfer (**Strong**). This can occur when a failed transferee becomes executor of the transferor’s estate and obtains title to the property that was the subject of the incomplete transfer (**Hilliard**). However, the rule in Strong will not apply where there is only a promise without consideration to give the property in the future (**Freeland**). If S/testator does everything required to transfer the property, the transfer can still pass beneficial title to B (**Rose**). Any transfer purporting to create an express trust cannot violate wills legislation (**Canson**). Where a B has been promised property under a secret trust, B holds an effective interest even if she predeceases the testator (**Gardner**).

# Express Trusts: The 3 Certainties

1. Certainty of Words (intention)
   1. Is it given to the trustee personally or in trust? In other words, was this intended to be a trust?
2. Certainty of subject matter
   1. The trust property
3. Certainty of objects
   1. Identity of beneficiaries

## Certainty of Words (Intention)

\*Ask: Did the settlor intend for this to be a trust or an outright gift?\*

* + - * transferee gets title to property, but consider whether the transferee gets equitable interest
      * law requires clarity for words—precatory words and imperative tone
      * dispose/confidence no longer necessary to create trust (**Hayman**)

No certainty——>no trust——>transferee is out and out owner

**Hayman v Nicoll**

F: Mom left money to daughter according to secret wishes. Mom’s residual heirs claim daughter was only holding as T.

I: Was it a gift or a trust?

H: Gift

R: **Courts must give effect to testatrix’s intentions gathered from instrument as a whole regardless of any particular language used.** Proof of a secret trust requires further corroboration, but there was none, and no evidence daughter ever did anything or agreed to secret wishes.

**Royal Bank v Eastern Trust Co**

F: Guy assigned rental payments to RBC to settle debt. He sold property to his friend and assigned mortgage.

I: Is bank a preferred creditor?

H: No

R:**ET can be created without any technical expressions, but intention to create trust must be indicated/inferred with reasonable certainty.**

The three certainties of intention, subject, and object are required for both express and implied trusts (**Tozer**).To create a valid ET, S must have intended to do so rather than to give an out and out gift. The court prioritizes S’s intention gathered from the instrument as a whole (**Hayman, Kayford**). Even if the transfer document does not indicate a trust, sufficient extrinsic evidence may still demonstrate intention to create a trust (**Bradshaw, Antle**). Precatory language expressing a hope that the transferee will use the property for another is generally insufficient (**Kensington**). An imperative tone may indicate a trust rather than a gift. However, S need not use any technical terms to indicate her intention to create a trust (**Royal Bank**). The court must be satisfied that S’s intention can be expressed with reasonable certainty (**Royal Bank**).

## Certainty of subject matter (Identity of Trust Assets)

Ask: What is S purporting to transfer?

1. Identity of property—->property that is capable of legal transfer
2. Amount of beneficial interest (**Beardmore**)
3. Sufficiently certain that property is described with sufficient exactness (**Beardmore**)—>court prefers certainty of subject matter

**Re Beardmore Trusts**

F: Guy sets up trust that does not comply with formalities of wills legislation, but also vague.

I: Void?

H: Yes

R: Trust subject matter must be described with sufficient exactness to ascertain it at the time the trust was created.

**Re Golay; Morris v Bridgewater**

F: Testator wanted B to live on his property and receive “reasonable income”.

I: Void for certainty of subject matter?

H: No

R: The reasonable income was intended to be an objective measurement.

**Sprangle v Barnard**

Beneficial interests must be certain to raise a trust.

Floating equities

* + - trust doesn’t exist yet because it is not vested in T (floating trust)
    - problematic when floating trust is used to circumvent wills legislation
    - can be okay if the equity floats until the actual assets are determined

The purported trust property must be capable of a legal transfer and sufficiently certain to warrant a description of reasonable exactness (**Beardmore**). The amount of interest being given to B must also be clearly described (**Sprangle**). Courts are generally reticent to void a trust based on subject uncertainty alone (**Golay**).

## Certainty of Objects (beneficiaries)

Ask: Who is getting the equitable interest in the subject?

1. Is at least one B a legal or natural person?
2. Are there signalling words?
3. Fixed trust, trust power, or power simpliciter?

*Fixed Trust –* MANDATORY IDENTIFICATION + DISTRIBUTION

T must distribute the specified trust property to the named Bs—no discretion

High threshold of certainty: complete list test

T must be able to draw up a complete list of every possible B

*Trust power* – MANDATORY DISTRIBUTION + PERMISSIVE ID

T must distribute the property, but can choose from a defined class who gets the property

T must be able to say whether potential **is/is not** part of the defined class (**Manisty’s**)

test is more pragmatic for discretionary trusts (comes from advent of pensions)

Condition can be broad, but there must be **evidential certainty** because T must distribute—ie trust cannot be administratively unworkable

*Power simpliciter* – PERMISSIVE ID + PERMISSIVE DISTRIBUTION

T need only consider from time to time whether to distribute property to B

indicated by gift-over requirement (ie no one is able to enforce the trust until actually selected), T is under no requirement to make an appointment at all

T uses is/is not test

something overly broad is okay because T is not under mandatory obligation to distribute the property

\*\**Power of appointment\*\**

S gives donee (not necessarily T) ability to exercise discretion in appointing B—protector/guardian

4. Apply tests for T, TP, or PS—conceptual certainty?

5. Evidential certainty?

T: must be clear, category not hopelessly wide for administrative unworkability (**Baden 1**)

TP: clear, not hopelessly wide (**Baden 1**)

**Baden 2 approaches**

Stamp: sufficiently clear that any individual is or is not, condition may still be okay even if there are evidential difficulties (ie so remote that cannot say who the common ancestor is)

Sachs: if it is uncertain, rule potential B out

Megaw: same as Sachs, but if there are too many uncertains (Bs out), then may be invalid

PS: evidential uncertainty does not apply (**Hay’s**)

The identification of trust objects depends on the settlement. Certainty is necessary because the B enforces T’s duty to properly administer the trust (**Century Services**). S can grant trusts, trust powers, or powers simpliciter to T. If T is to operate under a fixed trust, she has no discretion must distribute the trust property to a defined beneficiary or class of beneficiaries. Under a fixed trust, the certainty of object hinges on whether the T can draw up a complete list of any possible B (**Broadway Cottages**). If T has a trust power, she must distribute the property, but can use her discretion to chose the object from a defined class. The test for trust powers is whether the potential B is or is not part of the defined class (**Manisty’s**). For powers simpliciter, T need only consider from time to time whether to distribute property to a discretionary B (**Manisty’s**). A power simpliciter empowers T to distribute the property, but is not a mandatory requirement of the settlement. With each type of instruction, the settlement must be conceptually clear insofar as the settlor’s intentions are sufficiently understandable (**Baden 1**). For a fixed trust’s evidential certainty, the list of objects cannot be so hopelessly wide as to create administrative unworkability (**Baden 1**). Trust powers share the same attributes for evidential certainty, but because the trust power is discretionary, the evidential certainty is qualified. In **Baden 2**, three different approaches to the issue emerged. Stamp stated that the class description must be sufficiently clear to determine whether any given individual is or is not part of of the class. Sachs held that if a potential B is uncertain under the is/is not test, she is ruled out. Megaw delivered a similar judgement to Sachs’, but added that if there are too many individuals who could be ruled out for uncertainty, the trust itself may be void. In the event of a power simpliciter, evidential uncertainty does not apply because the power is entirely discretionary (**Hay’s**). However, T remains under a fiduciary duty to inform himself about the options under the trust to consider any appropriate exercise of the power (**Hill**).

# Express Trust: Formalities

Law imposes formal requires of conveyance to enforce transfer—protect value of IRR

* + - B will not get ET unless there has been LT transfer

The law imposes formal requirements to enforce the transfer from S to T. Formalities protect the beneficiary’s in rem right in the trust property **(McCormick**). In an inter vivos settlement, the type of interest in land determines the formality required. The legal transfer of title from S to T must written (**Statute of Frauds, s 59 LEA**), but the equitable disposition to B need not be written (**s 59 LEA**). If B wishes to assign her equitable interest, she must give written notice to the T (**s 36 LEA**). For gifts per causa mortis, different formalities apply. WESA imposes a series of requirements: a valid will must be written (**s 3**), signed by the testator/ix and witnessed by sui juris non-legatees (**s 4**), and the testator/ix must be 16 years or older (**s 36**). Any trust must comply with legislation to be considered valid.

## Inter vivos

What type of interest **IN LAND**

* + - Legal—must be in writing (SOF, **s 59 LEA**)
    - Equitable—doesn’t have to be written in BC (**s 59 LEA**)
    - **s 36 LEA**: absolute assignments must be written, notice given to T

## Gifts *Per Causa Mortis*

**WESA s 3**: will must be written

**s 4**: will must signed and witnessed by people not receiving a gift

**s 36**: have to be 16 or older to make valid will

**Mordo**: if S reserves power to collapse trust, does not necessarily mean trust is subverting WESA

## Secret + Half Secret Trusts

Secret trusts: Named B is actually T for secret, unnamed B

1. Testator intends named B to hold for secret B (**Ottaway**)
2. Testator communicates during her lifetime her wishes to named B, who must learn of secret B’s identity (**Boyes**)
3. Named B agrees
4. If secret trust fails, **s 59 WESA** gives broad discretion for court to give effect to testator’s intent

Half-secret trusts: Devise says named B is actually secret T

1. Prior to making will, testator tells named B about the scheme
2. Prior to making will, testator discloses identity of secret B to named B
3. Named B agrees before will is made
4. s 59 WESA court can intervene

**Ottaway v Norman**

F: Guys leaves secret trust to his son, secret T does not carry it out.

I: Can son get the property?

H: Yes

R: For secret trust, must show intention to create primary donee with obligation in favor of secondary donee, communication of this intention to PD, and acceptance of that obligation.

**Re Boyes**

F: Guy makes his lawyer sole legatee, but lawyer did not learn who the secret B would be until after guy died. Guy’s family sues.

I: Can the family get the property?

H: Yes

R: If testator doesn’t disclose secret B’s identity to named B, named B will hold RT for testator’s estate.

**Blackwell v Blackwell**

F: Guy left half-secret trust.

I: Valid?

H: Yes

R: Half-secret trusts will be valid if there is clear promise by T that the trust will be executed. Testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a T and leaving purposes to be supplied afterwards. Legatee cannot give testamentary validity to an unexecuted codicil by accepting an indefinite trust never communicated to him during testator’s lifetime.

Despite the formality requirements of wills legislation, a testator/ix may circumvent the law through creating a secret or half secret trust. These devices emerged as a result of social mores and the taboo of extramarital relations and children born born out of wedlock. Though less common in the contemporary context, these situations evolved to allow the court to honour the testator’s true intentions. A secret trust occurs when the named beneficiary is actually to hold the property on trust for an unnamed beneficiary. To effect a secret trust, the testator must intend the named B to hold for secret B as T (**Ottaway, Champoise**). The testator must communicate during his lifetime these wishes to the named B. If the named B does not learn the secret B’s identity until after the testator dies, he or she will only hold a resulting trust for the testator’s estate (**Boyes**). The named B must agree to the scheme. The criteria for secret trusts need only be met during the testator’s lifetime. A half-secret trust occurs when the instrument names the B, but indicates he or she is holding for an unnamed B. The criteria for half secret trusts is largely the same as secret trusts, but the testator must meet the requirements BEFORE the will is made (**Blackwell**). In the event that a secret or half secret trust fails, the court has inherent jurisdiction to vary a will to give effect to the testator’s clear intentions (**s 59 WESA**).

## Transitory Role of Settlor and Attempts to Revoke a Trust

S cannot revoke once trust is perfected through transfer, cannot enforce trust unless settlement provides

* + - S remains involved if a B, or has retained powers to amend or revoke

**Nolan v Kerry**

F: Pension plan provided defined benefit until it grandfathered in defined contribution. Employer was taking funds from DB plans to make contribution holidays for DC holders.

I: Can employer do this?

H: No because S cannot interfere with trust once declared.

R: Employer (settlor) may not remove pension contributions in trust unless the settlement says so.

# Resulting Trusts

Law implies trust pursuant to cultural assumptions: people generally do not give things away for free

* + - not considered UE because giving IRR to all parties in UE would be too broad
    - facilitative to give an explanation and outcome of certain situation—ET has specific objective

RTs occur when the law implies a trust pursuant to the cultural assumption that individuals generally do not give things away without compensation. Any property not effectually disposed of remains with the transferor (**Vandervell**’**s**) RTs are facilitative instruments to explain the outcome of certain situations. While ETs have specific objectives and regimes for beneficial distributions, an RT is imposed after the fact and may not have been contemplated by the parties at the time of transfer. While RTs are divided into either ARTs or PRTs, these categories are achieve the same functional result (**Westdeutsche**).

## 1) à Automatic Resulting Trusts (ART)

**1. The trust is void (but legal title transferred to trustee)**

* + - Transferor retains ET, transferee holds LT on RT

**2. Legal title is transferred to the trustee without fully disposing of the equitable interest**

**Re West**

F: Woman did not name any residuary beneficiaries.

I: Do Ts get beneficial interest in residuary property?

H: No

R: The trust for sale in the will indicates the Ts were not Bs.

**Schmidt v Air Products Canada Ltd**

F Two companies merge, both had DB plans that gave employer discretion to distribute surplus upon termination and automatic reversion once employee reaches max amount. Employees claim they are entitled to surplus.

R: Surplus from DB = RT for employer; surplus from DC = doesn’t exist, all belongs to employees

**3. Transfer of property to another subject on a condition precedent which has not occurred (“Quistclose” trust)**

* + - if primary purpose not accomplished, borrower holds RT for lender who has right of reverter
      * + if specific purpose is uncertain, borrower cannot keep money (**Twinsectra**)

**Twinsectra Ltd v Yardley**

F: Yardley got a loan for a very specific purpose, Twinsectra obtained guarantee from third party who could not pay.

I: Quistclose trust?

H: Yes

R: **A loan to a borrower for a specific purpose gives rise to FD on part of the borrower who has no beneficial interest in the money.** Quistclose creates two successive trusts: primary trust to identifiable Bs and secondary trust in favor of lender arising on failure of primary trust. Lenders pays the money to borrower, but does not part with the beneficial interest, which is a RT.

**Re Westar Mining Ltd**

F: Joint venture in a coal mine under proportional ownership. Westar owned 80% and went bankrupt. Poscan did not contribute its share of the operating expenses. T in bankruptcy sued Poscan. Employees of the mind claimed the monies from the joint venture was a purpose trust in their favour.

I: Are employees preferred creditors?

H: Yes

R: Payments by Poscan were paid into a separate joint venture account to be used exclusively to pay operating expenses. T in bankruptcy could not ignore Quistclose trust arrangement by framing it as a debt claim.

**4. Surplus of funds after trust purpose has been achieved**

* + - funds that have been advanced for legitimate purpose to group of people
      * + if possible to track lenders, give them back their money (**Red Cross)**
        + T can pay money into court and wait for people to claim it on RT (**Gillingham**)
        + look at donors to determine what to do with surplus (**West Sussex**)

large donation—RT

collection boxes—bona vacantia

street entertainment—residue that belongs to society b/c donor was paying for k)

* + - if only one surviving member left, follow **Hanchett-Stamford**
      * + money given to club according to rules of the club—->if no rules, imply from k law

if there are no rules around termination of club, distribute surplus among remaining members (ie if one person remains, they get the lot)

An ART will arise in four situations. If the trust is void for uncertainty of intent, subject, or object matter, or if there was inadequate consideration (**Ames**), the property becomes a resulting trust. The purported T will hold legal title, but the transferor retains equitable title, rather than it passing to the intended B (**Broadway**).

If legal title is transferred to the T without full disposal of the equitable interest, the remaining equitable interest is held on a RT for the transferor (**West**). Pension surplus may fall under this category, depending on the type of pension plan. A defined benefit pension surplus is held on RT for the employer, but a defined contribution pension plan does not create a surplus. Employees under a defined contribution plan own the excess funds, which disbars the employer from any equitable interest in them (**Schmidt**).

When property, such as a loan, is transferred subject to a specific purpose, the law will imply a RT in favor of the transferor/lender, who retains a right of reverter (**Quistclose**). The loan for a specific purpose gives rise to a fiduciary duty on the part of the borrower (**Gibert**), who does not obtain beneficial interest in the property (**Twinsectra**). If the specific purpose is uncertain, the borrower must return the property to the lender (**Twinsectra**). Because the lender never surrenders equitable title in the property, he or she is a preferred creditor in the event of an insolvent borrower (**Westar**). The specific purpose and segregation of the money to further this purpose must be a mandatory requirement of the loan (**Giles**). While traditionally confined to financial arrangements, Quistclose trusts may be imposed in situations to prevent an injustice (**Newmarket Plaza**).

An ART will arise when there are surplus of funds after the trust purpose has been achieved. If it is possible to track the lenders, they can reclaim their money on the basis of RT (**Red Cross**). In the event that there are many donors of small amounts, T may pay the money into court until the donors claim it (**Gillingham**). In **West Sussex**, the court held that surplus from large donations are held for the donor on RT, money from collection boxes is bona vacantia, and money collected from street entertainment is residue belonging to the society because the donor was paying for a contract of entertainment. In the event that the society has disbanded, the surplus is to be distributed according to the club rules. If no such rules exist, the remaining members will receive the surplus equally. (**Hanchett-Stamford**).

## 2)àPresumptive Resulting Trusts (PRT)

**PRT occurs when:**

1. Property purchased and
   1. registered in the name of another (**Nishi**)
   2. gratuitously transferred to another
2. No clear evidence to that transferor intended an absolute gift

**A transfers to B w/o consideration**——->law presumes B holds RT for A

* + - can be rebutted by evidence that A intended to give absolute title

**A transfers to B, gets payment from C**—->law presumes B holds RT for C

PRT based on notion that people don’t give things away gratis

* + - rebutted by evidence that transferor wished to give absolute gift (onus is on transferee)
    - if holders can draw on the account for their own benefit, may rebut PRT (**Sawden**)

**Standing v Bowring**

F: Lady transfers bonds to herself and godson as JTs, intending he would benefit on her death. She remarried and wanted to revoke the transfer.

I: Can she revoke the gift?

H: No

R: Actual intention to give legally and beneficially + transferor’s conduct will rebut RT.

**Nishi v Rascal Trucking Ltd**

F: Rascal advanced funds without any conditions or requirements, later claimed he maintained beneficial interest under a RT.

I: Did Rascal have RT?

H: No

R: Purchase money resulting trust is a gratuitous transfer RT where a person advances a contribution to the purchase price without taking legal title. Rascal’s contribution was made without consideration so the presumption of RT arises, but can be **rebutted if recipient proves on BOP that the person who advanced the funds intended them to be a gift.**

**Niles v Lake**

F: Sisters open a bank account together so healthy sister can take care of sick sister. Bank account had ROS, but sick sister’s children say it was only a RT.

I: Can the kids get the money on RT?

H: Yes

R: Bank account made them sign up as JTs to protect itself rather than it being something the parties actually intended.

**Rusell v Scott**

F: Lady opens account with her nephew and told her lawyer about the account and her intention that nephew could keep whatever remained when she died. Heir disputed.

I: Can heir claim on basis of RT?

H: No, it was an absolute gift

R: There was no POA, so there had to be PRT, which was rebutted by evidence that aunt intended nephew to have the money when she died.

**Young v Sealey**

F: Lady expresses intention that her nephew would get money from joint account, but that he would have no beneficial rights during her life and said she wanted to avoid death duties.

I: Is it an RT because the gift was in violation of wills legislation?

H: No

R: The intentions really should have been defeated because they violate wills legislation, but it was practice to honour this type of agreement.

**Eisner v Baker**

F: Unmarried couple move to Salmon Arm, girlfriend came mistakenly on record as co-purchaser and boyfriend did not attempt to remove her from title so they owned as JTs even though she paid nothing.

I: Did she hold her share on RT for him?

H: Yes

R: Baker did not intend to benefit Eisener by placing her on title. **Gift will not be found by mere lack of thought because there must be clear intention of a gift.**

A PRT occurs when an individual purchases property and registers it in the name of a third party (**Nishi**), or gratuitously transfers the property to a third party. In the absence of clear evidence to suggest the transferor intended an absolute gift, the law will presume the transferor retains equitable title (**Oord**). The onus to rebut is on the transferee to show that the transferor had actual intention to give legally and beneficially (**Standing**). In the event of a joint bank account, mere existence of joint tenancy and rights of survivorship is insufficient to rebut the presumption (**Niles**). The transferor’s intention to give absolutely is paramount (**Russell**). Lack of thought will not constitute clear intention (**Eisener**). While clear intention may violate wills legislation, a court may still accept it as rebutting evidence due to established judicial practice (**Young**). If holders of a joint bank account can draw on the funds for their own benefit, this may rebut the PRT (**Sawden**). Both PRTs and POA give a measure of certainty and predictability for individuals who put property unjoint accounts or make gratuitous transfers (**Madsen**).

## 3)àPresumption of Advancement (POA)

Cultural assumption that father transferring to child was an absolute gift (also mothers, **Pecore)**

* + - onus on transferor (parent) to rebut presumption to say it was PRT
    - husband to wife eliminated by legislation, but **Mehta** allowed it b/c there was a traditional marriage
    - **POA ONLY OPERATES TO MINOR CHILDREN—PECORE**

**Pecore v Pecore**

F: Dad transferred bulk of assets into joint account with daughter, who then became entitled to the residue of the estate and got ROS for the accounts. Daughter’s ex-husband claims she held accounts on RT for dad’s estate and they should be distributed as residue (he was a residual B).

I: PRT or POA?

H: PRT rebutted by intention to gift absolutely.

R: Advancement is a gift during transferor’s lifetime to transferee who is a financially dependent child. POA applies equally to moms and dads, but does not apply if the child is an independent adult. POA only applies to minor children.

POA comes from an assumption that a father transferring to a child was an absolute gift (**Murless, Bennet**). The presumption now extends to parents of both genders (**Pecore**). However, the presumption is limited to transfers from parent to minor children (**Pecore**). Traditionally, the presumption operated between husband and wife, but never vice versa. Legislation has eliminated the presumption between husband and wife. Despite this, the court may still allow the presumption if the marital arrangement was highly traditional (**Mehta**). The onus is on the transferor (parent) to rebut the POA by providing evidence that the transfer was meant to operate as a RT (**Vinogradoff**). The presumption operates once the gift is given (**Shepherd**). However, the application of the timing rule may be flexible depending on the facts of the case (**Lavalle, Neazor**). To rebut the POA, the evidence must be otherwise admissible.

## Rebutting the POA

Timing: once gift is given and presumption is operative, POA triggered **(Shepherd**)

Admissibility: evidence must be admissible to rebut PRT/POA

Onus: transferor to say the transfer was RT

**Shepherd v Cartwright**

F:Guy registers shares in kids’ names, but they don’t know about it. Years later he has kids transfer their shares back to him. Kids sue estate claiming the original shares were advancements.

I: Can kids get the shares back?

H: Yes

R: The original intention was for advancement, and this is the relevant point of intention for rebutting evidence.

## Illegality and Presumptions

**Par delictum** (**Scheurman**): court refuses to deal with tainted transaction and will not look at any evidence that could rebut the presumption—**court prefers possessor** (**Szoke, Gorog**)

**Pontius Pilate** (**Foster, Goodfriend**): court will acknowledge that there is evidence to rebut, but will not allow it because it indicates illegality (ie they wash their hands of the illegal dealings)

**Side step**: court will say it doesn’t even need to hear the evidence of tainted transaction

* + - court gives effect to plain transaction if there is no evidence explaining why there was gratuitous transfer (then RT in favour of transferor)

**Locus poenitentiae**: if fraud is rectified or hasn’t happened and party declares repentance

**Proportionate harm (NOT ACCEPTED IN CANADA)**: court may look at proportionality of harm to determine whether to hear the evidence of tainted transaction (ie how serious was the swindling?) **Nelson**

* + - proportionality + linkage between loss of property and punishment for defrauding government

**Tribe v Soiseth**

F: Lawyers marry and wife’s parents buy them a condo. Upon divorce, wife says she has no beneficial interest in condo to exclude it from patrimony—property only registered in her name to avoid taxes.

I: Did daughter have beneficial interest in the property?

H: No

R: Where a person transfer property into another’s name, RT is presumed and transferee must prove that a gift was intended. Scheurman confined to cases where there were creditors and illegal purpose was actually carried out. It is clear that while dad arranged his affairs to avoid taxes, he didn’t actually claim the exemption so it is open to him to repent.

**Goodfriend v Goodfriend**

F: Two couples are swingers. Mr. Cox threatens Goodfriend with damages for alienation of affection, Mrs. Goodfriend urges her husband to transfer her the property to protect it.

I: Did Mr. Goodfriend retain beneficial interest in the property?

H: Yes

R: Evidence of an illegal k or scheme will not be received to rebut the POA. If no creditor has been defeated then admissible.

**Tinsley v Milligan**

F: Lesbian couple buy house, but only register it in one name so the other could get welfare.

I: Is the evidence of getting welfare admissible?

H: Don’t even need to consider it

R: Where two parties have provided the purchase money to buy a property which is conveyed into the name of them alone, the latter holds RT for both parties in shares proportionate to contributions. Plaintiff claiming RT does not have to rely on illegal evidence. Court does not need to hear the illegal evidence (side-stepping).

The court takes several approaches to handling evidence of illegal activity or suspicious intent. The court in **Scheurman** expressed the par delictum approach whereby it refused to hear any evidence of a tainted transaction that could rebut the presumption of advancement. While Schuerman has never been overruled, the court has relaxed its exacting standard in some cases. A court may acknowledge the rebutting evidence, but will not give it effect due to its illegality (**Foster**). However, if the fraudulent activity never resulted in any harm, the court may hear the rebutting evidence (**Goodfriend, Krys**). In some cases, the court will choose to side step the illegality entirely and decide the case on other grounds (**Tinsley**). In David and Gorog, the court took the same approach and made its ruling without relying on the ex turpe evidence. In the event that fraud has been rectified or has not yet occurred and the party seeking to admit the evidence expresses repentance from the scheme, the court may hear the rebutting evidence (**Tribe**). In Australia, the courts have taken a proportionate harm approach, measuring the gravity of the fraudulent activity against the harshness of losing property as punishment (**Nelson**). While this approach is not yet accepted in Canada, it is open for parties to argue.

# The Beneficiary

## Nature of title and interest in equitable property

B owns an **in rem right** that avails against the world

* + - B has exclusive possession of property
    - if T goes bankrupt, B can recover her property as a PREFERRED CREDITOR

The beneficiary owns an in rem right in the equitable interest that avails against the world (**Csak**). Her possession and enjoyment is exclusive, and is a preferred creditor in the event of trustee insolvency. While the T administers the property and can dispose of the property to benefit B, B holds the right to enjoy the property and to dispose of the equitable interest. These roles must be kept separate (**Spencer**). B cannot manage, control, or administer the trust assets (**Schalit**), unless the B is acting as T’s agent in limited circumstances (**Bagot**). B and T share an in personan relationship in which B has a right against T to properly administer the fund. The individual assets are in personam strings attached to the T that B can pull to ensure T’s proper discharge of the fiduciary duty. (**Archer-Shee**). In Archer-Shee, the House of Lords held that the B owns the trust assets individually, while a New York court ruled that the B owned a personal right against the T for proper administration. In Canada, B ownership will depend on the type of trust. For a large, shifting trust trusts with many Bs, as in pensions, the Bs likely own rights against the T rather than the trust assets themselves (**Garside**).

B is able to dispose or assign her interest. The LEA abolished writing requirements for disposal of equitable interest, but **s 36** requires B to give T written notice if B chooses to assign debts or choses in action (personalty). No document can effect an assignment unless it vests in interest to the assignee such that T becomes T for the assignee once notice is given (**Timpson’s**).

## Role of Trustee and Beneficiary – Distinguishing

T holds utendi/disponendi, B holds fruendi/disponedi

* + - B *cannot* manage, control, or administer the trust assets

**Schalit v Joseph Nadler Ltd**

F: Nadler rented trust property to Schalit. B of property initiated distrainment.

I: Did B overstep its bounds?

H: Yes

R: The right of the B is not to the rent but to an account from T of profits received from the demise. B has no right to demand the actual bank notes, but can require T to account.

**Re Bagot’s Settlement**

F: B wanted to manage the trust properties less expensively.

I: Can she do this?

H: Yes

R: There is judicial discretion to allow a B to become life tenant of property if it would be convenient and adventitious. B can act in this capacity as T’s agent.

## Does the beneficial title attach to each item of the trust fund?

Special FD owed to B by T

* + - B is not concerned about the actual items, but about whether T is behaving properly
    - equitable interest = in personam relationship between B and T to enforce the trust
    - think of individual assets as in personam strings attached to T that B can pull
      * + if B gets too involved, T can tell B to go away or call for title

**Baker v Archer-Shee**

F: American lady immigrates the England, becomes sole life tenant of a trust in NY, no money was ever remitted to England.

I: Is she owner of trust as a whole or of each individual asset?

H: Each individual asset

R: An equitable right in possession to receive during her life the proceeds is B’s right, not to a balance sum but to the actual assets themselves. **American court said she owned only the balance sum and a right against the Ts.**

## Sub-trusts and Assignments

If B1 has the equitable title to x (Xe), B1 may become a testator, declaring a trust in respect of Xe for the benefit of B2. B1 and B2 may both hold equitable titles in relation to x but B1 has a bare equitable title alone, whereas B2 has the beneficial title as well. B1 must then administer their equitable interest (Xe) for B2 but *may not administer the trust assets* (x) *(i.e. legal title*).

What type of beneficial interest?

1. *Equity follows the law*à may need to follow formalities for legal interest.
   1. *Substance trumps form* in order to avoid fraud
2. In land:
   1. Must be in writing (s. 2 Statute of Frauds)
   2. LEA abolished writing requirements for equitable interests in land
3. In personalty:
   1. *Statute of Frauds* does not apply to personalty
   2. Chose in action (debt, company shares, negotiable instruments, copyrights, rights of action founded in tort or breach of K, equitable interest in a trust, etc) require formalities:
      1. Was assignment absolute and in writing, signed by assignor (s. 36 LEA)
         1. No
            1. Privity would usually not allow thisà assignor must be a party in the proceedings (*Di Guilo*)
            2. Chancery may intervene to issue an injunction, forcing assignor to facilitate actions brought by assignee against debtor
            3. If in a will, WESA will apply flexibly to uphold settlor’s intent

If none of this works out, the interest of the assignee won’t be enforceable (*Timpson’s*).

* + - 1. Yesà Assignor may bring an action

### *Law and Equity Act, s. 36* – assignment of debts and choses in action ***36*** *(1) An absolute assignment, in writing signed by the assignor… of a debt or other legal chose in action, of which express notice in writing has been given to the… trustee… is deemed to have been effectual in law…*

**Timpson’s Executors v Yerbury**

I: Were sums paid to kids out of testatrix’s income or the income of the children?

H: Testatrix’s income

R: The operative question is whether the children were vested in interest. If the children were vested, then the payments came from the income of the children. Equitable interest can be disposed if person entitled to it assigns directly, tells T to hold property in trust for 3rd party, k for valuable consideration to assign, or declare herself T for the third party. To effect an assignment of equitable interest there is no particular form of words needed if intention is clear. No document can effect an assignment unless it vests in interest to assignee so that after notice is given, the T becomes T for the assignee.

## Restraints on Alienation and Protective Trusts

CL will void anything that restrains alienation—if going to create protective trust must use determinable limitation rather than interest defeasible upon condition subsequent

* + - determinable interest defines parameters of interest, but does not restrain it
    - ET vests in people named in the gift-over

S transfers Blackacre to T on trust for A **until** A goes bankrupt, then to A’s children

A is a spendthrift who gets an equitable estate that will automatically terminate and go to kids once the determining estate happens

S may choose to set up a protective trust. While CL voids anything that restrains alienation, S can establish a protective trust by using a determinable limitation on B’s interest and providing a giftover (**Leir**).

## Termination of the Trust by Beneficiary (*Saunders v Vautier*)

Termination under Saunders

1. Is B sui juris? (age of majority + legally capacitated)
2. Is B vested in interest—absolutely entitled to the gift, only thing postponed is enjoyment
   * + court prefers early vesting and may interpret contingency to enjoyment rather than vesting **(Lysiak**)
3. If class of Bs, they must act collectively
   * + in large class + discretionary trust, cannot collapse (**Baden, Buschau**)
     + all sui juris Bs can get together and collapse trust, leave balance for non sui juris Bs (**Chodak**)
4. Can divide the property (**Sandman’s**)
5. Can’t collapse if it would cause unfairness (**Lloyd’s Bank**)

**Saunders v Vautier**

F: B wants to call for collapse of trust

I: Can B do this?

H: Yes

R: No gift over, so the stock either belongs to the B or falls into residue. It was a gift of immediate interest vesting. The fund was intended wholly for B’s benefit, the only relevant intention being postponement.

**Re Lysiak**

F: Bs will only receive the estate when they aren’t living in Communist Russia anymore, they want to collapse the trust.

I: Can Bs apply Saunders?

H: Yes

R: He intended they would have sole discretion as to the THE TIME at which and the MANNER in which they would realize and distribute the estate. Testator intended to make an absolute gift that would not be entirely dependant on the executor’s discretion. The provision to direct the distribution is repugnant, so can ignore it.

**Re Chodak**

F: Multiple Bs living in USSR, stiff directs executors to limit distribution per year.

I: Can Bs collapse the trust?

H: Yes

R: Clear that stiff intended the Bs to take immediate interest, leaving only the manner and time of payment to the executors—distinguish from case where gift does not take effect except on exercise of executor’s discretion.

**Re Smith; Public Trustee v Aspinall**

F: Stiff gives Ts discretion to create amount to pay Bs.

I: Can Bs collapse the trust?

H: Yes

R: Where there is a trust under which Ts have a discretion as to applying the whole or part for benefit of a particular person, that person cannot demand the fund. **When Ts have no discretion as to the amount, the B can call for the trust.** Multiple Bs can join together to form one individual if they are the sole objects of the trust (ie pay one portion for benefit of one, rest of the fund to another).

**Buschau v Rogers Communications Inc**

F: DB plan is engineered that it reverts to employer upon termination, want to collapse trust.

I: Can Bs collapse trust?

H: No

R: Pension plans do not lend themselves well to Saunders because it is not a stand alone instrument.

B may terminate the trust if she is sui juris and vested in interest (**Saunders**). If B is a minor, incapacitated, or only owns a contingent interest, she cannot collapse the trust. However, the court prefers early vesting and may interpret any contingent as speaking to the postponement of enjoyment rather than vesting (**Lysiak**). When the Ts have no discretion as to the amount of the fund, and can only control the distribution scheme, the B can collapse the trust (**Smith**). If there is a class of Bs, they must act collectively. All sui juris Bs can agree to collapse the trust and leave the balance for non sui juris Bs (**Chodak**). If the trust is discretionary and involves a large class of Bs, the rule in Saunders is generally inapplicable (**Baden, Buschau**). In the event that the sui juris Bs do not agree, the court has inherent jurisdiction to divide the property (**Sandman’s**), but will not do so if it would cause unfairness amongst the Bs (**Lloyd’s Bank**).

## Variation of trusts

Common Law

* + - administrative terms (emergencies), maintenance (ensure sufficient income for Bs), conversion, compromise (can act for non sui juris Bs in litigation)

Statute

TSVL allows variation, but court will protect groups who are unborn, unascertained, or incapacitated

1. **In which circ.s will court agree to vary the trust?**

Trust and Settlement Variation Act, s. 1 – Court approval of variation

If court is satisfied the rearrangement will **benefit** the unborn, unascertained, or incapacitated, it will approve the variation

* + - s 1(b): unascertained people may become entitled to the trust at some point in the future
      * + **Buschau**: s 1(b) deals with people who we know form a group, but we don’t know who will get the interest (usually referable to survivor of group)
        + has to be actual interest, can’t be someone who just expects to be an heir

1. **What counts as a “benefit” in the statute?**

Trust and Settlement Variation Act, s. 2 – Benefit to parties interested

*Financial*—good bargain test

* + - ask whether a prudent adult, motivated by intelligent self-interest and sustained consideration of risks, is likely to accept the arrangement (**Bentall**)
      * + include tax minimization (**Burns**)

*Nonfinancial*—social/education (rejected in **Western**), family/harmony (**Remnant**), psychological (rejected in **Harris**)

**Re Burns**

F: Settlor wants to vary trust.

I: Can Settlor vary the trust?

H: Yes

R: Tax deferral is valid benefit under TSVL.

**Re Weston’s Settlements**

I: Vary the trust?

H: No

R: Function of the court is to protect those who cannot protect themselves, and can give its consent to a scheme to avoid death duties and other taxes. The court should also consider the educational and social benefit to infants or unborn children.

**Re Remnant’s Settlement Trusts**

F: Protestants vs Catholics

I: Vary the trust?

H: Yes

R: The forfeiture would create discord in the family. Court must consider any benefit for the infants or unborn children.

**Re Harris Estate**

F: Widow wants to vary trust to benefit infant children after husband kills himself.

I: Can she vary the trust?

H: No

R: The variation would reduce one of the child’s shares. It was suggested that the benefits to the group of children as a whole would off-set the reduction in share. If the variation goes through, eldest son’s share would be reduced not just for him but for his unascertained children—these are not part of the class that would receive the emotional benefit of variation.

**Russ v BC (Public Trustee)**

I: Trust variation?

H: Yes

R: Court can vary or revoke any trust, regardless of S’s intentions

**Buscheau 2**

R: Court does not have jurisdiction to agree or consent to trust variation behalf of sui juris Bs.

**Nolan v Kerry**

R: The trust contemplated a broad category of Bs, so amendment is possible.

At common law, trust variation was limited to administrative terms, maintenance, conversion, and compromise (**Chapman**). Under TSVL, variation on other grounds is permitted, provided the court finds the variation would be beneficial and grants consent for any Bs who are unborn, unascertained, or incapacitated (**ss 1, 2 TSVA**). An unascertained individual is one who may become entitled to the trust fund at some point in the future. These individuals form a known group, but it is unknown who from the group will take the interest (**Buscheau**). The interest of an unascertained individual must be actual rather than an expected interest (**Knocker**). Under **s 2**, the variation must be beneficial to the parties interested. The test for benefit is whether a prudent sui juris adult, motivated by intelligent self-interest and sustained consideration of the risks, would be likely to accept the variation (**Bentall**). The court has found that tax minimization (**Burns**) and family harmony (**Remnant’s**) are beneficial grounds for variation. However, it has rejected tax evasion (**Weston**) and psychological benefits (**Harris**). Whether something is beneficial will depend on the facts of the case. The court reserves the right to vary or revoke any trust, regardless of S’s intentions (**Russ**). If all of the Bs are sui juris, the court will not grant its consent on their behalf (**Buscheau 2**).

# Trustee Appointment, Removal, and Retirement

### *s. 2 Trustee Act:* Statute applies to all people acting as T, regardless of appointment date

## Initial Appointment of Trustee

1. S has right and freedom to choose individual(s) w/ full legal capacity to act as Ts
   * + - S falls out of picture after trust is executed unless she reserved powers
2. S may appoint guardian/protector to hire and fire Ts
3. If more than one T, they hold at JTs with ROS—when last one dies, heir takes over
4. If T refuses appointment—make alternate appointment in will, or court can appoint

## Retirement, Death or Absence from Jurisdiction

T may leave position through retirement, death, or removal—statute fills in gaps

* + - **s 27 Trustee Act:** if dead, retiring, absent for 12+ months, new T appointed by protector, surviving Ts, or heir of last surviving T
      * + Bs may bring about any appointment (**s 36**)
    - **s 28**: retiring T and more than 2 remaining Ts—->retiring T must notify in writing and remaining Ts must consent
      * + if T does not follow this requirement, can still be liable for any FD breach
    - **s 29:** newly appointed T will be vested in trust property through retiring deed

T may leave his position through retirement, death, or absence from jurisdiction. If the settlement does not provide for these occasions, the Trustee Act fills in the gaps. If the T dies, retires, or is absent for more than 12 months, a new T can be appointed by a protector, the surviving Ts, or the heir of the last surviving Ts (**s 27**). The Bs may also work together with the other Ts to make an appointment (**s 36**). If a T retires and there are more than two remaining Ts, the retiring T must notify them in writing of his retirement and the remaining Ts must consent (**s 28**). If the retiring T does not fulfill this requirement, he will still be liable for any subsequent breach of trust. A newly appointed T will be vested in the trust property through the retiring deed (**s 29**). A new T has all the rights of the predecessor T (**s 29**).

## Removing a Trustee

Usually addressed in settlement document—document appoints protector to hire/fire Ts

trustee act

* + - **s 30**: sui juris B w/ consent of B majority may apply to court for T removal
    - **s 31**: court can remove T and appoint new one if expedient

conroy test for court removal

Have there been acts and omissions that endanger trust property and has T shown lack of honesty, appropriate capacity, or reasonable fidelity?

**Conroy v Stokes**

F: Ts were removed from office and new one appointed even though majority of Bs did not want this.

I: Overturn removal?

H: Yes

R: No misconduct or breach by Ts, but the removal was because there was friction between some Bs and Ts. The Ts did not nothing to impair the welfare of the Bs taken entirely.

**Re Consiglio Trusts 1**

F: Widespread misunderstandings among three Ts, bitterness developed that made it impossible for them to agree.

I: Remove Ts?

H: Yes

R: Misconduct is not a necessary requirement for removal, but when continued administration of trust with regard to Bs has become improbable or impossible is grounds for judicial intervention.

Where the settlement does not speak to circumstances of removal, parties must turn to statute. A sui juris B with consent of a majority of the Bs (if more than two others) can apply to court for T removal (**s 30**). Using its inherent jurisdiction, a court can remove T and appoint a replacement (**s 31, Letterstedt**). The test for court removal is to determine whether there have been acts and omissions on T’s part that endangered the trust property and whether T has shown lack of honesty, appropriate capacity, or reasonable fidelity (**Conroy**). Misconduct is not a necessary requirement for removal (**Consiglio**). The court will intervene if the administration of the trust under the current T regime becomes improbable or impossible (**Consiglio**).

## Vesting Assets in New Trustees

New T must read through settlement to determine types of assets, identity of Bs, role of T in administering fund and any trusts, trust powers, or powers

* + - important for old T to notify resignation because new T gets title vested upon resignation
    - **s 29** gives automatic vesting of new T; **s 32** new T has all the rights of old T

# Duties of Trustees

The trustee’s powers of administration are restrained by duties prescribed by law, including those set out by the settlor in the trust instrument and statute.

## The Duty to Take Custody and Personally Manage Trust Assets

Take custody

* + - obtain title to assets upon appointment
    - review document and determine whether to keep, sell, invest (depends on FT, TP, or PS)

Personally manage assets

* + - T cannot delegate the trusteeship itself, must perform the role herself
      * + T can enlist agents to help in sale, investment, or storage of assets
    - Statute gives more leeway for T to hire agents to help administer the fund as long as T **exercises prudence** in the appointment (**s 7**)
      * + **s 95 Trustee Act**: T must use proper judgment in selecting a helper, but is indemnified

**Speight v Gaunt**

F: Trustee hired broker to avoid bankruptcy.

I: Breach?

H: No

R: Although T cannot delegate the confidence reposed in himself, he may avail himself of agents like bankers and brokers. If a loss occurs, T is exonerated barring any negligence. SOC is a prudent businessperson managing his own affairs.

**Re Wilson**

F:Board delegated to a third party.

I: Breach?

H: Yes

R: Attempted exercise of discretion by any authority other than board of directors is ineffective.

**Fales SCC**

H: Uphold TJ and CA

R: SOC on T is traditionally ordinarily prudent person managing own affairs, no higher SOC for corporate Ts. T must be alert to changes in assets represented in the portfolio. Not expected that he will hastily sell, but needs to remain aware. Among considerations for s 98 is whether breach technical, minor error in judgment, decline in value was attributable to general economic climate,

T cannot delegate the performance of the trusteeship itself (**Re Wilson**). However, T can enlist agents to help in the sale, investment, or storage of trust assets (**Speight**). These agents cannot exercise authority over the trust (**Wilson**). If a T exercises prudence in appointing the agent, he will not be in violation of the duty to personally manage the assets (**s 7**). **s 95** indemnifies T in respect of any agent negligence, provided T exercised prudent judgment in appointing the agent. The standard of care on a T is a prudent businessperson managing his own affairs (**Speight**). The SOC is the same for both corporate and personal Ts (**Fales**). However, the court may be more lenient towards a personal T in application for exoneration under statute (**Fales**). The factors for assessing an application for exoneration include whether the breach was technical, whether the breach was a minor error in T’s judgment, and whether the decline in trust asset value was attributable to the general economic climate (**Fales**).

## The duty to take care of trust assets: investment duties and powers

Duty to invest

* + - if S restricts any sale, T holds bare trust for B because no activity is required
    - most Ts will have to invest assets, make decisions based on minimum risk and maximum return (ie cannot put trust fund in high yield but very risky stock)
      * + if T was Uncle Henry, only expected to do his personal best
    - **s 15.1 Trustee Act**: T may invest property in any form a prudent investor might invest
    - **Wohlleben**: all Ts (corporate + personal) are subject to prudent businessperson test
      * + **s 297 Trustee Act**: T exoneration if fair and reasonable in circumstances where breacher was being honest—Mrs. Wohlleben is exonerated because she was doing her best, Canada Trust liable because they were not
    - portfolio management: prudent businessperson invest in variety of stocks and shares (**s 15.3**)
    - **Scargill**: ethical considerations can’t be the only reason for not investing
    - **s 15.4 Trustee Act**: Ts can set off losses against profits—T has done very good job in one regard, can offset another bad deal or imprudent behaviour
    - **s 95**: T is not guarantor of investment

**Cowan v Scargill**  
R: Power investment must be exercised to yield best return in relation to risks and prospects of return yield. Ts must put aside personal views when making investments Powers must be exercised fairly and honestly for the purposes they were given and not to accomplish ulterior purpose. SOC of Ts includes duty to seek advice on matters T doesn’t understand—honesty and sincerity are not the same as prudence and reasonableness.

Unless T holds a bare trust, T must invest the assets and make decisions based on a minimum risk and maximum return basis. The T is expected to do his personal best in investing the assets (**Fales, s 297 TA**). T may invest the proper in any form a prudent investor might invest (**s 15.1 TA**). A prudent businessperson is likely to use the portfolio management approach to invest in a variety of stocks and shares (**s 15.3**). Ethical objections cannot be the sole reason T advances for not investing in a particularly adventitious stock (**Cowan**). The quality of T’s investing is judged at the time of making the investments rather than at trial (**Nestle**). If T has done exemplary work on one asset, but has made a mistake in another investment, he can offset the losses against profits (**s 15.4**). T is not the guarantor of the investment (**s 95**).

## Duty of Loyalty to the Beneficiary

conflict of interest

1. Did T profit through association with the trust? (**Keech**—property; **Boardman**—knowledge)
2. Was profit at the expense of B?
   * + - if yes, breach of trust
       - even if no, T CANNOT benefit from trust for policy reasons (**Keech**)

B must give informed consent even where there is no real conflict (**Boardman**)

T may have to disgorge profits (**Boardman**), but Canadian courts more lenient in corporate settings where there was no real conflict (**Peso**)

Assess position held, nature of opportunity missed, ripeness of opportunity, relation of director to opportunity, amount of knowledge possessed, how knowledge was obtained, private/special opportunity, time frame of breach, circumstances of termination (**Canaero**)

**Boardman v Phipps**

F: B and T get together, want to reshape investments, no one objects, company is successful.  
I: Breach?  
H: Yes due to conflict of interest  
R: Parties obtained knowledge by virtue of FD and cannot escape according liability. There was a potential conflict of interest between Boardman’s position as lawyer to Ts and his own interest in applying for the shares. He was in FD to Ts and Bs.

**Peso Silver Mines Ltd v Cropper**R: All business undertakings are carried on through corporate vehicle—T principles should not be broader but read in this light.

T cannot have a conflict of interest when administering the trust regime. To determine whether there is a conflict of interest, the court will ask whether T has profited from associating with the trust. The profit can be property (**Keech**), knowledge (**Boardman**), or a business advantage (**Peso**). The court will then determine whether the profit was earned at B’s expense. If the answer is affirmative, T will be liable to B for breach of trust. Even if the profit did not disadvantage B, the strict standard from **Keech** held that T can never profit from association with a trust for policy reasons. For this reason, T may have to disgorge profits gained through the association (**Boardman**). However, Canadian courts have relaxed the standard in corporate settings where there is no real possibility of conflict between T’s actions and B’s interests (**Peso**).

Self-dealing: T can buy trust property, but not in personal capacity

* + - T generally cannot buy trust property for her own use b/c court contemplates mischief (**Holder**)
      * + court may be flexible based on facts of the case (ie if no bad faith on part of T, gave adequate consideration, sale was in B’s best interest, B was given full disclosure—**Molcan**)
    - if transaction is outside exception from Holder/Molcan , IT IS VOIDABLE

**Holder v Holder**

F: Party intermeddled with estate, remained a personal representative.   
R: T cannot buy from the trust because that is buying from himself. A T, who is entrusted to sell and manage for others, undertakes in the same moment not to manage for the benefit and advantage of himself. However, if the sale is fair and honest, the court mat say it is okay.

**Molchan v Omega Oil & Gas Ltd**R: Canadian courts have indicated after the fact approval of sales to T in exception circumstances in analogous proceedings.

fair dealing

T purports to purchase equitable interest—>T bears burden of showing every advantage given to B—>T bears onus to show absence of fraud, B obtained independent advice, adequate consideration

* + - if T fails test, trust survives (unless T has sold to BFPV in interim) and T must disgorge profits because transfer was voidable (**Crighton**)

**Crighton v Roman**

F: T purchased beneficial interest in the trust property.  
I: Self-dealing?  
H: Yes  
R: Lowest duty was for T to make full disclosure to B what he was planning to do. No absolute rule against purchasing from B himself, but has to show there was no fraud or concealment, B obtained independent advice, valid consideration. T bears onus of justifying the transaction.

T generally cannot buy trust property for his own use (**Holder**) because an individual cannot purchase from himself. The courts may be willing to flexibly apply the rule against self-dealing depending on the facts of the case (**Molcan**). However, if the transaction falls outside of the exceptions in Holder and Molcan, it is voidable in favour of the B. If T purports to purchase the equitable interest from B, T bears the burden of showing every advantage was given to B in the transaction. T must prove there was no fraud, that B obtained independent advice, and that he gave B adequate consideration. If T fails the test for fair dealing, the trust survives unless T has sold the equitable interest to a BFPV in the interim, and T must disgorge any profits because the transfer was voidable (**Crighton**).

## Duty to be Impartial

T has fundamental burden to cultivate the assets and pass them on to B—explains and justifies existence good faith duty

* + - notion of equality between Bs is hardwired unless S has indicated otherwise

1. Are there beneficiaries in succession?
2. Did the testator/settlor intend partiality or impartiality?
   1. Does the trust instrument (explicitly or implicitly) prescribe partiality?
      1. Explicit partiality:
         1. Express provisions in the will to the contrary, such as asserting the rule in *Howe v Dartmouth* doesn’t apply
      2. Implicit partiality:
         1. If it’s an *inter vivos* settlement (although it may—see *Re Smith*)
            1. b/c settlor assumed to intend for the benefit to lay to the person to whom it is given
         2. If it may be implied through directions or authority to:
            1. Keep or retain the residue (trust to retain)
            2. Maintain unauthorized investments despite the duty of prudent investment
            3. Give income *in specie* to the life tenant (power to postpone)
      3. Implicit impartiality:
         1. Trust for sale
            1. Realtyà until sold, life tenant gets profits *in specie*
            2. Personaltyà until sold, life tenant gets 4% property value
      4. Is there a conflict with the testator’s signals? (e.g. trust for sale with a power to retain or postpone)
         1. Court should engage in interpretive exercise to determine the **dominant and primary intent** of the testator (*Lauer and Stekl*)
         2. Is the power permanent or temporary with a requirement to sell eventually when it’s advantageous to do so?
            1. If latteràimpartiality (and life tenant gets 4%, not *in specie* (if personalty)) (*Crawford*)
   2. If not clear from trust instrument, the CL assumes settlor intended impartiality.
3. Trustee should assess the types of assets in the trust. Are there any of the following:
   1. Wasting – lots of income but capital base deteriorates (mortage, copyright, car)
   2. Unauthorized – highly speculative assets which have high yields in short-term and nothing in long-term (gold mine shares)
   3. Reversionary—assets not immediately avl. and don’t produce income for life tenant (e.g. future interests in possession)
4. If a duty of impartiality exists:
   1. With **wasting or unauthorized assets**, they should be sold and apportioned under the rule in *Howe v Lord Dartmouth* (4% income to life tenant and remainder to capital base) if the following is met:
      1. A testator or testatrix (i.e. in a will only—exception *Re Smith*; most *inter vivos* gifts are presumed to benefit the person on whom they fall)
         1. Re Smith is explained likely because the father’s will (precatory words) led to this *inter vivos* trust, so the latter was quasi-testamentary)
      2. Leaves a residuary (i.e. not specifically devised, *Lottman*)
      3. Personalty
         1. *Not* real estate, (*Lottman*)
         2. *Except* circs where testator signals realty should be sold + treated like personalty (*Lauer and Stekl*)
      4. To persons by way of succession and
      5. The residue includes a wasting or unauthorized asset
      6. Then the trustee must:
         1. Sell the wasting personalty
         2. Invest the proceeds in authorized investments
         3. The income of which goes to the benefit of the life tenant, the corpus of which accrues to the remainderperson in the capital base.
   2. With **reversionary assets**, the asset must be sold. Based on sale price, calculate 4% income per year and give that income to the life tenant. The rest of the sale price should be ploughed into the capital base + invest in things that will generate a fair income for life tenant (The rule in *Earl of Chesterfield*)
5. Calculating the “4%”
   1. Was there a power of postponement?
      1. Value of goods is taken at date of death
   2. Was the gift in a will?
      1. Was it sold within 1 year of testator’s death?
         1. Yes – value at date of death
         2. No – value at 1st year anniversary of death
   3. Was it an *inter vivos* gift?
      1. The property value is assessed at the date of the trust (ie death).

**Howe v Lord Dartmouth – 1802 (“the rule in Howe v Lord Dartmouth”)**

Trust assets must be sold and reinvested so that 4% of the income stream may go to the life tenant, with the balance augmenting the capital base of the trust fund.

Where

1. a testator or testatrix (*not a settlor—they are presumed to intend the share that results while they place assets in the fund during their life*) – except in *Re Smith*
2. leaves a residuary (*ie residue of estate, not devised specifically to someone*--Lottman)
3. personalty (*ie not real estate--*Lottman)
4. to persons by way of succession and
5. the residue includes a wasting or unauthorized asset

then the trustee must

1. sell the wasting personalty
2. invest the proceeds in authorized investments
3. the income of which goes to the benefit of the life tenant, the corpus of the funds accruing for the remainderpersons

**Earl of Chesterfield’s Trusts – 1883**

To correct unequal treatment where a life tenant has been disadvantaged by a reversionary trust asset, the reversionary trust assets are sold and are apportioned based on 4% from the date of inception of the trust to the date of sale. The trustee has a *duty to convert reversionary interests into income-producing assets.* Where there is an express trust with a trust for sale of a reversionary asset, the proceeds must be apportioned amongst the life tenant and remaindermen.

**Lottman v Stanford**

F: Widow unsatisfied with her income, launches a motion opposed by remainder men.  
I: Does Howe apply to realty?  
H: No  
R: Howe requires T to deal even handedly between LT and remainders by converting wasting assets and investing the proceeds elsewhere. LT is assured of an income and capital is preserved. Chesterfield relates to apportionment between capital and income of proceeds of conversion between LT and remainders—called in by conversion of assets resulting from Howe or express provision in the will. Will contained direction to convert personalty and investment of residue. Howe never extended to realty.

**Lauer and Stekl**

F: Will directed Ts to sell the entire estate, but contained general power to postpone.  
I: Apply Howe?  
H: Not really  
R: Where residuary personality is settled on successive Bs, Ts must convert all wasting or reversionary assets into property of a permanent and income bearing character. Will contained trust to convert, but wide discretion as to manner of conversion and power to postpone. Power to postpone is not indefinite, does not defeat primary trust to convert. Must protect interests of LT. T is under duty to convert and pending conversion he must pay LT a notional income pending conversion. LT is entitled to annual income that be fair equivalent for what she would have received had the assets been converted and the proceeds been invested.

**Royal Trust Co v Crawford**

F: Guy leaves large amount of money from stevedoring company, widow is spoiled.  
I: Should dividends be treated as income or capital?  
H: Capital  
R: In the absence of a clear authorization to prefer one interest over another, T’s duty is impartial. Testator only made it clear that his wife should be secured in the enjoyment to which she had become accustomed, even to the appropriation of capital. Widow is only entitled to interest on estimated value of stock as provided. Where there is direction to convert with power to postpone and retain, LT doesn’t necessarily get actual income pending conversion. Question is whether power to retain is permanent or only until Ts can sell adventitiously.

**Re Smith**

F: Trust company interpreted settlement as requiring retention of shares.  
I: Breach?  
H: Yes  
R: A power was given to retain the fund in its present form, but other language that gave power to convert. T refused to invest in securities that would have produced a life income. T believed it was acting under a trust to retain, but construction shows it was only a power.

T bears a fundamental burden to cultivate the assets and transmit them to B. In the event of successive Bs, the law presumes impartiality unless S has indicated otherwise in the settlement. If S explicitly prescribed partiality between the successive Bs, T must fulfill these wishes. However, even if the document does not explicitly prescribed partiality, it may still be implicit. If the transfer is inter vivos, the gifts are presumed to benefit person on whom they fall, implying partiality, unless the inter vivos transfer is quasi-testamentary (**Smith**). In a will, the testator may imply partiality by including a trust to retain, requiring the retention of unauthorized investments, or giving the income in specie to the life tenant with a power to postpone. Impartiality may be implicit where there is a trust for sale. If there are conflicting signals, the court will look to the dominant intention (**Lauer**), and ask whether to a power to retain is permanent or temporary with a requirement to sell when it would be most adventitious (**Crawford**). In the event of a temporary power to postpone, the court will presume impartiality. Ability to encroach on capital may imply partiality (**Critchley**), but the court will place greater emphasis on evidence of the testator’s intentions (**Fleming**).

If T is to act impartially, he must apply the rules in **Howe** and **Chesterfield** to any wasting, unauthorized, or reversionary assets of personality in the trust estate. The T must sell and apportion wasting or unauthorized assets, giving 4% of the income to the life tenant and the remainder to the capital base. The rule in Howe does not apply to real estate (**Lottman**) unless the testator has signalled that the realty should be treated like personalty (**Lauer**). T must sell any reversionary asset, such as a life insurance policy, calculate 4% of the income per year based on the sale price, and give this amount to the life tenant. The rest of the sale price is then ploughed into the capital base and invested in assets that will generate fair income for the life tenant (**Chesterfield**).

## Impartiality – Settled Shares in a Company

Settled shares: usually from closely held corporations (ie corporation with very few shareholders)

* + - if major asset is settled share, income or capital is determined by form of transmission (**Waters**)
      * + governance decides whether to distribute shares as dividends (income) or preferred shares (capital)
    - if company is stripping assets, may send check labelled dividends which is profit + sale of assets
      * + these are actually shares (capital), but labelled as dividends (income)
    - court will give effect to testator’s intention over form in certain circumstances (**Welsh**)

**Re Waters Estate**

**F**: Company profits were capitalized into preferred shares and distributed to shareholders in lieu of dividends. When the preferred shares were given to the trustee, they were treated like capital.

**R**: **Form is substance.** The classification by the company will dictate its nature in the trust—capital or income.

**Re Welsh**

F: Shares delivered to widow as income, but this favours her second husband and children from another marriage.  
I: Income or capital?  
H: Capital  
R: Gave Ts power to encroach upon capital for benefit of wife in emergencies and power to sell. He intended the assets would be capital from which income was derived. **Court may look at form of transaction, but intention is most important**.

If a major trust asset is settled shares, the form of transmission determines whether the revenue becomes income for the life tenant or capital for the remainders (**Waters**). The governance of the company will either issue dividends or preferred shares to the trust, the former being income and latter comprising capital. Form will generally dictate substance (**Waters**). However, the court will give effect to the testator’s intention over form in certain circumstances (**Welsh**). The form is substance rule has been relaxed in favour of an assessment of the surrounding facts of the case (**Fehr**).

## Duty to Apportion Debts and other Disbursements

**Allhusen**: abrogated for impossibility in **s 10 Trustee Act—**T makes debt payments out of capital unless testator says otherwise

**s 144 WESA**: same as **s 10**

## Duties (and limits) to Provide Information

T is owner with special obligations—does not have to expose everything to Bs

* + - T not required to volunteer information
    - B entitled to know she is a B, terms of settlement that dictate who can be a B, details of the equitable estate itself
    - B does not have an absolute right to disclosure, will depend on circumstances (**Rosewood**)

**Re Londonderry Settlements**

F: B wanted full disclosure from Ts about why they made a decision.  
I: Can B get this information?  
H: No  
R: Ts exercising discretionary power are not bound to disclose to Bs the reasons actuating them in coming to a decision, but if they do give reasons Court consider soundness. In the absence of impugning good faith, minutes and agendas of meetings cannot be disclosed.

**Butt v Kelsen**

**F**: The trusts contained shares in a private company. Through their control of those shares, the trustees appointed themselves sole directors of that company. The plaintiff-beneficiary was unhappy with the management of the company and wanted to see documents which were unavailable to all shareholders. The trustees held that they could not disclose those documents because, as directors, they had duties to the company and minority shareholders.

**R (policy)**: Trustees who are directors of companies cannot be compelled to provide information flow beyond that available to all shareholders. To hold otherwise, beneficiaries would be able to exploit company secrets. However, beneficiaries may compel trustees to vote for the shares as directed and change articles of the company.

Because T is a legal owner with special obligations, he may have to provide some information to B regarding the trust. However, T is not under an obligation to reveal all information, especially minutes and agendas of meetings to choose discretionary Bs (**Londonderry**). B is entitled to know she is a B, the terms of the settlement that dictate who can be a B, and the parameters of the equitable estate itself (**Rosewood, Short**). Ts who are directors of companies cannot be compelled to provide information flow beyond that which is available to all shareholders (**Kelsen**). However, Bs may compel Ts to vote for shares as directed and change articles of the company (**Kelsen**). This will likely only apply if the trust is a sole shareholder (**Martin Estate**) Disclosure of legal opinion on the trust not automatically available, but this rule is not absolute and may depend on the facts of the case (**Froese**).

## Duty to Account

T must give accounts when requested within a reasonable amount of time

**Sanford v Porter**I: T misconduct?  
H: No  
R: Duty to account is to have account always ready and make reasonable facilities for inspection and examination. Give full information whenever required. Not obliged to prepare copies of his accounts for parties interested. T gets reasonable amount of time to prepare the accounts.

T must provide accounts of the fund within a reasonable amount of time of the request. T is not obliged to prepare copies of the reports, and can have a reasonable amount of time to prepare the accounts for review (**Sandford**)

# Trustees’ Rights

## Remuneration of Trustees

Ts are prima facie unpaid, but can be remunerated

1. By trust instrument (S makes specific remuneration clause)
2. Under k w/ sui juris Bs (vulnerable to undue influence, so don’t do this)
3. By the court’s inherent jurisdiction
   * + - **s 88(1)**: fair and reasonable allowance that does not exceed 5% of gross aggregate value
       - **s 88(3), Sproule**: care and management fee

only for superstar Ts, does not exceed .4% (**Pedlar**)

value of assets, nature of assets, degree of responsibility, time expended, degree of ability exhibited, success, extraordinary service

**Re Sproule**

**R**: The court will prefer lump sum remuneration over percentage-based remuneration for a care and management fee. The court will consider the following guidelines in setting the remuneration:

1. The magnitude of the trust, including its value and its complexity
2. The care and responsibility arising under #1
3. The time required of the trustee to perform the duties
4. The skill and ability displayed by the trustee
5. The trustee’s success in administering the trust assets.

**R2**: Courts will only award a “care and management fee” for administration that is above and beyond.

**Re Pedlar**

F: Ts take additional remuneration.  
I: Can they do this?  
H: Yes  
R: Care and management fee should no exceed .4% of the average market value of the assets and involve various factors to consider. Legislature intended the fee to be an annual allowance.

Ts are prima facie unpaid volunteers, but CL and statute allows some measure of remuneration. If the trust instrument contains a specific remuneration clause, the court will give effect to S’s intentions. Sui juris Bs may contract with T for T’s remuneration, but this agreement is susceptible to claims of undue influence and is not suggested. The court has inherent jurisdiction to provide T remuneration. Under **s 88(1)** of the TA, Ts can apply to court to obtain a fair and reasonable allowance that does not exceed 5% of the gross aggregate value of the trust fund. Ts can also apply for a care and management fee under **s 88(3)** for administration that s above and beyond the normal capabilities of a T (**Sproule**). The care and management fee should not exceed .4% of the average market value of the assets (**Pedlar**). To assess the care and management fee, courts will consider the magnitude of the trust, the care and responsibility required of the T, the amount of time T spent performing his duties, the skill and ability displayed, and the success in managing the assets (**Sproule, Pedlar**).

## Indemnification of Trustees

T entitled to indemnity for all debts incurred in executing trust **(s 95**), only modified if there is a good reason why T should bear the burden (ie T was only making payment due to poor performance)

**Re Reid**R: B who has full benefit of property should bear its burden unless there is a good reason T should bear the burden. Right of T to be indemnified out of the whole estate against any liabilities is indisputable. If sole B is sui juris, indemnity extends to personal obligation against B for indemnity.

# Powers of Trustees

Powers contained in

1. Settlement according to S’s intentions
2. CL precedents on managerial powers
3. Statute (**unless curtailed by S**)
   * + - form of sale (**ss 5, 6**), appoint solicitor/ banker (**s 7**), insure property (**s 8**), compound debts (**s 9**), spend money on repairs/improvements (**s 11**), appoint investors ensuring due diligence (**s 15.5**), vary investment decisions (**s 22**), maintenance/education of infants (**s 24**)

# Control of Trustees

## Control By Settlor

S’s intentions in the settlement will take precedence—S can direct T to do things

## Control by Beneficiaries

Bs can collapse trust, combine w/ Ts to redraft or amend, compel Ts to vote for shares directed or change articles of company (**Butt**), but cannot compel Ts to exercise administrative powers (**Brockbank**)

**Re Brockbank**

**F**: There were 2 trustees with a power to appoint a professional trustee. One was going to retire. The beneficiaries were pushing the continuing trustee to appoint a bank as a professional trustee; the continuing trustee refused.

**I**: Can the beneficiaries compel a trustee to exercise a discretionary power of co-trustee appointment? (*no*)

**R**: The power of trustees to make trustee appointments is not controllable by beneficiaries (and the court should not interfere with it either).

**Butt v Kelsen**

**F**: The trusts contained shares in a private company. Through their control of those shares, the trustees appointed themselves sole directors of that company. The plaintiff-beneficiary was unhappy with the management of the company and wanted to see documents which were unavailable to all shareholders. The trustees held that they could not disclose those documents because, as directors, they had duties to the company and minority shareholders.

**R (policy)**: Trustees who are directors of companies cannot be compelled to provide information flow beyond that available to all shareholders. To hold otherwise, beneficiaries would be able to exploit company secrets. However, beneficiaries may compel trustees to vote for the shares as directed and change articles of the company.

Bs can collapse a trust under **Saunders**, combine with Ts to redraft or amend the settlement, and compel Ts to vote for shares or change the articles of the company (**Kelsen**). However, Bs cannot compel Ts to exercise administrative powers of discretion (**Brockbank**).

## Control by the Courts:

Advice/opinion

* + - **s 86 Trustee Act**: court preserves administrative role to give advice
    - **s 87 Trustee Act**: if acting under court’s advice, T is absolved of responsibility
    - **Tempest**: court will not force T to do something T thinks improper
    - T can exercise discretion as properly as she sees fit and w/o interference (**Wright**)
      * + court will only intervene in case of bad faith
    - court will intervene in situation of serious deadlock (**Billes, Kordyban**)
    - if T is attempting to misuse her power (**Schipper**) or fails to be even handed (**Fleming**), court will intervene at behest of Bs

**Re Wright**

F: Deadlocked Ts make application.  
I: Can Court compel Ts to make a decision?  
H: No  
R: Ts agree to sell the shares, but only differ in the adequacy of the price. Ts must be unanimous, and if they agree on a discretionary power the Court will not interfere.

**Re Billes**

F: Stiff directed annual annuities be paid from capital, income to 23 charities.  
R: Stiff conferred an absolute power on his executors to convert as well as an absolute power to retain. Must be unanimous in either course. This is serious deadlock, so court can intervene.

The court can play administrative role to give advice under **s 86**  of the TA. If a T acts under the court’s advice, he is exonerated under **s 87**. The court will not force a T to make decision he thinks improper (**Tempest**) because T can exercise discretion as properly as he thinks fit and without fear of interference (**Wright**). Therefore, the court will only intervene in the case of demonstrable bad faith or T incompetence, or in situations of serious deadlock (**Billes, Kordyban**). If T attempts to misuse his power (**Schipper**), or fails to be even-handed (**Fleming**), the court may intervene at the Bs request.

## Ousting Court Jurisdiction

Court will not tolerate an attempt to oust its jurisdiction for public policy reasons

* + - clauses that exclude rule of impartiality (**Wynn**)
    - clauses preventing judicial review where T was dishonest (**Boe**)
    - exculpatory clauses (**Poche**)
    - clause that precludes B from accounting (**Jones**)

NB: Ousting jurisdiction regarding findings of FACT are okay (**Tuck’s**)

**Re Tuck’s Settlement Trusts**

F: Guy anxious that his title would only go to Jewish people, appoints Chief Rabbi to make determination.  
I: Valid settlement?  
H: Yes  
R: Conceptual uncertainty arises when testator makes bequest on unclear condition. Evidential uncertainty is where the condition is sufficiently precise, but court has difficulty in applying it due to uncertainty of facts. Conceptual uncertainty may avoid a condition subsequent, but not a condition precedent. Testator can allow third party to resolve any dispute.

**Boe v Alexander**R: Even the broadest language creating discretion cannot displace jurisdiction of the court to review T’s discretion.

**Re Poche**

F: Will relieves T of any liability not attributable to her dishonesty or knowing breach.  
I: Ousting jurisdiction?  
H: Yes  
R: T was grossly negligent, and a will cannot fully exonerate T in the area of gross negligence.

Despite the court’s general reticence to interfere with a T’s decisions, it will not tolerate an attempt to oust its jurisdiction for public policy reasons. Clauses that wholly exclude the rule of impartiality (**Wynn**), prevent judicial review (**Boe**), fully exculpate T (**Poche**), or disbar B from any accounting (**Jones**) have not been upheld. However, ousting jurisdiction regarding findings of fact may pass judicial muster (**Tuck’s**).

# Fiduciaries and the Constructive Trust (CT)

CT: Court implies trust when circumstances call for such intervention

FPS is referable to all jurisprudence on CTs until the 1970s when court broadened designation to AHF, court is now willing to make declaration of fiduciary relationship based on facts of each case **where there is an undertaking**

CT used as restitutionary remedy outside trust law in UE situations

A CT occurs when the court implies a trust when circumstances for such intervention. The court has split fiduciary relationships into two categories, FPS and AHF. FPS is referable to all jurisprudence on CTs until the 1970s when the court broadened the designation to AHF. An AHF is a relationship that does not fall under FPS categories, but still merits a fiduciary label. A successful claimant obtains equitable interest in the asset post judgment. The defendant has the right to use the trust property, but the plaintiff, as constructive B, can call for legal title and collapse the trust. CT may also be used outside of trust law as a restitutionary remedy for UE.

## Why do you want a CT?

Claimant gets equitable interest in asset post judgment—if claimant has invested in the asset, or if defendant has violated claimant’s unregistered proprietary right to the asset

## Mechanics of CT

* + - all remedial because court is trying to fix something after outcome of trial
    - D has right to use property, but has FD to plaintiff, who can call for legal title

## When will a fiduciary relationship arise?

Can split fiduciary relationship into two categories (no functional difference): FPS + AHF

fiduciary per se

* + - static set of relationships
      * + disloyal T (**Keech**), faithless directors (**Canaero**), delinquent agent, solicitor/client, overreaching partners, bribers, undue influencers, trustees de son tort, doctor, vendor/purchaser
    - relevant time to assess relationship is **at time of the transaction (Galambos)**

FPS consists of a static set of relationships developed in CL over time. These relationships include disloyal Ts (**Keech**), faithless directors (**Canaero**), delinquent agents, wayward solicitors, overreaching partners, bribers, undue influencers, trustees de son tort, doctors, and vendors. Once the claimant establishes that the relationship falls into one of these categories, the court will automatically grant a CT in favour of the plaintiff. The relevant time to assess the nature of the relationship is at the time of the transaction, rather than judgment (**Galambos**).

Ad hoc fiduciary

Relationship doesn’t fit into CL categories, but assessment of relationship leads to fiduciary conclusion

**Dissent in Frame later forms law:**

* + 1. Undertaking (statutory, express/implied, simple) by one party (**Galambos**)

undertaking is to act in best interests of other party (**Elder**)

* + 1. Fiduciary has scope for exercise of discretion/power (**Lac**)
    2. Fiduciary can unilaterally exercise power that affects practical/legal interests of B (**Lac**)
    3. One party is vulnerable, or at other party’s discretion (**Guerin**)

vulnerability is indicative, but not conclusive—>can establish AHF if there is power-dependency, one party places trust in expertise of another (**Hodgkinson**)

vulnerability is clear requirement of AHF (**Soulos**)

**Guerin v The Queen**

F: Crown is a dick, leases Musqueam land and ignores Musqueam wishes.  
I: Breach of fiduciary relationship?  
H: Yes  
R: Crown was under FD to FN because RP disallows anyone from purchasing land directly from FNs. Where by statute, or unilateral undertaking, one party has an obligation to act for the benefit of another. Obligation carries a discretionary power, which makes empowered party fiduciary. But the fiduciary obligation is not a trust in the strictest sense.

**Canadian Aero Services v O’Malley**

F: Ds were directors at P splintered and made their own successful company.  
I: Breach of FD?  
H: Yes  
R: General standards of loyalty, good faith, and avoidance of a conflict of duty and self-interest to which the conduct of a director must conform should be tested in each case. Factors include position held, nature of opportunity, ripeness, specificness and relation to it, amount of knowledge possessed, circumstances in which it was obtained, and whether it was a special/private, factor of time in continuation of FD, and circumstances of termination (resignation, retirement, discharge).

**Hodgkinson v Sims**R: Breach of FD arise where someone relies on guidance or another and other is aware of the reliance may obtain a benefit from the transaction. It is the nature of the relationship, not the specific category that gives rise to the FD. Must be evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely of behalf of another. Vulnerability encompasses all three characteristics from Frame dissent. Critical question is whether is total assumption of power by fiduciary coupled with total reliance by the beneficiary.

**Galambos v Perez**

F: Lawyer’s accountant put her own money into the firm to prevent insolvency, lawyer said she could get her money back with interest, she obtains simple legal services from lawyer.

I: Breach of fiduciary duty?

H: No

R: **Fundamental to AHF that there be an undertaking by the fiduciary (express or implied) that fiduciary will act in best interests of other part.** Fiduciary duties will only be impose on those who have expressly or impliedly undertaken them. Not all power dependency relationships are FD..

**MKvMH**

F: Child sues father for breaching FD after molesting her.  
I: Breach of FD?  
H: Yes  
R: Nature of fiduciary obligation will depend on the facts of the case.

**Soulos v Korkontzilas**

F: Real estate agent buys property for himself secretly, buyer wanted the property for a special reason.  
I: Remedial CT?  
H: Yes  
R: Canadian courts recognize the availability of CT for wrongful acquisition of property and UE. CT imposed where good conscience requires: property wrongfully obtained or under UE.

**Alberta v Elder Advocates of Alberta Society**

F: Old people sue government for elevating subsidizing medical expenses.  
I: Breach of FD?  
H: No  
R: Fiduciary relationships have three general categories: scope for exercise of discretion or power, unilateral exercise of power to affect B’s legal/practical interests, B is vulnerable to fiduciary’s discretion. Vulnerability alone is insufficient to support fiduciary claim. Must show alleged fiduciary gave an undertaking of responsibility to act in best interests. Party asserting the duty must show alleged fiduciary made the undertaking by forsaking interests of all others in favor of B’s in relation to specific legal interest at stake. Fiduciaries do not exist at large, but only confined to specific relationships.

**Professional Institute of the Public Service of Canada v Canada AG**

F: Statutory pensions for RCMP and Armed Forces.  
I: Breach of FD?  
H: No  
R: An undertaking of a duty of loyalty by government is inherently at odds with its duty to act in the best interests of society as a whole.

**Sun Indalex v United Steelworkers**

**R**: a CNT was unavailable b/c proprietary remedies are generally awarded only w/ respect to property that is directly related to a wrong or that can be traced to such property. The conditions are:

1. the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands;
2. the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;
3. the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and
4. there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

There is no functional difference between FPS and AHF. In both scenarios, the court deems the relationship fiduciary and imposes a CT in favour of the plaintiff. The primary difference between FPS and AHF is that AHF is assessed on a case by case basis. These relationships do not fall into the formal categories of FPS, but may still merit the fiduciary label. The law is less concerned with the positions of the parties before they entered into the relationship, and focuses on the imbalance that results from the relationship (**Galambos**) An early inroad towards the development of AHF occurred in Wilson’s dissent from **Frame**, in which she established three criterion for AHF: the scope of exercise of discretion or power, unilateral exercise of the discretion or power to affect another party’s practical or legal interests, and a peculiar vulnerability to the exercise of the discretion or power. In **Guerin**, the Court held that a FD arises when one party, by statute or unilateral undertaking, has an obligation to act for the benefit of another party. Vulernability was emphasized in **Lac Minerals**, but deemphasized in **Hodgkinson** in favour of a power-dependency metric. However, in **Soulos** McLachlin recently stated that vulnerability a dominant element of the AHF analysis. Finally, in **Galambos**, Cromwell established the criteria for AHF: an undertaking that is either statutory (**Sun Indalex**), express or implied, by one party to act in the best interests of another (**Elder**) is required for any AHF relationship. Directors and senior officials owe a FD to their companies (**Canaero**). Canaero establishes the criteria of breaching this duty: the position held, nature of the opportunity, its ripeness, its specificness and the individual’s relation to it, the amount of knowledge possessed, the circumstances in which the knowledge was obtained, whether the knowledge was special or private, time factors, and circumstances of termination. AHF do not exist at large, but are confined to specific relationships that the court assesses on an individual basis (**Elder**).

## Unjust Enrichment: Remedial CT

Social revolution of people not getting married, but entering into joint family ventures of common law marriages—when things dissolve, one individual usually seriously disadvantaged

**Criteria for unjust enrichment**: Enrichment, corresponding deprivation, absence of juristic reason to let defendant keep the enrichment (**Pettkus**)

**Pettkus**: situation of UE to be remedied by CT because couple engaged in common enterprise, he was enriched and she was clearly deprived

* + - must be causal connection between plaintiff’s activities and the acquisition of property
    - case was outside usual jurisdiction of UE—imposition of remedial CT may be more in law of restitution?

**Kerr/Seguin**: when looking at remedial CTs, consider unconscionable situation where court should use money to fix the problem

* + - has there been payment/benefit with no reciprocity?
    - think of CL marriages as family partnerships—resist duelling quantum meruit claims
      * + whatever assets survive the dissolution of joint family venture comprise corpus of CT
    - family legislation has eclipsed these issues in BC

Remedial CT not FPS because it doesn’t involve fiduciary relationships

**Pettkus v Becker**

F: Common law immigrants break up, he claims he is absolutely entitled to all of the property because it is in his name even though she helped procure it.  
I: Remedial CT?  
H: Yes  
R: Three requirements for UE: enrichment, corresponding deprivation, absence of any juristic reason for the enrichment.

**Kerr v Baranow**

F: Couple separated after CL marriage of 25 years, wife lodges claim for support and share of property on basis of UE and RT.  
R: In domestic cases, CT is used to prevent duelling quantum meruits. P must demonstrate causal connection between her contributions and property. Indirect contributions may suffice provided there is connection between deprivation and acquisition. **Treat relationships like a joint family venture to look at the accumulation of wealth.**

The remedial CT for UE arose out of a social revolution that deemphasized traditional marriage in favour of extramarital cohabitation, colloquially known as common law marriages. When these relationships dissolved, often one individual was enriched at the expense of the other. Therefore, the court began examining these issues through the lens of UE. The criteria for unjust enrichment is enrichment, corresponding deprivation, and the absence of a juristic reason to permit the enrichment (**Pettkus**). There must be a causal connection between the plaintiff’s activities and the acquisition of property to warrant a remedial CT (**Pettkus**). The court will ask whether there has been payment or benefits given by one party with no corresponding reciprocity (**Kerr**). In BC, these situations are now enveloped in family legislation. However, in provinces where there is not statutory authority, courts will treat the relationships like joint family ventures. At the conclusion of the relationship, the value that survives the joint family venture will be proportionally distributed, so as to defeat duelling quantum meruit claims (**Kerr**)

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# Remedies For Breach

## Personal Remedies:

Specific performance/injunction

* + - SP is when court orders T to do something she hasn’t done
    - Inj is when court orders T not to something she is planning to do or is already doing

B can obtain an order for specific performance to require T to do something he hasn’t done when CL remedies would be inadequate (**Beswick, Colley**). SP may extend to third parties (**Staniar**). In the alternative, B can apply for injunctive relief, in which a court orders T not to do something he is planning to do or is already doing (**Lee**).

Compensation for Loss

B has already suffered a loss—damages put B back in position she would have been in but for the breach

* + - pretend breach did not happen to compensate B
    - equitable damages do not require foreseeability or mitigation, **reasonable correlation**
      * + ie in **Guerin**, damages were assessed at time of judgment and were for the lost interest in renting out the very valuable property

damages are what B has lost, not the difference in value

**Canson**: has to be reasonable correlation between loss and D’s breach

**Deare**: s 15.4 Trustee Act says T can set off damages against other monies owed

**Guerin v The Queen**

R: Compensation is to be assessed by reference to value of assets at date of restoration not deprivation.

**Canson Enterprises Ltd v Boughton & Co**

F: Lawyer sold house on secret profit, house collapses due to shoddy architecture.  
I: Is lawyer liable for breach of FD?  
H: Yes, but not for damages of collapsed house  
R: Equitable compensation must be limited to loss flowing from T’s acts in relation to the interest he undertook to protect. Losses stemming from P’s unreasonable actions will be barred.

B may wish to seek compensation for loss. These damages put B back in a position she would have been in but for the breach. The court does not require foreseeability or mitigation, but the claimant must show reasonable correlation between the T’s breaching actions and the loss suffered (**Canson**). Damages are assessed at the time of judgement rather than breach, and account for the lost interest instead of the difference in value (**Guerin**). T may apply under **s 15.4**  of TA to offset damages against other monies owed (**Deare**).

Accounting for Profit (“Disgorgement”)

T is on the hook for all profits made in commission of fraudulent behaviour

* + - ongoing remedy
    - **Boardman**: property acquired as result of trust venture, so T has to give full account
    - **Warman**: court will accounting for profit because it is a deterrent
      * + court has power to limit the time when the accounting happens
    - **MacMillan**: court looked to time factors in assessing the damages and put it into a lump sum
      * + instead of having the remedy be ongoing, can assess profits in one payment

**Warman International Ltd v Dwyer**

F: Guy resigned to do business with another company and did a good job with other company.  
I: Accounting for profit?  
H: Yes, but capped at two years after Dwyer entered into the joint venture  
R: Fiduciary must account for profit if it was obtained either when there was a conflict between FD and personal interest, by reason of FD or knowledge obtained from FD. Must account for what has been acquired at expense of trust and act as general deterrence. No defence that P was unwilling to make the profits. Fiduciary ordered to make account of profits made within scope and ambit of his duty. Outcome depends on nature of the property, relevant powers and obligations of fiduciary and relationship between profit made and powers of obligations of fiduciary. D can establish it would inequitable to order an account of entire profits.

If T breaches the trust and obtains profit from the breach, B may wish to pursue an account for profit. In this remedy, T must disgorge any profit made in the commission of the breach (**Boardman**). Courts are willing to grant this remedy because it is a deterrent (**Warman**). While some jurisdictions place a time limit on the ongoing nature of the remedy, such as 2 years in **Warman**, the Canadian approach is to assess time factors and grant the profits in a lump sum (**MacMillan**). The court may grant an order for allowance to the T (**Boardman, Lutak**).

## Proprietary Remedies:

Following: outcome of nemo dat, track the same property to find out who has it

* + - buck stops with BFPV
    - practically significant for bankruptcy—B can follow property and claim status as preferred creditor because she has an in rem right
    - if asset has depreciated due to breach, B gets difference between original value and what it would been, but only as concurrent creditor

If B wishes to assert her in rem rights over the actual trust property, she will look to either following or tracing as a remedy. Proprietary remedies are generally awarded only with respect to property that is directly related to a wrongful breach, or that can be traced to other property (**Sun Indalex**). Following is an outcome of the nemo dat doctrine, and allows the B to track the same property into the hands of different owners (**Foskett**). If the asset has depreciated due to breach, B can obtain the difference between the original value and what the value would have been, but can only do so as a preferred creditor (**Foskett**). Once the property passes into the hands of a BFPV without notice, B’s interest is defeasible (**Foskett**).

Tracing: B identifies a new asset to substitute for lost property

* + - at CL, failed once the property passed into a bank but equity waives this restriction
    - three conditions for tracing
      * + misappropriate was result of FD breach or UE

**Chase**: tracing trust funds into insolvent bank (aff’d in **Anjou, Tracy**)

* + - * + property is recognizable as traceable

unmixed funds: if T purchases asset, it is traceable; if T dissipates it is not traceable **Hallet**

mixed funds**:** assume T uses her own money first, then B’s money

when T adds money from other sources, trust money is no longer traceable

when T buys an asset, B can place a charge for proportionate share

**Boughner**: pro rate approach for lowest intermediate balance

* + - * + verdict would not be inequitable

if an innocent volunteer has done a lot of work on the property and made the property into something totally different, equity may protect the volunteer

equity will not allow for estoppel, laches, acquiescence

**Sunindalex LLC v United Steelworkers**R: Proprietary remedies are generally award only with respect to property that is directly related to a wrong or that can be traced to the property.

**Foskett v McKeown**

F: Property development falls through, monies held in trust for purchasers was dissipated, developer committed suicide and left life insurance policies, purchasers sue for these policies.  
I: Can purchasers trace this money?  
H: Yes  
R: Following involves the same asset as it moves from hand to hand. Tracing incomes identifying new asset to substitute for the old. Claimant can elect to follow original asset or trace its value. Buck stops with BFPV. If T buys property with mixed funds, B can lodge a lien on property or take proportionate share.Where an asset was acquired exclusively with trust money, B can assert equitable ownership of asset or enforce a lien (**Hallet’s**). Where T wrongfully uses trust money to provide part of the cost of acquiring an asset, B is entitled to claim proportionate share or enforce a lien to secure personal claim. Gains and losses are borne by contributors rateably.

**Re Oatway**R: True owner is entitle to seize his property in its new shape if he can prove the identity of the new material. B entitled to charge on property purchased for the amount of trust money laid out in purchase of new property. When money is drawn out and invested in T’s name, T cannot maintain that the investment which remains represents his own money alone. T presumed to use his money first, then B’s money.

**Re Diplock’s Estate**

**R**: If a volunteer innocently holds receives trust funds, that interest is defeasible at the hands of the beneficiary so that the volunteer holds on a CNT for the beneficiary.

**Chase Manhattan v Bank of Israel**

**F**: Mistaken transfer. Israeli bank acknowledged, then went bankrupt. There was no bad faith here.

Did the $2 million mistakenly-transfer amount belong to Israeli bank or Chas Manhattan?

**R**: Tracing was allowed as a result of good conscience, despite the law of fiduciary rel’nship.

Tracing requires B to identify a new asset that substitutes for the misappropriated property (**Oatway**). To successfully trace, the misappropriation must result from a breach of an FD or unjust enrichment (**Anjou**). FD is not required for the tracing remedy (**Tracy**). A B tracing her assets will receive preferred creditor status in the event of insolvency (**Chase**). The property must be in a form equity recognizes as traceable. If the property is in unmixed funds—T purchases a single asset with the trust money alone—it will be traceable until it passes to a BFPV or until T dissipates the property (**Hallet’s**). In the case of mixed funds, the court presumes that the first money withdrawn is T’s, followed by the trust property (**Oatway**). When T adds money from other sources, B’s trust money is no longer traceable. If T uses the trust monies to purchase an asset with other monies, B can place a charge on the asset for her proportionate share. Courts will apply the pro rata lowest intermediate balance approach to determine the shares of each contributor to a mixed fund (**Boughner**). Finally, a verdict of tracing cannot produce inequitable results. If a volunteer innocently receives trust funds, the interest is defeasible to B’s interest (**Diplock’s**). However, if the innocent volunteer has done significant work to the property such that it is fundamentally different, the court may prefer the volunteer. If T can show estoppel, laches, or acquiescence, then he may defeat B’s claim.

## Alternative and cumulative Remedies

B can combine remedies provided they do not create double recovery and are not mutually inconsistent

## Actions Against 3rd Parties

trustees de son tort and intermeddlers

* + - someone who interferes with a trust and becomes de facto T can be fully liable as though they were a T themselves

A trustee de son tort is an intermeddler who interferes with the trust so significantly that the law considers him to be a de facto T (**Morrison**). TDSTs are fully liable as though they were Ts.

KNOWING RECEIPT OF TRUST PROPERTY

* + - property was held in trust—->property taken in breach of trust—->third party receives property—>third party uses for own benefit—->third party had actual/constructive knowledge that trust was breached
    - **Nelson**: bookie clearly knew the money was from a trust and took it anyway, so liable as someone who knowingly engaged in breach

A third party is liable for knowing receipt of trust property if the property was taken in breach of trust, received by the third party that had actual or constructive knowledge that the the trust was breached and used the property for her own use (**Nelson**).

knowing assistant to breach

* + - someone knows there is a trust and helps to facilitate the breach
    - **Air Canada**: to show liability for knowing assistance, demonstrate recklessness or wilfulness to equate deliberate knowledge
    - **Twinsectra**: Leach was not liable because he did not have actual knowledge and was not reckless or wilfully blind

**Nelson v Larholt**

F: T deposits trust money with bookie who knew the money came from a trust.  
I: Action against bookie?  
H: Yes  
R: Ts who withdraw trust money for their own private purposes never obtain title to the money because rightful ownership can recover the amount from anyone who the money with notice. Test for third party knowledge is what any reasonable man would have known about the money.

**Air Canada v M&L Travel Ltd**

F: Travel company did not set up trust account for Air Canada to give them preferred creditor status in the event of bankruptcy, which happened. Air Canada personally sued company directors.  
I: Are directors personally liable?  
H: Yes  
R: Whether personal liability is imposed on a stranger to a trust depends on the basic question of whether the stranger’s conscience is sufficiently affected to justify the imposition of personal liability. Strangers can be liable as trustees de son tort and if they knowingly participate in a breach—knowing receipt of trust property and knowing assistance. Basis of knowing assistance liability is on two issues: nature of breach and degree of knowledge required (actual knowledge, recklessness, or wilful blindness). Fraud is the taking of a risk to the prejudice of another’s rights, which risk is known to be one which there is no right to take.

**Twinsectra Ltd v Yardley**

R: D must first himself appreciate that his act was honest by standards of honest and reasonable men. D would not be dishonest in assisting a breach where he knew of the facts which created the trust and its breach, but was not aware that what he was doing would be regarded by honest men as dishonest.

A knowing assistant to breach may also be liable. This individual knew there was a trust and helped facilitate the breach. To show liability for knowing assistance, the B must demonstrate that the third party had actual knowledge, recklessness, or wilful blindness to equate with actual knowledge (**Air Canada**). Parties innocently discharging their duties, despite breaching the trust, will not be held liable (**Twinsectra**).

## Defences

exoneration

* + - free and informed concept from B will exonerate T
    - s 95 Trustee Act: if T acted honestly, reasonably, and it would be fair to exonerate them
    - **Fales**: Mrs. Wohlleben was exonerated because she fit the criteria, but Canada Trust was still on the hook

LACHES, Acquiescence

* + - laches is long delay on B’s part to bring a claim
    - acquiescence is similar to laches
      * + estoppel: B’s actions suggested she accepted T’s actions and T relied on this
        + inaction: B knew about breach and did nothing—reasonable inference of agreement

advice or opinion from court

* + - T can apply to court for advice—exonerated if acting under judicial instruction

T may argue exoneration under **s 95** of the TA if they acted honestly, reasonably, and it would be fair to exonerate them (**Fales**). If B delays bringing a claim, or can be estopped either through positive conduct or knowing passivity, T may defeat her claim. Finally, T can apply to the court to obtain advice. Any T acting under judicial instruction will not be liable for any resulting breach.